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ADVISORY COMMITTEE ON RULES

FOR CIVIL PROCEDURE

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WEDNESDAY MORNING SESSION

May 19, 1943

The meeting reconvened at 9:35 a. m., Chairman Mitchell presiding.

THE CHAIRMAN: Before we proceed, I want to say that we have passed two or three resolutions which approved an idea and left it to the Reporter to trim up. Judge Clark got the impression that we expected him to work all night and get these redrafts ready and bring them back to us at this meeting. I told him last night, subject to your approval, that what we meant was that he was to draw these revisions carefully when he got back home and that we would consider them at our next meeting. We haven't time to go back and fuss with words, or we will never get through with this meeting.

I have also suggested that when he goes back and starts on these revisions to present at our next meeting, as he gets it out in sections, he send it out to the members, and those of us who have time to think of them and examine them before the next meeting can do so and send back to him any suggestions you have, and that will be a step in advance for our next meeting.

The third thing I suggested to him was that in his redraft which he brings to our next meeting, when he changes a rule he ought to follow the system required under bills in Congress. The rule will be set forth, and he will put in

brackets everything he has omitted and underline everything he has added. That will be a great help to us. That sort of draft is the sort of thing that ought to go out to the bar and to the Court and, finally, to the Congress, because it simplifies the effort. If you just get a draft of a new rule, you have to call in a stenographer and check the others interminably. If the changes are indicated, it will help the Court, and I think that is the way we ought to do it.

Unless you have some further suggestions about those things, we will let it ride that way.

The next matter is Rule 34, and I understand Mr. Sunderland has some suggestions about that on page 6 of his report.

PROFESSOR SUNDERLAND: Pages 6, 7, and 8 of my material.

THE CHAIRMAN: Will you take that up, Mr. Sunderland?

PROFESSOR SUNDERLAND: Going down through the rule as printed, the first item is a change in wording to correlate this rule to Rule 26(b). About the twelfth line of the printed rule reads this way: "which constitute or contain evidence material to any matter involved in the action".

SENATOR PEPPER: This is which rule?

PROFESSOR SUNDERLAND: Rule 34. This relates to "letters, photographs, objects, or tangible things, not privileged, which constitute or contain evidence material to any matter involved in the action". Instead of "material to any

matter involved in the action", I think we should substitute "relating to any of the matters mentioned in Rule 26(b)". Then that brings us right back to the same phraseology that the rest of the rule rests on.

JUDGE DOBIE: That is about relevance and admissibility, and all that sort of stuff?

PROFESSOR SUNDERLAND: Yes.

THE CHAIRMAN: 26(b) is "Scope of Examination."

PROFESSOR SUNDERLAND: That is under sub (1) in Rule 34.

THE CHAIRMAN: Let's consider that first, then, before you go on.

DEAN MORGAN: What I wonder about that, Mr. Mitchell, is simply whether we want to go so far as to say that a person has to produce documents which merely give a clue to evidence, names of witnesses, and so forth. I suppose your answer is that he has to have a court order, anyhow.

PROFESSOR SUNDERLAND: Yes, you have to have a court order, anyway.

DEAN MORGAN: And you have to show how it is material, and so forth.

PROFESSOR SUNDERLAND: So you have court protection there under the Rules.

JUDGE DOBIE: I move its adoption.

SENATOR PEPPER: May I inquire just where in 26 is the

comparable language to which we are trying to assimilate this?

DEAN MORGAN: Rule 26(b).

THE CHAIRMAN: Which has been changed a little, I think, hasn't it?

DEAN MORGAN: Yes, it has been changed--no, 26(b) hasn't been changed.

SENATOR PEPPER: I didn't think 26(b) had been changed.

DEAN MORGAN: No.

SENATOR PEPPER: There the language is different, isn't it, from what you propose: "relevant to the subject matter"?

PROFESSOR SUNDERLAND: You see, I propose just to relate it right back to 26(b) and not have any special language in Rule 34.

SENATOR PEPPER: I beg your pardon. I thought you were trying to assimilate the language in the two sections.

PROFESSOR SUNDERLAND: No, merely to make a reference back.

SENATOR PEPPER: I see. Thank you.

MR. DODGE: Just which of your amendments are we considering now? The one on page 8?

THE CHAIRMAN: Rule 34, subdivision (1).

JUDGE DOBIE: Strike out the words "material to matter involved in the action" and substitute "relating to any of the matters mentioned in Rule 26(b)".

PROFESSOR SUNDERLAND: At the bottom of my page 8.

MR. DODGE: You passed by the earlier one.

PROFESSOR SUNDERLAND: I was taking it in the order of the printed rule.

MR. DODGE: Oh, yes.

THE CHAIRMAN: Any further discussion? All in favor of the amendment say "aye"; opposed. It is agreed to.

PROFESSOR SUNDERLAND: There is an almost identical change in subsection (2) of that same rule: "(2) order any party to permit entry upon designated land or other property in his possession or control for the purpose of inspecting, measuring, surveying, or photographing the property or any designated relevant object or operation thereon." I want to out out "relevant", so that it will read: "property or any designated object or operation thereon so far as it relates to any of the matters mentioned in Rule 26(b)."

SENATOR PEPPER: Here, again, you have to have an order.

PROFESSOR SUNDERLAND: Here you have to have an order.

SENATOR PEPPER: So the court can protect against the taking of a photograph of the ladies of the house, or anything of that sort.

PROFESSOR SUNDERLAND: Yes.

THE CHAIRMAN: Have you had any trouble under this rule in the courts?

PROFESSOR SUNDERLAND: It is general trouble that has

gone all through the Rules as to just how they relate to each other. It has caused a great deal of trouble. We have used different language in every rule when we really mean the same thing, and I think it would be very easy to go through and simply substitute a reference to 26(b) in all of them. That would tie them all together. There can't be any question.

THE CHAIRMAN: You mean there has been trouble in the courts?

PROFESSOR SUNDERLAND: In the courts, yes.

JUDGE CLARK: There are some cases we give back on page 69, the same sort of limitation on the scope of examination. Some of those cases are under 34 as well as under 26.

THE CHAIRMAN: I see.

JUDGE DOBIE: Wherever you use different language, the question of meaning pops up.

PROFESSOR SUNDERLAND: You mean the same thing and say something else.

JUDGE DOBIE: I think that is rather important. I move the adoption of the second suggestion.

SENATOR PEPPER: Second.

THE CHAIRMAN: Is there any objection? If not, it is agreed to. Have you another one on 34?

DEAN MORGAN: Where is that amendment written?

PROFESSOR CHERRY: Higher up on page 8. It is the first underlined matter.

MR. DODGE: He changes the language there.

THE CHAIRMAN: I don't think he wrote it out.

PROFESSOR SUNDERLAND: I don't think I have that in there; I don't think I wrote that out.

THE CHAIRMAN: He just read it to us here. It isn't in his report.

PROFESSOR SUNDERLAND: It isn't in my report, but it exactly corresponds to what I put in the report, and goes into the next paragraph.

THE CHAIRMAN: You have some suggestion for an addition to 34 next?

PROFESSOR SUNDERLAND: Yes, that is what I take up next.

JUDGE DOBIE: That is broadening the rule to change it to non-parties?

PROFESSOR SUNDERLAND: Yes. Rule 34 has been held to apply only to parties.

THE CHAIRMAN: We discussed that several years ago and agreed that the only way you could get stuff out of a person not a party was by getting a subpoena duces tecum allowed and by examining him, or something of that kind.

PROFESSOR SUNDERLAND: My proposal, instead of forcing the party to give notice of a deposition on oral examination with a subpoena duces tecum, if all he wants is inspection of a document, is that he ought to be able to get it directly

instead of going through the hocus-pocus of a deposition that he doesn't want in order to use a subpoena duces tecum that he does want.

JUDGE DOBIE: It might very well be, I should think, for inspecting the document or the object, and that you don't want to take a deposition.

PROFESSOR SUNDERLAND: You don't care for the deposition at all.

JUDGE DOBIE: It would save time, and you still have to have the court order.

PROFESSOR SUNDERLAND: Yes. My proposal would be to add to the rule this statement: "An order for similar discovery from a person not a party may be made by the court in which the action is pending or by any other district court, upon similar motion, showing and notice, if such notice is also served personally upon such person within the district where the court sits."

THE CHAIRMAN: When you say "similar discovery", we go back to Rule 26(b) again for that, now that you have that all in.

PROFESSOR SUNDERLAND: Yes; go right back to 26(b).

THE CHAIRMAN: And 26(b) refers to examinations.

JUDGE DOBIE: All it is, is to make this rule, hitherto limited to parties, now applicable to all persons.

PROFESSOR SUNDERLAND: Yes.

JUDGE DOBIE: But in every instance requiring a court order.

PROFESSOR SUNDERLAND: In every instance.

JUDGE DOBIE: For the protection of the party who has the property, and so on.

MR. DODGE: Even though no deposition is needed.

PROFESSOR SUNDERLAND: Even though no deposition is needed or wanted.

SENATOR PEPPER: Mr. Chairman, that is going pretty far. I can think of a court, who is not much disposed to exercise supervision over what happens and who will sign almost any order for inspection or discovery that is presented to him, signing an order which has a very remote relation to the controversy, the real purpose of which is to be a nuisance to some third person who never is going to be called as a witness, but into whose affairs the moving party has an urge to pry. I think it has implications that we ought to consider. I entirely sympathize with the purpose of Professor Sunderland, but I wonder whether we are not pretty wise in allowing this rule to be applicable only to parties.

THE CHAIRMAN: My reaction is that that is the theory we had before. There is another thing about this that occurs to me. All this business goes on in this way: You go into court for an order under this amendment, which provides for service of notice of the application, and I suppose it would

have to be made on the other parties. Then it also says that notice is served personally upon the outsider. When you come to the discovery, there isn't any provision here that a party to the action, who is interested in the thing, has even a right to appear when the inspection is going on and discovery is being had or anything of that kind. It is a matter between the moving party, we will say the plaintiff, and the witness.

PROFESSOR SUNDERLAND: They have to give notice to the party.

THE CHAIRMAN: Yes, I know; notice of the application or motion for leave to do it, but after the leave is granted, the other party to the action is out in the street. There is nothing here which enables him to take any part in that proceeding, and as we have it, you have a perfectly workable machinery now. You get the deposition of this outside witness and get an order ordering him to produce stuff, and when you have that, all the parties to the action have a right to appear at the hearing; and if he produces something, not only the moving party can inspect it and examine him about it, but the other party can. There is some risk about this thing that the Senator has mentioned. I don't see why there is some advantage.

JUDGE DOBIE: I am just thinking that wouldn't the protection there be the sound discretion of the District Judge? In a case that is very dubious or where the papers are quite

private or something of that kind, the party who has notice might ask the court to be heard, or something of that kind. It might very well be that the District Judge might say, "That is quite an extraneous thing, and on a mere ex parte showing I won't do it. I want to hear the other party."

THE CHAIRMAN: What happens when the order is once made and the plaintiff moves to have this witness who is not a party dig up stuff and inspect and all that? Where does the other party come into the picture there? There isn't a word in this amendment about giving him any right.

JUDGE DOBIE: There has to be notice to him, and certainly if he desires to be heard, I can't understand a District Judge's just saying, "No, I don't want to hear you."

THE CHAIRMAN: We already have a very workable and simple machinery to do this, and I can't see that there is anything less cumbersome about getting an order requiring a witness to produce documents for inspection, and all that, under the deposition rule than there is under this. There is just as much machinery here, and you would have to add some more machinery, I think.

MR. DODGE: It really is not very important, because the important thing here, the thing that is wanted almost every time, is documents. You can get the documents perfectly well under deposition, and you don't need anything like this. You can get them and put them in evidence and have copies made of

them. The only thing that this extends the privilege to is the photographing of tangible objects, which is a pretty rare thing.

PROFESSOR SUNDERLAND: And inspection of land.

MR. DODGE: Inspection of land and examination of a third party. There is a very unusual feature of litigation. It doesn't seem to me that it adds much to the rights of the plaintiff or party to extend this right independently of a deposition to the photographing of tangible things or the measuring of land.

THE CHAIRMAN: It says here "for similar discovery". Our rule, as we have just amended it, refers back to 26(b), and he has taken out the general provision that it is merely relevant and has hooked it up to 26(b). 26(b) doesn't say anything about photographing anything, does it?

PROFESSOR SUNDERLAND: "Similar discovery" in this rule, following our designation of method by means of photographs and copies and inspection, I think would carry this same idea through. You see, we are dealing with a particular kind of discovery relative to the same subject matter that is dealt with in 26(b).

THE CHAIRMAN: I see.

PROFESSOR SUNDERLAND: This says "similar discovery", relating to the same types of subject matter may be authorized by an order against a person not a party.

THE CHAIRMAN: We have adequate machinery for this already, and there hasn't been any particular trouble about it as it stands. What is your pleasure with it?

JUDGE DOBIE: I move its adoption.

THE CHAIRMAN: Is there any further discussion? All in favor of adopting it raise their hands.

... Three hands were raised ...

THE CHAIRMAN: Opposed.

... Five hands were raised ...

THE CHAIRMAN: It seems to be lost. That is all on 34, as I understand it. Now, Mr. Reporter, will you go on to Rule 35?

JUDGE CLARK: The first comment on Rule 35 is not important, I think. We have just mentioned the Sibbach case. You may all have seen Mr. Wigmore's remarks on the dissenting opinion, in his best caustic style.

On Comment II, you will notice that Mr. Sunderland makes the same question. There has been a limitation by some Judges. It is much the same problem we have run into before on the scope of examination. The Wadlow case here is a libel suit. It was held that this rule didn't apply to a libel suit. We have tried to make it clear that it applies, and the suggestion is on the top of page 91, over on the next page. Mr. Sunderland has a suggestion directed to the same end, based on the same cases. On page 9 he suggests we make it: "In an

action of any kind". We have a little different wording.

THE CHAIRMAN: Notwithstanding, the rule for physical examination says that it can be had whenever the mental or physical conditions of a party is in controversy (which might be in an insurance case or an accident case or anything), I had a judge (Otis, I think) who wrote a decision saying that it was limited to personal injury cases, which, of course, is nonsense. Then another case arose where the parentage of a child was involved, a bastard case, I think, or something of that kind. Maybe it was a divorce case. At any rate, the lawyer who had the case wrote to me. He was very much interested in getting a drop of blood from the alleged father because, as you know, there are certain types of blood. If they could get the reputed father's sample of blood and the child's and found they were different, that would let out the man charged with being the father of the child; it would clear him. Of course, if they were the same type, it still left it unsettled. He wrote me and wanted to know whether this rule, which was narrowly limited to cases where the physical condition was in controversy, covered that situation. Of course, you might not say in a narrow sense that it was in controversy. On the other hand, it was. Charlie has pointed out in his amendment that it was relevant to an issue in the case. I wrote back and told the fellow I thought the rule was very badly worded if that kind of blood test was not going to be made, that I hoped the court

would take the broad view of it and let it in. I never found out how it came out.

JUDGE DOBIE: That is a question of the physical condition, isn't it? The child wasn't a party? Is that the idea?

THE CHAIRMAN: No. The alleged father and the woman were the parties, and the type of blood the father had was relevant to the question of parentage, but the type of blood you couldn't say was a matter in controversy within the strict meaning of this rule.

JUDGE CLARK: That was admitted, I think, in Beach v. Beach.

THE CHAIRMAN: Did he finally let it in?

JUDGE CLARK: On page 90, the U. S. Court of Appeals down here so held.

MR. DODGE: Ordered the father to subject to having his blood taken.

DEAN MORGAN: It would be the other way around, wouldn't it?

PROFESSOR MOORE: I think it was a case of whether or not they could make a blood test on the child.

THE CHAIRMAN: Was that it?

PROFESSOR MOORE: They allowed that. The child was a quasi party in this divorce action.

MR. DODGE: That is more remote from the issue that is being tried than is the physical condition in this libel suit.

Why wasn't it directly at issue in that libel suit?

JUDGE CLARK: It was, notwithstanding Judge Otis.

PROFESSOR CHERRY: Otis said he didn't like the rule.

MR. DODGE: It was not directly in controversy.

THE CHAIRMAN: It seems to me that the amendment at the top of page 91 in the Reporter's report, striking out the words "in controversy", and saying, "relevant to any issue in the case", is a good one. Now we have the rule sustained by the Supreme Court, and we can have the courage to branch out and spread it out a little bit. Maybe they wouldn't have done that if they had had it that way in the first place.

JUDGE DOBIE: Do you think it is desirable to adopt both of them?

PROFESSOR SUNDERLAND: "of any kind".

JUDGE CLARK: And "relevant to any issue in the case"?

THE CHAIRMAN: Where is that?

JUDGE DOBIE: On page 9 of Professor Sunderland's suggestions. After the words "In an action", he suggests that we insert "of any kind", to show very clearly that it is applicable to other types of civil action besides personal injury cases.

THE CHAIRMAN: I don't think that means anything. It is as plain as daylight now. When you say "In an action", that already means any kind of action. There can't be any doubt about that. You can't beat a man like Otis with that sort of

amendment, because the rule now says "In an action" and draws no distinction between personal actions, personal injuries, and insurance cases.

MR. DODGE: I move that we make the amendment suggested by the Reporter.

THE CHAIRMAN: Do you want to say anything, Mr. Sunderland, about yours?

PROFESSOR SUNDERLAND: I think I agree with you except that here is Otis making this fool decision.

THE CHAIRMAN: There is no use shooting him.

PROFESSOR SUNDERLAND: We are changing it, putting in another phrase, and we might as well put this in.

PROFESSOR CHERRY: We would have to define "action", and we would be in trouble under other rule, or might be.

THE CHAIRMAN: The proposal is to amend Rule 35(a) by striking out the words "in controversy" in the first sentence and substituting the words "relevant to any issue in the case". All those in favor of the amendment say "aye".

MR. LEMANN: Is there any risk in that? The Supreme Court sustained this rule by a five to four vote, am I right?

DEAN MORGAN: That is right.

MR. LEMANN: The supposed extension may be opposed. Personally, I don't think it changes the rule. Suppose it does change the rule and extends it somewhat, which is the theory upon which it is proposed, the Court may get into an argument

about this particular provision when the new draft is submitted; the personnel being somewhat different from what it was when the decision of five to four was announced, this rule, like our cross-examination rule, might go out on further discussion of the Court or it might cause a delay in the consideration of the draft. I am asking, not answering.

THE CHAIRMAN: I shouldn't think so. There is a note that we can put on it.

JUDGE DOBIE: I think that is a chance, but I can't conceive that even the Supreme Court could do a thing as foolish as that.

DEAN MORGAN: You are an optimist.

JUDGE DOBIE: Yes. I still carry a corkscrew on my key ring.

MR. LEMANN: I don't think the improvement effected by the change is sufficiently clear that it warrants taking that chance.

PROFESSOR CHERRY: This is not the Otis amendment.

MR. LEMANN: It is supposed to cover Mr. Otis' case. I agree with Mr. Dodge. It seems to me his decision was clearly wrong.

THE CHAIRMAN: It is not an issue of law, but an issue of fact.

PROFESSOR SUNDERLAND: An evidentiary issue or an ultimate issue. If you construe this in a pleading sense, it

could be an issue on pleading. They might construe it that way. It seems on controversy, it is broader than issues.

THE CHAIRMAN: There is one thing that can be said, of course, and that is that in those cases when interpretations of the rules come up, the Court has construed the words "physical condition in controversy" any way it wanted to make it read. That case about taking the blood test of the child as a matter of evidence to find out whether the father was the father squarely raised the question whether the condition of the child was in controversy. It really wasn't the controversy. It was whether the husband was the father, and yet they took the broad view. I remember that when I went over that case with the lawyer, he wrote me and I wrote him an argument which I thought he ought to make in the court. I had grave doubt in my own mind whether the rule ought to be construed as broadly as that. I am afraid we will get some conflict in it in the future, although we haven't yet, and it would be unfortunate if the controversy arose in the Supreme Court on a conflict taken to the Supreme Court as to the interpretation of the rule. In view of the fact that there are four of them already who don't like the rule at all, I suspect they might drag over one other man who would say, "Well, the physical condition has to be in controversy in an accident case or personal injury case, and the mere fact that a man's physical condition may be a matter of evidence in the case, like the blood test case, isn't

within it." If am afraid the lower courts, like the Circuit Court of the District, already take a liberal view of the interpretation of the word "controversy," which might be "busted" in the Supreme Court.

PROFESSOR SUNDERLAND: They might take issue with a little more technical and narrow restriction.

THE CHAIRMAN: If we make a rule so as to accept the interpretation that the Circuit Court of Appeals of the District has already made on it, no other Circuit Court is going to take the opposite view and raise a conflict to go to the Supreme Court, because we have abolished the trouble. So I think there is an advantage, rather than a detriment, as far as the Supreme Court is concerned, in removing all chance for conflict between Circuit Courts as to whether that word "in controversy" means the subject of the action.

MR. LEMANN: Would this amendment clearly cover the case of the baby who was not a party to the suit?

THE CHAIRMAN: They held he was a party.

MR. LEMANN: They may have held it, but I don't think your amendment would help that.

THE CHAIRMAN: I am not aiming at that. We can't change that.

MR. LEMANN: That is the blood test case, really. That was the real point there, as I understand it. It is not the question that Otis had before him that this amendment would

reach.

THE CHAIRMAN: Suppose the thing had been this way: Suppose there wasn't any objection to taking the blood test of the infant, but the wife wanted to take the blood test of her adversary party, the husband, and he refused. Our amendment would make it perfectly clear that he had to subject himself to a pin prick in his forefinger and the taking out of a few drops of blood, but without the amendment, he would argue, "My physical condition is not a matter in controversy," and he might get a Circuit Court in another Circuit to hold that you can't make a test like that on a party.

PROFESSOR SUNDERLAND: Another phrase might be used there," and that is "drawn in question." That is a phrase that is familiar, and there is a Federal statute on appeals involving a Federal question. You could say, "condition of a party is drawn in question". That doesn't use that technical word, "issue," and it is a little broader than "controversy," I should think.

THE CHAIRMAN: There is another question, and that is whether the character of a man's blood is a matter of physical condition. I suppose it is.

JUDGE DOBIE: Oh, unquestionably.

PROFESSOR SUNDERLAND: At least, it is drawn in question.

THE CHAIRMAN: Is that a matter of physical condition?

JUDGE DOBIE: I should say it was, unquestionably, just as much as whether you have a compound fracture of the tibia or what percentage of hemoglobin you have in your blood. What type of blood you have, whether it is 1, 2, 3, or A, and so on, is as much a matter of physical condition as whether you have high blood pressure, I should think, General.

JUDGE CLARK: May I just protest when Judge Dobie gets to talking in mathematical terms?

THE CHAIRMAN: I don't think this is a matter of very great importance. What do you want to do with it?

JUDGE DOBIE: I think the Reporter's suggestion is a good one, and I am very strongly in favor of it. It is a fine rule.

JUDGE DONWORTH: Is this question affected at all by the subdivision (iv), which was considered by the Supreme Court in the case we have discussed?

THE CHAIRMAN: What rule?

JUDGE DONWORTH: It is subdivision (iv), Rule 37, the one that prohibits the issuance of a contempt order for disobedience. I don't know that it has any relevancy, but I thought I would mention it.

THE CHAIRMAN: I think that is the thing that saved the vote in the Supreme Court. In one Supreme Court case, the lower court, instead of dismissing the man's case or taking fact against him, made an order for contempt proceeding and

put him in jail. I knew that that would lose the case in the Supreme Court, and neither of the parties raised the point or suggestion that that wasn't authorized by the Rules. So that was the reason I took it upon myself to file a brief. I pointed out to the Court that compulsion by physical arrest wasn't allowed by the Rules, and I think that is the thing that has saved the rule.

JUDGE CLARK: Maybe Judge Donworth wants to take it out, now that it has done its job.

JUDGE DONWORTH: No, not at all.

THE CHAIRMAN: Shall we adopt it or shan't we? All in favor of the amendment say "aye"; opposed, "no." I think we will have to have a hand vote. All in favor of the amendment raise their hands. Five, isn't it? Yes. Those opposed.

.... Five hands were raised ...

THE CHAIRMAN: A tie vote. It is affirmed, without opinion.

PROFESSOR SUNDERLAND: I voted against it. I didn't like the word "issue."

MR. LEMANN: You never can tell what changes a vote in court, can you?

JUDGE DOBIE: Do you want to take up that suggestion of Sunderland's about "of any kind"?

JUDGE CLARK: I will accept Sunderland's wording.

THE CHAIRMAN: You mean "an action of any kind"?

JUDGE DOBIE: Yes; insert the words "of any kind".

THE CHAIRMAN: He didn't put it that way. He said "in any action".

PROFESSOR SUNDERLAND: No; "In an action of any kind".

JUDGE DOBIE: The rule reads, "In an action in which the mental or physical condition of the party is in controversy, ..." Sunderland's suggestion is that after the word "action" in the first line, you say "of any kind".

THE CHAIRMAN: The only purpose of that is to slap Judge Otis, and his opinion is so clearly wrong that I don't think it is necessary.

JUDGE DONWORTH: We would have to do the same thing in every place where the word "action" appears.

THE CHAIRMAN: Yes.

JUDGE DOBIE: That would be. I can see that. I withdraw that.

THE CHAIRMAN: We stand on the proposition that our rule means what it says now and that we don't have to say it means what it says.

Anything on Rule 36, Mr. Reporter?

JUDGE CLARK: First on page 92, "Request for Admission." There has been some discussion as to how a request could be attacked. You see it has been raised by several gentlemen noted at the top, and some writings and some cases have said you could suppress a request, and so on. As we understand it,

the rule was intended to operate extrajudicially as to the penalty in the line of expenses and also, of course, as to the effect of the admission on the party who makes it or doesn't make it. So we suggest that the way that should be treated is as is stated at the foot of the page. "Objections to a request to admit or to a refusal to admit shall be heard only on the application to assess expenses pursuant to Rule 37(c)."

THE CHAIRMAN: Have cases arisen where there has been some other method of trying to raise the objection?

JUDGE DOBIE: A motion to strike has been permitted in some instances, hasn't it?

JUDGE CLARK: Yes. Here, again, we have the Western District of Missouri. Was that Judge Otis, too?

JUDGE DOBIE: Probably so.

JUDGE CLARK: It seems to be his habitat. "motion to 'suppress' sustained where the admissions requested were deemed irrelevant or 'absurdly onerous'." We think, however, it was Judge Reeves, and not Judge Otis.

MR. LEMANN: Mr. Reporter, if we adopt your suggestion, when defendant is asked to make an admission and he thinks he shouldn't be asked to admit and doesn't admit, if he doesn't deny, is he taken to admit? He would like to find out whether he is called upon to answer or not. He doesn't want to make an admission by default. He might object to that very much. He would deny it, if he has to say anything, but he prefers not

to be called upon to do anything. Do I understand this amendment would be that he couldn't find out his obligation until you came along later on a rule to tax the cost of expenses, and meanwhile he wouldn't know just what risk he was taking? He would know that he was taking a risk if he didn't answer, and it was held to be a proper demand, that he had admitted it?

JUDGE DOBIE: He can set forth the reasons.

THE CHAIRMAN: It is an adequate answer that satisfies the demand if he (in the last words of the rule) sets "forth in detail the reasons why he cannot truthfully either admit or deny those matters."

MR. LEMANN: Suppose he can admit or deny, but that the admissions requested are irrelevant or absurdly onerous. I am looking at the language used here. He can't very well say, "I can't truthfully admit or deny," because he could truthfully admit or deny.

THE CHAIRMAN: He thinks it is improper to have him admit it at all; that it is irrelevant, for instance.

MR. LEMANN: That is right; he ought not to be asked about it. If he has no way to provoke a ruling on that beforehand, what is he going to do? He can't come in and say, "I can't truthfully admit or deny," because he could.

THE CHAIRMAN: How about that?

PROFESSOR SUNDERLAND: He might claim it a privilege.

MR. LEMANN: He might.

JUDGE CLARK: If you will look at (c), you will see the idea that we had. There is a remedy that we have in mind.

THE CHAIRMAN: Look at what?

JUDGE CLARK: 37(c). It seems to me if you are going to have a scrap in advance of this, you destroy a good deal of the usefulness.

MR. DODGE: Have any courts refused to deal with a matter on motion. In all these cases you cite, they did refuse to?

DEAN MORGAN: They did not deal with it.

JUDGE CLARK: There are two cases on page 92.

JUDGE DOBIE: One way is to sustain a motion to suppress.

MR. DODGE: They sustained the motion here?

JUDGE CLARK: No. Down under the recommendations you will see the Penmac case and the U. S. Rubber case. Mr. Lemann's point, it seems to me, is a good one, that 36(a) applies, that if he refuses to answer as prescribed in the Rules, the facts are taken against him. There are two kinds of answers that he is permitted under Rule 36. One is to admit or deny, and the other is the answer that he cannot truthfully either admit or deny. He may have a third reason for not wanting to admit or deny, to wit: it is privileged or perfectly irrelevant and scandalous stuff that hasn't anything to do with the case. If that is his ground for not doing it, unless

he can get the interrogatory demand stricken, the fact is taken against him because he can't make the answer prescribed in 36 and say that he can't truthfully admit or deny.

JUDGE DOBIE: Would it obviate that objection if, instead of "he cannot truthfully either admit or deny", we substituted some such phrase as "why he should not be compelled either to admit or deny"? Such as a question of privilege. In other words, this seems to be phrased solely in terms of power.

MR. LEMANN: It wouldn't help if you permitted that. It would help the man who didn't want to answer, but it wouldn't expedite the discovery of the truth, because all he would say then is, "I won't answer this because it is privileged" or "because it is irrelevant," and you would have no way to find out in advance whether that position was well taken. Meanwhile, the moving party, the questioning party, wouldn't have gotten anything from the rule. So I think that remedy wouldn't really permit you to use this rule properly.

It would be much better to get a ruling on whether the man was required to admit or deny, which is the way it is supposed to work now.

JUDGE CLARK: Mr. Chairman, may I comment on this? I am afraid that I would say that in practice I think Mr. Lemann's suggestion would be unwise, because really the great difficulty, or a great difficulty, here is the various appeals to the

District Judges. I know in the Southern District they are a good deal troubled by those now. One great criticism of the rule generally is that there are too many opportunities for interlocutory appeals to the judge, and I should suppose that in a District such as that over which Judge Dobie originally presided, it would be very difficult where the Judge sits in so many cities. It seems to me the usefulness of these things is much less if you have too many applications. If the statement that the party must say why he cannot truthfully either admit or deny is incomplete, I think we should make it as complete as we want it. That is one question. But on the other question of the operation, of the mechanics of it, it seems to me it should be made self-operating. The more of these we can have self-operating, the better.

PROFESSOR SUNDERLAND: You can enlarge that thing to cover Mr. Lemann's point by just adding at the end of that paragraph "or ought not to be required to do so."

MR. LEMANN: That is in effect Judge Dobie's suggestion, as I got it. My reply there was that I thought that would prevent the man who was asking the question from getting an answer to it. Suppose the person to whom the question is addressed arbitrarily says, "I ought not to be asked to answer this question."

PROFESSOR SUNDERLAND: That is all right, if he wants to stand on it and take a chance of having to pay the cost.

MR. LEMANN: It limits the efficacy of the rule.

MR. DODGE: You can't say that under the rule as it stands.

PROFESSOR SUNDERLAND: No.

THE CHAIRMAN: Let me point out something to you now. Let's get our noses right down on this proposed amendment. It seems perfectly clear to me that it doesn't fit the situation. Rule 36(a) provides that there is only one of two things you can do: you admit or deny, or you say you can't truthfully do either. It makes no provision now for saying that the matter is privileged, improper or anything. Then there is this expenses business, subdivision (c), to which the Reporter's amendment relates. "Objections to a request to admit or to a refusal to admit shall be heard only on the application to assess expenses pursuant to Rule 37(c)." Rule 37(c) hasn't any application at all to a refusal to admit because it is irrelevant or improper. You read it. It says that if a party, after being served with a request under Rule 36, serves a sworn denial, and if the party requesting admission thereof proves it genuine, the cost of the proof shall be borne by the man who perjured himself.

That doesn't fit the case at all or relegate this thing to 37(c), because that touches only a wrongful refusal to make any answer. So it just adds confusion to the situation to make this amendment. When you say you can bring it up only

under 37(c), and then you go to 37(c) and say the only way expenses can be applied is in the case where you wrongfully deny the fact, it doesn't hit the matter at all. So it doesn't seem to me that, whatever view you take of what ought to be done, this amendment would do anything but confuse the matter.

JUDGE DONWORTH: Mr. Chairman, I think the rule should be left as is. As it is now, it leaves to the discretion of the judge whether he would entertain a motion or not. We have no rule on the subject of a motion.

THE CHAIRMAN: A motion to force the man to answer and negative his claim of privilege or whatever it may be.

JUDGE DONWORTH: Yes. It seems to me that the Reporter's suggestion that it is desirable to prevent interlocutory applications to a judge is not proper. I think a judge is there for the purpose of answering all these difficulties and that local option, so to speak, in the discretion of the judge, is the best guide we can have here.

THE CHAIRMAN: It seems to me that even though the rule is silent as to the means to which the man to whom the interrogatory is directed may resort to to save himself from answering it at all, I think it is necessarily implied that he might apply to the court to have the demand nullified on the ground, not that he can't truthfully admit it or deny it, but on the ground that it ought not to have been asked at all, saving him from the consequences of failing to comply with Rule

36. That is what the courts have done, as I understand it.

MR. HOLTZOFF: Some courts have held that they have no authority to entertain such a motion. That is what has created the difficulty.

THE CHAIRMAN: If that is so, we ought to provide that they can, but certainly we ought not to say that the "Objections to a request to admit or to a refusal to admit...."

MR. LEMANN: The Southern District of New York seems to make most of the cases, doesn't it? What percentage of the decisions under these Rules come from the Southern District of New York? Are they in proportion to the number of cases in their District or not? I notice that the only cases here where they declined to permit these motions are two cases from the Southern District of New York. Are they both from the same judge? Could we look at them?

MR. HOLTZOFF: There is one from the Eastern District of Pennsylvania, and there is another one from Massachusetts, where I recall that it was held that such a motion would not ride.

MR. LEMANN: I see you have your C.C.A. 7th case holding that you can get relief from the trial court, and you have another case in the Western District of Missouri where it was permitted. Could we see those two cases in the Southern District of New York? If they were both by the same judge, unless he gives a very well-reasoned opinion, Mr. Chairman, I am not

sure that we ought to take notice of it.

JUDGE CLARK: I think that is better reasoning myself. I am already predisposed that way. The fact of the matter is that there has been some conflict here, and the question has been raised. There is some ambiguity. The question is whether you want to change it or not. I am quite sure myself that it is a mistake to provide that it can be held up and have the Judge (as in the Western District of Missouri) who is opposed to this procedure tie it up, as has been done.

The objections made to the form of the statement here of course are sound, but those can easily be corrected. You can easily add the matter privileged to Rule 36(a). You can change 37(c) to make it adequate. Those are technical matters. But on the question of the method to be followed, I think it is too bad to invite the enforcing of this procedure by Judge Otis.

THE CHAIRMAN: Do you want us to amend the rules so as to provide that if a man doesn't do what 36 now provides, (he doesn't either admit or deny on the one hand, nor does he set forth in detail the reasons that he cannot truthfully either admit or deny, but he takes the third position that the interrogatories are improper, that he ought not to be required to make any answer or suffer any consequence) it shall be equivalent to a wrongful or false denial and that merely the expenses of proving the fact are to be borne by him?

JUDGE CLARK: I don't think that I would make that third position quite as broad as that. You know, earlier there is the word "relevant." I should be inclined to think that if you added to that ground of refusal the word "privilege," you would have all that you need, but I should say that even if you did make it quite broad, I should think it would be wiser to have it done this way than to have the running to the judge.

MR. LEMANN: You mean to expressly provide in the rule that he may claim the privilege, and then his penalty would be that, on the trial of the case, it might be held that it wasn't privileged and that he should pay the cost of proving the fact. Would that be the penalty?

JUDGE CLARK: Yes.

MR. LEMANN: That would be workable, but personally I don't think that would improve the administration of justice, because I think it would be much better to find out in advance whether it is privileged or not, so that if it is not privileged, he can be required to answer in advance. If I were the plaintiff or the defendant, whoever was seeking the information, I should much prefer that, because then I would know what position I would be in about this fact in advance of the trial. It really comes to a question of whether you want to facilitate matters in advance of the trial or not. If you want to facilitate matters in advance of the trial, I think it should be left where it is, or make it plain that you can bring up this matter

in advance, if it is not plain.

THE CHAIRMAN: What happens when a man takes a third position--not one of the two defined in 36(a), but a third--that the demand is improper?

SENATOR PEPPER: The rule doesn't cover that.

THE CHAIRMAN: I know it doesn't, but what happens in the courts?

SENATOR PEPPER: It is admitted. Wouldn't Mr. Lemann's suggestion be met if there were added at the end of 36(a) a very simple sentence, like this: "If he refuses to admit for any other reason, the court on motion shall determine the adequacy of the reason."

SENATOR LOFTIN: Mr. Chairman, I was one of those who raised objection, and I agree with Mr. Lemann, and Senator Pepper's suggestion would be agreeable to me. It would provide something so that the party can raise the question. It seems to me that it ought to be decided, that it ought not to wait until it goes to trial.

SENATOR PEPPER: If it is in order, I move as a substitute for the proposed amendment, the following: Add at the end of Rule 36(a) the following sentence: "If he refuses to admit for any other reason, the court on motion shall determine the adequacy of the reason."

SENATOR LOFTIN: Second.

MR. TOLMAN: I second that motion.

JUDGE DOBIE: That has the advantage, of course, of protecting the party. It has the disadvantage of slowing it up a little.

SENATOR PEPPER: Of what, sir?

JUDGE DOBIE: It has the disadvantage of slowing up the answer a little.

SENATOR PEPPER: Not very much.

JUDGE DOBIE: And also the intervention of the judge.

SENATOR PEPPER: The relative disadvantage of leaving the party in the dark as to whether he is bound to answer or not, seems to me to outweigh the disadvantage that you have to disturb the leisure of the judge and ask him to hear a motion.

THE CHAIRMAN: Would your amendment involve also Sunderland's amendment to 37(c)? Will you look at that, Senator?

SENATOR PEPPER: I don't think it would, sir.

THE CHAIRMAN: Just look at it.

SENATOR PEPPER: Yes, sir.

THE CHAIRMAN: It says: "If a party, after being served with a request under Rule 36, to admit .... serves a sworn denial thereof...." That doesn't deal with the case where, having been served with a request under 36--

SENATOR PEPPER (Interposing): I had that in mind, Mr. Chairman, but it seems to me that the penalty of paying costs and counsel fees is only where he has made a denial and it is

found out that his denial is improvident. It doesn't seem to me that a man ought to be penalized by having to pay costs and counsel fees on a motion which is in effect a motion for instructions from the court as to whether the admission that he is asked to make is one that he ought to be required to make.

THE CHAIRMAN: Your theory is that if, under Rule 36, instead of either admitting or denying or saying he can't truthfully admit or deny, he puts in a third answer and says that he doesn't think he ought to be asked to admit or deny, then if the party doesn't move at that time for an order from the court directing him to answer, for instance, but just lets it drop and has to go to the expense of proving the fact, he couldn't, under Rule 37(c), then show that third answer, that he ought not to have been asked, was phony and still put the expenses on him, as you word it?

SENATOR PEPPER: I had that in mind.

THE CHAIRMAN: You did that deliberately.

SENATOR PEPPER: I meant to face that consequence.

MR. LEMANN: The only comment that might be made on Senator Pepper's suggestion is that it would put the burden on the person who demanded the question--

DEAN MORGAN: That is right.

MR. LEMANN: --to get an order for an answer, that is, overruling the claim of privilege, whereas the way it has worked out in what seem to me the right cases that have been cited

here, the fellow who doesn't want to answer has to make a motion to suppress the question. I should think that is the way it ought to be. Otherwise, he claims it is privileged and puts the delay on the other fellow, who then has to file a motion and set it down for hearing. I think it ought to be required that he go forward with a motion to suppress.

THE CHAIRMAN: Senator, if he doesn't want to have to be burdened with the consequences, the person to whom the demand is addressed, instead of sitting smug and saying, "I don't answer," and forcing the other fellow to go into court, has either to admit or to deny or himself go to the court and get relief from it. Don't you think that would be better?

SENATOR PEPPER: I think it depends a little upon one's original apprehension as to whether this business of requiring an admission is rather an extreme provision, in which case the burden is on the man applying for the privilege, and he can't reasonably complain if he has to overcome any objection that is interposed in good faith. If, on the other hand, you start with the supposition that you want to facilitate this process as much as you can, then I think Mr. Lemann's suggestion is better than mine. If the sense of the Committee is that we want to use this request for admissions in speeding up in every way we can, I should be glad to withdraw my motion in favor of one suggested by Mr. Lemann.

THE CHAIRMAN: I should like to ask the Reporter to

clear my own understanding of the situation. Have some District Courts held that under 36, if a man just balks and won't do anything under it, there is no means of applying to the court, or have they held that if he comes in with an answer and says he doesn't think he ought to be required to answer, there is no means of getting an order requiring him to do so?

JUDGE CLARK: First, there have been quite a number of decisions on this point. In Mr. Moore's last Supplement, he says, "Just generally speaking, requests for admission have been held not subject to motion to strike." There are cases from the Eastern District of New York, the Southern District of New York, the Eastern District of Pennsylvania, and a couple more from New York. A motion to dismiss has been deemed unavailing--Eastern District. Nevertheless, in a few cases the request for permission has been determined on motion--Ohio and Delaware. In Massachusetts the court raised a question and said it couldn't determine the relevancy, anyway, from the pleadings and, I take it, then permitted the questions to go on.

Can you answer, Mr. Moore, as to what has been done by way of penalty? This relates to preliminary attempts.

PROFESSOR MOORE: I don't know of a case, Mr. Chairman, where a party has been compelled to answer these. If he doesn't want to answer, he just doesn't and takes the consequences under 37.

THE CHAIRMAN: The only consequence under 37 is that in 37(c).

PROFESSOR MOORE: Yes, sir.

THE CHAIRMAN: That, by its very terms, applies not to a case where he refuses to answer, but only where he denies, where he makes a sworn denial.

MR. LEMANN: If he doesn't do anything, it is admitted; if he remains silent, it is admitted. Isn't that really the case you are thinking of?

DEAN MORGAN: That is the third sentence in 36(a). "Each of the matters of which an admission is requested shall be deemed admitted unless, within a period designated in the request," and so forth.

THE CHAIRMAN: I see.

JUDGE DOBIE: Either admit it or deny it or do that last thing--state the reasons why he can't truthfully do it.

DEAN MORGAN: The Senator's motion struck me a little different than it struck Mr. Lemann, because I supposed that the Senator's motion would do away with the delay instigated by the objector. If the objector said that he couldn't answer for the reason that it was privileged, and the propounder was satisfied, he could go right along. You don't have to bother with a motion, and so on. It is the questions that are not answered for these reasons that are important enough to be taken up. The propounder can delay that. The objector doesn't

get much chance under the Senator's draft, it seems to me, to delay this thing.

THE CHAIRMAN: Here is the thing, then, in view of what you have read to me under 36(a): Suppose that demands for admission are submitted to me, and I don't do either of the things specified in the rule--I don't file a sworn denial or an admission, and I don't give reason why I can't truthfully do either. Although the rule doesn't provide for it, I just come back and serve an answer saying that the question is privileged and is irrelevant and scandalous, and that I won't answer. Then, under the terms of the rule that you have read to me, the fact is taken against me right there, and I haven't any way of going to the judge under some of these decisions and having him rule right then and there whether my claim of privilege is right or not. The result is that if I am wrong, the fact is taken against me, and I haven't any way of finding out beforehand; and some of these courts have said you can't do it.

MR. LEMANN: I should like to see what some of these courts have said.

DEAN MORGAN: Let me answer that, if I may. The Senator's motion would take care of that. If he put that kind of answer, then the proponent could bring him before the court immediately, if he wanted to delay the case.

THE CHAIRMAN: I think that is the way to do it, but

I think I should like to see the fellow to whom the demands are submitted be the one, unless he does what this rule says--either denies or admits or says he can't truthfully do either. If he has some third reason for it, the fact should be taken against him unless he himself goes to the court and gets a ruling as to whether his position is sound or not. I don't think the burden ought to be on the demander. It weakens the rule.

SENATOR PEPPER: It seems to me that when it comes down to this mere matter of choosing which party should bear the burden, you may have as a choice either what I proposed ("If he refuses to admit for any other reason, the court on motion shall determine the adequacy of the reason) or what Mr. Lemann proposed, as he would put it, that if he desires for any other reason to refuse to answer, he may within such period move to quash the request. It seems to me it is one of those two.

THE CHAIRMAN: Yes.

PROFESSOR CHERRY: Mr. Chairman, doesn't the Senator's motion leave it open to either party to move? I thought when you stated it, it did.

MR. LEMANN: Yes, but that puts the burden on the questioning party. The party making the objection won't move. He is in no hurry--he is objecting. He simply says, "I object." Then the Senator's motion, it is true, would permit either

party to bring it on, but the objecting fellow won't do it.

PROFESSOR CHERRY: If he doesn't, isn't he in trouble if it turns out that that is taken as admitted?

THE CHAIRMAN: That is my point.

PROFESSOR CHERRY: I thought the Senator's motion was exactly that, that it left it up to either one who wanted that thing determined then to take it into court. I think that would be the way to handle it. There will be cases where one party would want to go in, and other cases where the other would want to go in.

MR. LEMANN: You would have to make it very plain, or otherwise I think it would very probably be held by many courts that if a man made an objection of privileged and it wasn't passed, he was not exposed to the penalty of having it taken as admitted. I don't think you ought to leave that open to discretion. I think you ought to have a ruling on it. The best way to get a ruling is to require that the man making the objection should present a motion to quash or suppress, which is what some courts have already held he is entitled to do. Except for these decisions in New York and the one you referred to, Mr. Holtzoff, in Pennsylvania, I would have thought that we didn't need to do anything.

SENATOR PEPPER: I think Mr. Lemann is right about it. I should be glad to withdraw the motion, if what I said is interpreted as a motion, and substitute this, the language, of

course, to be perfected by the Reporter: Add at the end of 36(a) a sentence, as follows: "If he desires for any other reason to refuse to answer, he may within such period move to strike the request." I have substituted "strike" for "quash" because the Major points out that we haven't used the term "quash" elsewhere and that "strike" is the familiar phrase. Does that meet it?

MR. LEMANN: Yes, I think that would cover it.

SENATOR LOFTIN: I seconded Senator Pepper's original motion. I shall be glad to accept it.

MR. DODGE: If he does so move, the time for filing objection is extended accordingly.

SENATOR PEPPER: Wouldn't that be a pretty necessary implication? If he is exercising a right given by the rule, he can't be penalized under the rule by not having filed as he would have had to do if he hadn't moved. It could, of course, be spelled out, but I don't really think that is necessary.

THE CHAIRMAN: Is there any further discussion? The question is on the motion just presented by Senator Pepper, to add at the end of 36(a) a provision, the substance of which, without trying to give the exact words--

SENATOR PEPPER (Interposing): The exact language was: "If he desires for any other reason to refuse to answer"--or maybe it should be "refuse to admit".

THE CHAIRMAN: No. I was going to object to that

because he might refuse to make any answer.

SENATOR PEPPER: Yes.

THE CHAIRMAN: Maybe he didn't want to be forced on oath to deny it.

SENATOR PEPPER: I think it ought to be "to make an admission".

MR. LEMANN: Perhaps when the Reporter phrases it, he should bring in the idea of privilege instead of saying "If he desires not to answer". Say, "If the person to whom the question is addressed contends that he should not be required to answer because the matter is privileged or irrelevant or impertinent, or for any other reason, he may then present a motion to strike."

THE CHAIRMAN: You agree that the Senator's motion covers the ground?

MR. LEMANN: I do. I think when it comes to wording it, perhaps the word "desires" should be substituted by some other language.

JUDGE DONWORTH: I am wondering about the meaning of the word "other" in Senator Pepper's sentence.

SENATOR PEPPER: You see, Judge, it follows the body of the rule as it now stands, which allows the person who is asked to admit, both of two grounds for refusal. One is a denial of the truth.

THE CHAIRMAN: That is an answer.

SENATOR PEPPER: The other is a contention that there are reasons that he can't either truthfully admit or truthfully deny. Then my thought was that if there was any other reason, that would cover privilege or any other matter that he could think of at the moment.

THE CHAIRMAN: You see, Judge, immediately preceding the Senator's amendment, it says he may set "forth in detail the reasons why he cannot truthfully either admit or deny those matters." That is a reason for not answering. Then it goes right on and says if he has any other reason for not wanting to answer, he may apply.

JUDGE DONWORTH: I wasn't questioning that. I understood very well. The word "other" indicates that it follows the existing reasons.

SENATOR PEPPER: Yes.

JUDGE DONWORTH: That is all right.

JUDGE CLARK: May I make just a very minor suggestion? I understand that I am to work on the wording, and perhaps this is covered. I should think that perhaps we could improve the wording a little bit. You had it a motion to strike. I think some expression such as that he may apply to the court to determine the adequacy of the reason, might be a little better in practice, because, of course, under your suggestion, Senator, he can make his motion, and the motion will not automatically come on, I suppose, in practically all courts. It would not

come on in New York. He would file his motion, and then he would wait. If you really want to put the burden on, why don't you just change that in a minor way in the wording and say he may apply to the court to determine the adequacy of the reason? That keeps the burden on him.

THE CHAIRMAN: You come back with a draft, and if we like yours better a month hence, we will adopt it.

SENATOR PEPPER: I am sure we will like it better. One can't just offhand strike the happy phraseology. The purpose is clear, and the burden, I should think, is fairly clearly lodged on the objector by the language that I used. "If he" (that is, the objector) "desires for any other reason" (that is, other than the reasons that have been theretofore specified in the rule) "to refuse to answer, he" (that is, the objector) "may within such period" (that is, the period within which he was required to answer) "move to strike the request." But my understanding is that if the motion carries, the Reporter will perfect it.

DEAN MORGAN: Is there any reason that he should refuse to answer except privilege or relevancy?

PROFESSOR MOORE: I think relevancy is now covered.

DEAN MORGAN: That is what I thought, so I wondered if there were need for covering any except privilege.

JUDGE DOBIE: He might get somebody else in trouble. It might be a breach of confidence, not absolutely one of

privilege. I should like to have the motion put, the exact wording of it to be left to the Reporter and to be resubmitted, if that is in order.

THE CHAIRMAN: That is the idea. All in favor of the motion say "aye." It is agreed to.

Have we anything more on 36?

JUDGE CLARK: At the top of page 93, Mr. Loftin had a suggestion as to 36(a). "At any time after the pleadings are closed...." He thought there was some ambiguity in that, and he thought it ought to be "after the answer has been filed". I should think that is all right. I am ready to endorse it. Maybe Mr. Loftin would like to speak about it.

SENATOR LOFTIN: I don't think it is necessary to speak about it. Some of the lawyers down my way thought it was ambiguous and that it would be more definite to say "after answer has been filed", although there might be some outstanding motions.

DEAN MORGAN: You don't mean "filed". You mean "served", don't you?

JUDGE CLARK: Yes. It should be "served". I think it is clear.

MR. LEMANN: What is the bearing of your second sentence on Rule 36 now, on page 93? "If the Reporter's proposed new Rule 12(a) were accepted, the necessary for this change would vanish and the present language would be appropriate."

JUDGE CLARK: It wasn't accepted, you know.

MR. LEMANN: The change that we have made wouldn't now affect it.

JUDGE CLARK: That is correct.

JUDGE DOBIE: I move that the word "filed" be changed to "served", and that it be adopted.

SENATOR LOFTIN: Second.

THE CHAIRMAN: Does that mix you up any with all these other third-party pleadings and all that sort of stuff that you haven't covered here?

JUDGE CLARK: Of course, in that event, "answer" would have to be construed broadly, I should think, to include those, but I should think it would be so included.

DEAN MORGAN: As between the different parties you mean, yes.

JUDGE CLARK: Yes.

THE CHAIRMAN: All in favor of the amendment say "aye." That seems to be agreed to. Is there anything else under 36?

JUDGE CLARK: Now, Comment III. That is one that Mr. Sunderland has called attention to. This was just a little blindness in the rule as to the word "therein" at the end of the first sentence. The Second Circuit, as a matter of fact, has handed down a decision construing it properly, but the question has been raised by various people.

THE CHAIRMAN: Refer to the section and the subsection

that you are talking about, so the reporter's transcript will show them.

JUDGE CLARK: Rule 36(a), the word "therein" at the end of the first sentence. The question has been whether "therein" referred to the request or to the matters of fact set forth in the "relevant documents described in and exhibited with the request". The reference is not to the documents.

JUDGE DOBIE: Making one change in it. I move that that be adopted.

JUDGE CLARK: The specific suggestion is to substitute for the word "therein" the words "in the request."

MR. TOLMAN: I move its adoption.

SENATOR LOFTIN: It is merely to clarify.

THE CHAIRMAN: Is there any objection to that? If not, it is agreed to. Does that finish 36?

JUDGE CLARK: That finishes 36.

THE CHAIRMAN: We go to Rule 37. You recommend a change there. What is it? What part of 37?

JUDGE CLARK: That is 37(d), The word "wilfully fails to appear before the officer ...., or fails to serve answers...." The question that has been raised there is whether it is "wilfully fails to serve answers". Perhaps there is a slight ambiguity. "Wilfully" is supposed to modify both, and we suggest, although, of course, it may not be too important, that the word "wilfully" be repeated before the second word "fails".

THE CHAIRMAN: That seems to me to be unnecessary; "wilfully fails". He might be hit by an automobile, and it is all right to say "wilfully", but when it comes to failure to serve the answers, it doesn't look to me as if there is any difficulty about that.

JUDGE CLARK: If you don't think it is important, let's pass it, then.

THE CHAIRMAN: That is my own individual idea. Maybe somebody else disagrees with me.

MR. LEMANN: The rule of self-denial comes in, I think. The rule of self-denial applies.

DEAN MORGAN: Otherwise known as the rule in "Lemann's case."

THE CHAIRMAN: You see, "the court upon motion .... may strike out". It follows as a matter of course that when you try to impose a penalty, when the court is asked to impose a penalty for failing to answer if a fellow is hit by an automobile or is sick in bed, he isn't going to impose it. I don't think there is any use fooling with the word "wilfully" there.

JUDGE DOBIE: You want to repeat the word "wilfully"? Is that the idea, Charlie?

JUDGE CLARK: That is the suggestion, yes.

PROFESSOR SUNDERLAND: Mr. Mitchell doesn't think it ought to be in there. Isn't that the point?

THE CHAIRMAN: If I were drawing the rule over again,

I might draw it so that the word "wilfully" applied to both.

PROFESSOR SUNDERLAND: It ought to apply to both.

THE CHAIRMAN: But you go to a court for a penalty before you get any penalty, and no court on earth is going to penalize a fellow for his failure, but he will say, "I will give you three days to put it in."

SENATOR PEPPER: What is the difference between failing to serve an answer and wilfully failing to serve?

DEAN MORGAN: You don't serve it; and on the way to serve it, you get hit by an automobile, so that you can't serve it.

JUDGE DOBIE: The word "wilfully" in criminal law generally means that you do something intending to do that thing. Wilfull homicide is when you kill a man intending to kill a man, not when you accidentally kill some other fellow. I don't know that it is vital, but it is slightly inartistic. "Wilfully" belongs to both. If it doesn't belong there, it ought to be out out altogether. It is quite a small thing.

THE CHAIRMAN: The amendment is to insert the word "wilfully" before the word "fails" in the fifth line of Rule 37(d), as I get it.

SENATOR PEPPER: Don't you think, really, this is a bit meticulous?

THE CHAIRMAN: That is my view of it.

SENATOR PEPPER: After all, you are leading up to the

right of somebody to make a motion to strike. If, as suggested by one of the members, it appeared that the reason for not filing was that the man or woman sent to file the paper had been hit by an automobile in transitu, I don't believe that the motion would prevail.

THE CHAIRMAN: That is what I said.

JUDGE DOBIE: Let's skip it.

THE CHAIRMAN: All right.

JUDGE CLARK: I have changed the vote several times on this. It is now "No."

THE CHAIRMAN: It is now "No," unless there is some objection or a motion to the contrary.

JUDGE CLARK: Mr. Sunderland had a suggestion which had to do with orders against non-parties under 34, and that didn't go through.

PROFESSOR SUNDERLAND: I don't think I have anything more on that.

JUDGE CLARK: So I think that covers everything there.

THE CHAIRMAN: That brings us to Rule 38. That shifts us to Volume II of your report, doesn't it?

JUDGE CLARK: Yes, it does. On Rule 38 we have quite a little discussion. I am not sure how much you want to go through it. I might say first that it seems to me, in view of the importance and the general difficulty of the question, the rule has worked out very well. There are still some questions.

On 95 and 96 you will see some matters discussed dealing with the question of law and equity. On 97 there is a discussion of the effect of the Tompkins case and some of the ideas under that. That comes up in connection with the effect of jury trial upon the Federal Courts. It is our general view, as we have suggested before, that we doubt that there is anything particularly that we can do in the Rules about it, but I would call to your attention, in line with some of our previous discussion, that the courts are having about as much struggle as to the effect of the Tompkins case on the matter of jury trial as anything else. I haven't any suggestion.

DEAN MORGAN: Mr. Reporter, is that on the question as to whether the facts are sufficient to get to the jury or whether there is right to trial by jury on the particular issue?

JUDGE CLARK: The latter question has definitely come up.

DEAN MORGAN: Has it, really?

JUDGE CLARK: Yes. The chief case where it seems to come up is in connection with the right of jury trial on the issue of fraud.

DEAN MORGAN: Oh, yes; I know that.

JUDGE CLARK: You see, that is a case where the law has shifted from place to place. What is binding? Is it state law? There is also some discussion on the other question you suggest, too--the sufficiency of the evidence.

DEAN MORGAN: Yes, that one, it seems to me, runs pretty closely into substantive law, but I can't quite see the line of reasoning by which you would call the right to trial by jury substantive instead of procedural.

JUDGE CLARK: There is a recent Supreme Court case that is referred to on page 99, the Stoner case.

THE CHAIRMAN: Let me understand what this is about. I don't understand. Do I get it that since Erie Railroad v. Tompkins was decided, the question has arisen whether we no longer look only to the 5th Amendment (is it), the jury trial provision in the Federal Constitution, about the right of jury trial in the Federal Courts, and the question has arisen whether the state law providing for trial by jury of any particular issue as a matter of substantive right, under Erie Railroad must be recognized in the Federal Courts?

DEAN MORGAN: That is the question.

THE CHAIRMAN: How can we do anything with that by rules?

JUDGE CLARK: I don't believe we can.

JUDGE DOBIE: I believe you had better leave it alone.

JUDGE CLARK: I am not suggesting you should do anything. I am calling your attention to those cases.

THE CHAIRMAN: Is there any recommendation for a change in the rule that you make under Rule 38?

JUDGE CLARK: Another matter that we discuss is the

question of the operation of the demand rule and the effect of amendment possibly changing the time. That appears in the comment on (b) of Rule 38, on page 99 and page 100. It has been brought to a head in the commentary in the Federal Rules Service that "it would seem a more reasonable construction of the Rule to hold that an amended pleading is not within its purview except insofar as it might change the nature of the action or bring in new issues as to which the adverse party has had no opportunity to demand a jury." There are two or three cases that support that view.

THE CHAIRMAN: Are there any on the contrary?

JUDGE CLARK: I don't think there are.

PROFESSOR MOORE: I don't think so.

THE CHAIRMAN: The decisions all agree that if there is an amendment, it doesn't renew the right to jury trial unless it changes the issues and creates a jury issue that didn't exist before; is that the gist of the decisions?

JUDGE CLARK: That is the gist of it.

THE CHAIRMAN: Then there is no need to do anything with that.

JUDGE CLARK: That is the suggestion at the end. "In view of the fact that the reported cases have handled the matter adequately, no change seems necessary."

JUDGE DOBIE: I move that we pass it. I think you are playing with fire there.

JUDGE CLARK: That brings us to Rule 39.

JUDGE DOBIE: I have a suggestion on that. I don't know whether it is worth anything. I wrote the Attorney General about it. I had a case, Safarelli Brothers v. Elgin, in connection with 39(b). It says, "the court in its discretion upon motion...." Exactly what was a motion? A letter was written to the clerk and some other stuff there, and it occurred to me just to raise this question. I am not going to dwell on it any time at all. Is it advisable to give the District Judge the power to order a jury trial upon his own initiative? Brother Moore and Brother Chlinger are at odds on that, and there is some difficulty in the books.

THE CHAIRMAN: As it stands now, we don't.

JUDGE DOBIE: As it stands now, it would seem that he has not. It says, "the court in its discretion upon motion", so if no motion is made, it would seem that he could not.

SENATOR LOFTIN: That was done very deliberately.

PROFESSOR CHERRY: We argued that out at New Haven and did that very deliberately.

JUDGE DOBIE: You don't think that the Judge ought to have it?

PROFESSOR CHERRY: No.

JUDGE DONWORTH: Some of our District Judges are very much concerned about this. They say they don't like to have the jury waived in a case that is particularly adapted to jury

determination, but the answer usually made--and it seems to satisfy them--is that if the Judge does not really want to sit without a jury, he can suggest that, and one party or the other will help him out by making a motion.

JUDGE DOBIE: I should like to ask Mr. Cherry why he thinks the District Judge shouldn't have that power, if he can state it in a few words. I am inclined to think he should have, not that the party can do it as a matter of right, but in a case that the judge thinks a jury trial is the proper way.

PROFESSOR CHERRY: I think it is best expressed in the reasons given for giving the judge the power at that meeting. The reason was that judges didn't want to try these cases, even though the parties wanted them to, and the Committee didn't feel that that was an adequate reason. However, the right has been a right of parties to jury trial, as stated in the Constitution, and to have a judge insist on that mode of trial when they don't want it, didn't seem to us proper.

JUDGE DOBIE: In this case the man did want it, but he wasn't very familiar with the Rules and he wrote a letter to the clerk and did some other things that I won't bore you with. I said that that complied with the spirit of the Rules.

PROFESSOR CHERRY: If he wants to make that in any informal way, I shouldn't think there would be any doubt about the judge's power to give it to him.

JUDGE DOBIE: That was the only thing I was interested

in. I didn't know.

PROFESSOR CHERRY: This was where neither party wanted it.

JUDGE DOBIE: Yes. So you don't think he should have it. Of course, he could have an advisory jury.

PROFESSOR CHERRY: Yes, surely.

JUDGE DOBIE: I make no point of it. If you all have gone into that matter, skip it.

DEAN MORGAN: It is clearly intended, I should think, by the difference in phraseology between (b) and (c).

PROFESSOR CHERRY: Oh, yes.

JUDGE CLARK: I think it was intended, and I think I would agree with Judge Dobie that that was argued out, and I also thought that the judge should have the power.

JUDGE DOBIE: I think that as the rule is drawn now, Moore is right and Ohlinger is wrong. He may upon motion. The other says he may upon motion or of his own initiative. Certainly that seems to indicate a difference between the two. I agree with Moore's book that the judge has not the power now unless there is a motion, and motion ought to be broadly construed. I did in the Safarelli case, and my colleagues agreed with me. No certiorari was sought. If you have gone into that, I don't see any sense in going into it again. I must confess I agree with the Reporter; I think the judge should have that power. I think he should be careful about exercising it, but

I think he should have the power.

DEAN MORGAN: Under those circumstances, I think the question should be reconsidered, if the judges feel that way.

SENATOR PEPPER: Something is to be said against making it possible for judges to duck the responsibility of trying a case without a jury when both parties want it. We have a variety of District Judges in our jurisdiction, some of them very diligent and some of them not, and there is a perfectly definite tendency to object to the effort and labor involved in trying the case without a jury. It is so easy for the court to order a jury trial if he is given that right on his own initiative, against the will of both parties, and to do it for no better reason than that it is the easier way out. Somehow or other, I don't feel as if that is a sensible feature to incorporate. If all the judges were equally diligent and on the job and would only exercise this power where there really was some good reason for it, that would be one thing, but it seems to me to be rather opening the door to a lazy judge to get out of the responsibility of doing what both parties want him to do.

THE CHAIRMAN: My experience at the bar has been just that. The judge forces a jury trial on the parties in nine cases out of ten that I have had to do with in all kinds of courts. It is because the judge wants to loaf on the job or doesn't want to face the issue, and he can have a jury trial

and dump it on them, and when the verdict is in, he is all through. I can recall back in my memory many cases where I know Judges have done that. That is what we had in mind when we made this rule as it is.

JUDGE DOBIE: I am willing to have it stand as it is. I am glad to hear from you gentlemen. I think there is a good deal in what you say. I think if you didn't have lazy judges, which we all have, if we had good District Judges, it would be a good provision, because there is no question about it, a great many of them don't like to sit without a jury. It is harder on the judge, because he can wish a lot of things on the jury. In our part of the country, the waiver of juries is becoming much more common, and it certainly speeds up matters, unquestionably. In a great many criminal cases I have found they are very glad to waive the jury. I make no point of it. It has been brought up.

THE CHAIRMAN: Have you any amendments, Mr. Reporter, to Rule 39?

JUDGE CLARK: Yes. There is considerable discussion, but I will come right to the one specific suggestion, which appears on 106.

THE CHAIRMAN: What part of the rule is it in?

JUDGE CLARK: This is to add a new subdivision to Rule 39, "Sequence of Trial." "The court in its discretion may provisionally determine the order and sequence of the trial

of the various issues in the action, and until actual trial may modify such order as judicial convenience may suggest."

There is a tendency in some courts--and they are referred to on page 105 particularly--to make a hard and fast rule, and that hard and fast rule usually is that the equitable issues should be tried first. It would seem unwise to have a rule of thumb here. It is a matter that should be decided depending on what issue will first settle the matter. In addition, there is a complication brought in by the recent Ettelson case in the Supreme Court, which has held that an order concerning jury trial in that case was a binding order on that point.

DEAN MORGAN: That was on sequence?

JUDGE CLARK: Yes. It is appealable.

JUDGE DOBIE: Equivalent to an injunction.

JUDGE CLARK: Yes, they work it out as an interlocutory injunction and as appealable. I think the reasoning was rather unfortunate, because it goes back to the old division of law and equity and visualizes a situation where the chancellor enjoins an action at law, which is a situation entirely unlike the one civil action here. But forgetting the reasoning, the practical result, I should say, was quite unfortunate, because these matters are decided more or less provisionally, or at least they should be. That is the suggestion here. Every time a judge makes an order as to the form of trial, it would seem

unfortunate if they could run to the appellate court over it.

DEAN MORGAN: They could do it only in case he decided to try the equity case first, couldn't they? That would be just an injunction against trial by jury. If he said trial by jury first, would it be appealable?

JUDGE CLARK: I should think so.

DEAN MORGAN: Oh, no.

JUDGE CLARK: Of course, you can't be so sure. I don't mean to give a final decision on that, but why isn't that the denial of an interlocutory injunction on the reasoning? You see, the other is the grant of an interlocutory injunction, and why isn't that a denial of one?

JUDGE DONWORTH: There is no appeal from the denial of an interlocutory injunction.

DEAN MORGAN: It is only for lifting an interlocutory, isn't it?

PROFESSOR MOORE: Order granting a denial to interlocutory.

JUDGE DOBIE: I think Mr. Moore is right: either granting or denying or, I think, even refusing to continue or modify. I think that statute on interlocutory injunction appeals is very, very broad.

THE CHAIRMAN: I don't quite get the direction of the discussion. The particular amendment is on page 106, "Sequence of Trial. The court in its discretion may provisionally determine

the order and sequence of the trial of the various issues in the action, and until actual trial may modify such order as judicial convenience may suggest." The Reporter has pointed out that some District Courts have made a general order or rule that they will always try equity issues first. Just how would this amendment change that verdict? He will have to make an order in each particular case. The judge has made up his mind in a court that they are going to try all equity cases first, and he just is put to the bother of making an order in each case instead of a general order, but he does exactly the same thing. How do you solve the difficulty by your amendment?

JUDGE CLARK: I think the chief solving part of the amendment is the end: "until actual trial may modify such order as judicial convenience may suggest."

THE CHAIRMAN: He has that power now, hasn't he?

JUDGE CLARK: I don't know. I shouldn't think he had if the case had gone out of his hands and up to the appellate court, that is, if you want to make it two-purpose, so to speak.

THE CHAIRMAN: He can appeal, can't he?

JUDGE CLARK: Yes; frankly, quite so. I mean that is one end of it.

THE CHAIRMAN: On the ground he hasn't made a final decision, he may change his mind, and therefore he ought not to appeal.

JUDGE CLARK: That is one important thing I am trying

to do and hope I have.

SENATOR PEPPER: Mr. Reporter, may I inquire, as a practical matter, ought there not to be some limitation upon the right to change a predetermined order other than the words "until actual trial"? I can think of cases which are quite complicated and involve the calling of a lot of witnesses from a distance, and the court fixes the order of trial and either the plaintiff or the defendant, in reliance upon that, has arranged to have his witnesses come at specified times. Issue number one is going to be tried first, and the witnesses need not come from New York or Baltimore or Chicago or wherever they are coming from to Philadelphia.

JUDGE DOBIE: Senator, may I interrupt you. I did that in one or two cases in connection with doctors. They had some big doctors in a very big automobile case, and they could be there on a certain day. They were very valuable, very fine men, so I just said, "We will take up the question of extending the inquiries in medical testimony to such and such a day." It was very helpful.

SENATOR PEPPER: Then, just before the trial begins, if the court says, "I have thought this thing over, and I think we can expedite it more by reversing the order of the trial of the issues," the plaintiff or the defendant, as the case may be, finds himself called upon to go forward with a phase of the case which he had expected would not come for another week. I think

there ought to be some reasonable time before the actual beginning of the trial when a provisional order of sequence or proof of issues can be modified by the court.

THE CHAIRMAN: Why couldn't you say, "until actual trial may modify such order as judicial convenience or the convenience of the parties may suggest"?

JUDGE CLARK: That would be quite all right, I think. I should think it would be within the intent of it.

THE CHAIRMAN: Of course, the tender point is that it seems to involve an assumption that the court would be guilty of an abuse of discretion. It is pretty strong tactics for the judge to make an order, saying "I will try certain issues first," and then after the parties have gotten there with the issues, saying "I have changed my mind." I can't visualize a District Judge, poor as he may be, doing a thing like that.

JUDGE CLARK: The Senator makes one suggestion that implies something I find the lawyers often feel and, I am afraid, often with justification, and that is that judges are very arbitrary, and I suppose they can be, easily. I am afraid it looks to me, as I read the cases that come to us, that you can't stop that by rule. I think the Southern District Judges are very often very arbitrary. I should think that really this might be helpful. I don't know that I got Judge Doble's case in full, but suppose that developed after the judge had made a preliminary order and hadn't talked much about it, and

along came the time for trial and it appeared that certain men couldn't be there then and that they could be there some other time. He ought to vary it, and can't.

Without this rule, you want to consider also the other difficulty I spoke of. A party who wants to obstruct may have taken the case to the Circuit Court of Appeals on the theory that it is a denial of a preliminary motion.

SENATOR PEPPER: I withdraw my suggestion. I think the Reporter is right.

JUDGE DOBIE: I move its adoption.

JUDGE CLARK: I am perfectly willing to accept Mr. Mitchell's addition.

THE CHAIRMAN: I should like to see the power of the court to switch the position explicitly affected not only by judicial convenience but by the convenience of the parties. On page 106, it now reads, "as judicial convenience may suggest", and my thought is to insert something like this: "as judicial convenience or the convenience of the parties may suggest."

DEAN MORGAN: Why not "convenience of the court or parties"?

THE CHAIRMAN: Yes; any way the Reporter wants to word it.

JUDGE DOBIE: I accept that. Certainly we are not limiting it to the personal convenience of the judge.

THE CHAIRMAN: What is your question?

MR. DODGE: I wanted to ask this question: Hasn't the Supreme Court previously decided that the equity issues should be tried first, and if so, did this last decision of Justice Roberts overrule that?

JUDGE CLARK: I don't think they have decided that question. Of course, the last decision of Justice Roberts in the Ettelson case went back to the Enelow case, which was before the Rules, and held in effect that there had been no change in that situation.

MR. DODGE: There was an opinion written by Chief Justice Taft years ago in which, I have a vague recollection, it was decided that the equity issues should be tried first. I was wondering whether they changed that.

JUDGE CLARK: Aren't you perhaps thinking of the great case that he passed on, the case of Liberty National Bank v. Condon Bank? I didn't think that case decided this issue. That case decided that an equitable issue was taken out of the case, so to speak, and was not to be tried by the jury.

MR. DODGE: That is right.

JUDGE CLARK: In that case they may have tried it first. I feel rather confident that this matter of the order wasn't an issue as such in the case. It was the form of trial. The lower court, as I recall, had held that because this defense was brought into an action which had formerly been at law, it

must be tried as a law action to the jury. The reversal was to have it tried by the court.

DEAN MORGAN: The C.C.A. held that they were bound by the decision of the jury in the particular case, and they refused to review the facts. Chief Taft's opinion sent it back to C.C.A. and told them to review the facts, because it was an equity appeal rather than a writ of error. That is the decision in the case.

JUDGE CLARK: That is the point.

MR. LEMANN: Of course, in the Ettelson case, Mr. Justice Roberts apparently recognized the propriety of an order directing the equitable issue to be tried first and sustained appeal from that order in order to determine, I assume, whether the plea was a proper one, whether there was an equitable issue involved. But I am wondering, beyond that, whether this would accomplish the purpose the Reporter has in mind, if I am sure of what he has in mind. He says on page 105 of his notes: "On the other hand, a few courts--some of them relying on authority under the former divided procedure--have held that in such a case the equitable issue should be tried first." He cites three cases, and then he says: "We do not believe the latter practice is sound, and in order to insure that the court will have complete freedom of choice, dictated only by trial convenience, we further believe that some provision relating to the sequence of trial--such as adopted by the May, 1936, Draft--

should be incorporated in Rule 39."

If we adopt this amendment, the courts would have clearly the power to try the equitable issue first, and will you bring about any change in these decisions if you say they are unsound? I am not sure just why you say they are unsound--whether the cases proceed on the theory that they have to try the equitable issues first and you want to make it plain to them that they don't have to, or whether you think they ought never to try the equity issues first and they ought to be prohibited from doing so? If it is the latter, of course, your amendment wouldn't accomplish that result

JUDGE CLARK: I might answer this way: First, I quite agree that you can't always be sure what would be the effect of the rule. I can conceive that those courts may say that notwithstanding this rule, there is some fundamental policy that overrides it. I don't think there is, but of course that is quite possible. In other words, how can you ever be sure in any case that a rule is completely effective? It would seem to me that this rule would go as far as we can in the direction of making this a matter of convenience. It may be said by a court that you can go only up to this point, and, after all, if some law prevails, they would have to say that. But I should think it would be helpful, and I don't see how it can do any harm, because if the rule doesn't govern, it doesn't govern, but the trend is in the right direction. Wherever it does

govern affirmatively, I should think it would be helpful.

MR. LEMANN: What is the basis for these decisions that you don't like? Did they go on the ground that they were compelled to try equitable issues first, or did they go on the ground that they thought that was the orderly and logical thing to do and the convenient thing to do? What ground did they assign for their ruling that they would try the equitable issues first?

JUDGE CLARK: There is not a complete expression of the ground. Generally the ground indicated is that there is a nature of "must" about equity, going back to the chancery's interfering with an action at law. Whenever it is on the ground of good policy, convenience, and so on, of course we don't want to interfere with that. What we are trying to do is to strengthen that end. Fundamentally, and in advance of looking at the particular trial and the witnesses, as Judge Dobie said, that settles the matter. But the matter should be settled, looking at the best way of getting this case tried.

MR. DODGE: Wasn't that the ground on which those courts proceeded?

MR. LEMANN: That is what I should like to know. Could we look at the cases in 27 F.Supp. and 28 F.Supp?

DEAN MORGAN: If I may say so, Mr. Chairman, I think this discussion is beside the point for this rule. What Judge Clark wants to do is to have the order of trial not made sub-

ject to appeal so as to tie up the proceeding.

THE CHAIRMAN: That is a thing that I admit I am dumb about, and I don't quite understand it all. Laying aside for a moment the question of defeating the right of appeal, I can't see any advantage in this amendment at all. If Judges have a standing rule or a general rule that they are going to try equity causes--issues--first, and we put them on the burden of making a special order in each particular case, they are going to do by special order exactly what they have done now by their general order.

As far as the counsel are concerned, they don't know which issue is going to be tried first or last until they get a special order, whereas if you have a standing order, as he says some of them have, to try certain issues first, they know all the time what they are going to be up against.

I can't see anything in this rule except, as he said, something about defeating the right of appeal. See if I understand that. I don't think I do. I have it in my head that where there is a suit to cancel a policy and another suit to recover on it, the upper court has held that if you take up the equity suit to cancel first, you are in effect staying, as by an order.

DEAN MORGAN: An injunction against a jury trial.

THE CHAIRMAN: Yes, like a temporary injunction against the other case. The effect of this amendment would be that you

can't take your appeal until he finally makes a special order for the equity case first, but the moment he does it, if it is two days before the trial, hasn't he then granted a temporary injunction against the lower case and can't you take an appeal then the moment he files this special order under this amendment? What is the difference?

The point the Reporter is driving at is that he doesn't want the issue settled as to which is to be first because he wants to defent the appeal, but it is settled by this rule at some time by special order.

DEAN MORGAN: Before trial.

THE CHAIRMAN: It may be a day before the trial, and if I were wanting to appeal, I would wait until he made this special order; even if it were fifteen minutes before the trial, I would slap an appeal on right then. Why wouldn't I be within that rule? I am muddy about it, but that is what is running in my head, and I don't quite get the idea at all.

MR. LEMANN: In two of the cases decided here, apparently the court ordered the equitable issues tried first because he thought that would dispose of the case. It was a very good ground, which they could still take under this amendment.

SENATOR PEPPER: That certainly would be the case in the illustration put. If you cancelled the policy, there would be nothing left for a jury trial.

THE CHAIRMAN: Isn't it now, without this amendment,

up to the trial court to decide? Hasn't he got power to decide which he will try first?

MR. LEMANN: Yes.

JUDGE DONWORTH: Subject to appeal.

MR. LEMANN: The only thing the Reporter doesn't like, I gather, is some language in these cases in which they referred to the old practice before the combination of law and equity. He doesn't like talk like that, and he wants to emphasize the fact that they ought not to talk along those lines. Isn't that about right?

JUDGE CLARK: I think it is a little more than that. All this is a process of education. A few years ago we were told, even by the Supreme Court, that you had to have separate courts of law and equity. That was a statement of the Supreme Court. There was a question of whether there might not be constitutional objection to making a union of law and equity. The union of law and equity has caused a lot of difficulties when you start thinking back to the old court of chancery in England, which there is a tendency to do. It seems to me that the Rules have an educative process as well as one which is authorizing. Sometimes they have a limiting process, too. Most of our rules are authorizing rather than limiting. In the process of authorizing, you may also help to make a smooth-running procedure. You can't of course, force a judge--and I am all for giving the judge general discretion--to vary the order

of trial, but you can tell him that when the reason for doing it is that the chancellor could enjoin an action at law, he hasn't caught the spirit of the Rules. It seems to me that is a very proper thing to do. It is true, also, that when the order of trial is settled, there is an appealable matter. I think that this will properly discourage appeals in that event, and it seems to me that that is a sound process to take.

THE CHAIRMAN: That is a sort of trick to avoid a decision of the Supreme Court, and it strikes me that it is a trick that won't work.

MR. DODGE: May I ask this question?

THE CHAIRMAN: It may make more trouble, because you would slam your appeal on him when all the witnesses are in court.

MR. DODGE: It seems obvious that this change doesn't affect the right of appeal at all.

DEAN MORGAN: It doesn't.

MR. DODGE: But in the Liberty Oil case, according to our notes to Rule 39, it was there decided that the court may determine the sequence in which the issues shall be tried. Has that power of the court, which you are providing for in this amendment, been taken away by any later decision of the Supreme Court?

JUDGE CLARK: It seems to me it is in substance taken away by the Ettelson case.

MR. DODGE: How so?

JUDGE CLARK: Of course, you have to consider what has happened in actual fact. The Ettelson case is that an order made as to trial by jury is immediately appealable.

MR. DODGE: That is a different question.

JUDGE CLARK: Of course, in one sense it is a different question, yes.

MR. DODGE: It seems to me the amendment is entirely covered by existing law.

MR. LEMANN: If the trial judge today says, "I am going to try the law issues first by jury," there couldn't be any appeal taken from the order.

DEAN MORGAN: Yes, a denial of an injunction.

MR. LEMANN: Maybe there could, but at any rate, we couldn't change that. He has a clear right to regulate it now. In looking over Professor Moore's notes to these cases on Rule 39, he says two of them were decided on the ground that the trial of equitable pleading would dispose of the case, and he says as to the third, "Since decision on the equitable issue prior to trial on the legal issues would promote trial convenience, the decision was proper." I don't see why you have any kick about any of these three cases, Mr. Moore.

THE CHAIRMAN: Haven't we some other rule about the order of the trial of issues anywhere?

JUDGE DONWORTH: Rule 42 provides for separate trials,

but there is nothing about the order; 42(b).

THE CHAIRMAN: That necessarily involved the order.

JUDGE DONWORTH: Yes.

THE CHAIRMAN: So as the law stands today and as the rule stands today, the judge has the right to try one issue or one claim.

JUDGE DOBIE: If we amend this rule, Charlie, and it is adopted, do you think that would in any way affect the right of appeal when under this rule the judge says, "I will try the equitable issue first"? Would the Supreme Court, if it sticks to the Ettelson case, still hold that that is equivalent to an interlocutory injunction?

JUDGE CLARK: Of course it doesn't take away the right of appeal. We can't do that. I think as a practical matter, it will. I think these are practical matters. They are not all just in writing.

MR. LEMANN: Suppose we adopt the amendment, Charlie, and leave it to the convenience of the court. If a case came up the next day and the judge said, "Let me look at the rule and the amendment," he would look at the amendment and say, "I can determine the order of this trial as convenience may suggest. I see an equitable plea here that will dispose of the case. I am going to try it first." He would be just following the mandate of the amendment, and I don't think you would even accomplish the purpose of discouraging it. I don't think you

ought to discourage it, if the equitable plea would dispose of the case. You can't then change the right to appeal. I don't think you even accomplish what you would like to accomplish. I don't think you are making any change.

THE CHAIRMAN: I think if the appeal business is wrong, you ought to amend the statute about appeals and say that an order determining the order of trial of equitable and legal actions shall be treated as a temporary injunction, not to be appealable.

JUDGE DOBIE: I move that we leave the rule as it is.

MR. DODGE: I second the motion.

THE CHAIRMAN: I suppose fundamentally the trouble with the situation is that where you have such a case as a suit to cancel a policy and another suit to recover on it, one would be a jury case and the other wouldn't, and the moment you stick the equity case up first, you tie the policyholder or beneficiary to a jury trial. That is what stuck in the crops of the Court. I am not at all sympathetic with any rule that allows you to juggle a fellow out of a jury trial with any proceeding of that kind.

DEAN MORGAN: Of course, it is all a question of history, too, isn't it. If you pleaded fraud to an undeveloped instrument, tothe trial court that was a legal issue; if you pleaded fraud to a developed instrument, it was an equitable issue. That is a common law matter of history.

THE CHAIRMAN: I call the attention of the Committee to the fact that we have got to put up to the Supreme Court a note explaining why we make these amendments, and if we are honest in this case, we would say, "We don't agree with the Ettelson case, and we have a juggling around here to prevent an appeal at the last minute, with the idea of defeating the man's right of appeal so that he can't apply this Ettelson case on him." If we are honest, that is what we will say about it.

DEAN MORGAN: Oh, yes.

JUDGE CLARK: I didn't suppose we did agree with the Ettelson case.

THE CHAIRMAN: I am not prepared to put a note up saying I am trying to juggle the parties out of rights that the Supreme Court has said they have under the Ettelson case. I think the Supreme Court would bat us right out of the window and say, "We won't tolerate it." You couldn't explain this amendment honestly without frankly telling the Court that you were trying to trick the fellow so he couldn't avail himself of what the Court has held in the Ettelson case. I don't think that would work.

JUDGE DOBIE: Question.

THE CHAIRMAN: The question is on the amendment on page 106 of the Reporter's comments, to add subdivision (d) regarding "Sequence of Trial." All those in favor of the amendment say "aye"; opposed, "no." It is not agreed to.

We are on Rule 40.

JUDGE CLARK: I think there is nothing there. That was a very minor rule.

THE CHAIRMAN: Rule 41.

JUDGE CLARK: Rule 41 is the dismissal rule, and there is a question. The first point we bring up is as to voluntary dismissal, on 41(a). "A number of cases have held that the court in its discretion may sustain a plaintiff's motion for leave to dismiss a removed cause, where the purpose of dismissal is to defeat removal and get the action back into a state court. It has been said that the defendant has no absolute right to litigate in Federal Court." There have been various decisions. "In some cases, the plaintiff has been compelled to pay costs as a condition of dismissal," and so on. "Since the rule leaves the matter to the discretion of the court, diverse results may be reconciled on the basis that 'the Court .... should weigh the equities and should make that decision which to the Court seems fairest under all of the circumstances,'" as Judge Doble says.

THE CHAIRMAN: You mean in a case where the plaintiff, after removal, asks for leave to dismiss--

JUDGE CLARK (Interposing): That is it.

THE CHAIRMAN: --for the purpose of bringing a second suit below the jurisdiction of a state court. Is that it?

JUDGE CLARK: That is probably what he is up to.

DEAN MORGAN: Or joining a resident defendant.

THE CHAIRMAN: All right; go ahead.

JUDGE CLARK: All we say is that the courts are handling it as a matter of discretion. They are allowing the plaintiff to do it at times, sometimes on conditions, and so on. We are not objecting to it. We are bringing it to your attention.

THE CHAIRMAN: And have no amendments to recommend on that?

JUDGE CLARK: That is correct.

THE CHAIRMAN: Does anybody in the Committee want to make any?

JUDGE DOBIE: I think it ought to be left that way. I am not in accord with that particular case, but there were a great many things on one side and the other. I thought the best way was to weigh the equities in that case, and it seemed to me they required the decision. I made it and wrote that little opinion.

THE CHAIRMAN: Let's proceed, then, to the next proposal on Rule 41. To what section does that relate?

JUDGE CLARK: Subdivision (b), on page 109, "Involuntary Dismissal; Effect Thereof." "The following question was raised several times at various Institutes on the Federal Rules: if an appellate court reverses a trial court's order of dismissal, made upon defendant's motion under Rule 41(b), will the

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appellate court order judgment for the plaintiff, or should it remand for further proceedings (in a non-jury case, or for a new trial in a jury case) so that the defendant may have an opportunity to present his evidence?" I might say that the matter is often discussed in the jury cases, and we have something more on 50(a) on that. "At the Institutes, the answer was that the latter course was the proper one," and there are various remarks, including one of Judge Donworth. "As Judge Donworth put it, the defendant should not be deprived of his right because of the trial court's error; if the trial court had denied the motion, the express language of the rule would have allowed the defendant to introduce his evidence, and the situation should be no different where the appellate court holds the motion should have been denied."

The decisions have been quite limited. In a Federal Deposit Insurance Corporation case in the Third Circuit, "the appellate court ruled that the district court's order of dismissal was erroneous, but remanded the case for further proceedings so that the defendant might present his evidence." Yet in the Seventh Circuit, in the case at the top of 110, "the appellate court, upon reversal and without discussion of the point, ordered judgment for the plaintiff."

THE CHAIRMAN: Can we change what the upper courts do by a District Court rule in this case?

JUDGE CLARK: Well, this is the comment we make. As

a matter of fact, as Mr. Pike points out in his commentary, there was a petition for certiorari, and defendant reiterated his contention that he should be given opportunity to present evidence, and the petition was denied there. We say, "In light of the limited occurrence of the problem to date, we do not believe any action should be taken by the Committee now. Moreover, the character of the McKey decision, centering as it does almost entirely on bankruptcy questions and without any discussion of the point here raised, is such that it is probable other courts will be inclined to follow the Mason case as more persuasive." So we have no recommendation.

MR. LEMANN: You also point out that it was contended in the McKey case that in the briefs that the defendant actually submitted, the defense was insufficient as a matter of law. Perhaps that is what is responsible for the decision of the Supreme Court. It is at the middle of your page 110.

JUDGE CLARK: Yes.

JUDGE DOBIE: I move to leave it as it is.

JUDGE CLARK: The next matter comes under (c). "The provisions of this rule apply to the dismissal of any counter-claim, cross-claim, or third-party claim. A voluntary dismissal .... shall be made" so and so. By applying the provisions of the rule, you bring in the provisions that say when the dismissal is with prejudice and when it is not. The Seventh Circuit (we omitted the citation here, but it is Jefferson

Electric Company v. Sola Electric Company, 122 F.(2d) 124) felt that that compelled the holding that dismissal was a final order and that it was therefore appealable. Hence, "If this is true, it follows that delay in prosecuting an appeal from the order of dismissal until final decision of the original cause of action would bar appellant from its appeal. Hence, if appellant was to have an appeal from the denial of the cause of action set up in its counterclaim, it had to take its appeal as it did, within the three months after entry of the order of dismissal appealed from. We think this is an unfortunate result of the rule for the reason that it requires separate appeals from very closely related cases which would much better be combined for hearing on one appeal. However, under the rule quoted, we see no way of avoiding the duplication of appellate hearings."

Mr. Moore has stated in his book--and it seems to me that he is correct--that he thinks the decision is not a correct application of the Rules, that this rule deals only with dismissals as such and does not define the entry of judgment. The entry of judgment should be considered under 54(b), which is the rule for judgment at various stages. The court seems not to have considered the effect of 54(b).

I might say that I suppose this is the kind of question which may recur, and it happens that at the very moment we have the case in the bosom of the court; we are struggling with the

very case where a part of the action has been dismissed, and it is a question in our case, where the counterclaim was left standing and the original action was dismissed, whether that should be treated as final. We are going to recommend certain ideas with respect to Rule 54(b) in the hope of making that rule clearer. The question of final order is always difficult.

THE CHAIRMAN: Then you have no recommendation to make on (c), then, have you?

DEAN MORGAN: That carries us to 54, doesn't it?

JUDGE CLARK: Yes. I don't know that it is necessary to cross-reference to 54(b). We didn't suggest that. You don't think it is necessary?

PROFESSOR MOORE: I don't think so.

JUDGE CLARK: That is, we think it ought to be clear that the Seventh Circuit decision ought not to be followed. Certainly, if the Seventh Circuit decision is followed, it would take away all effect of 54(b) in this one instance, but I don't believe it needs to be negatived.

THE CHAIRMAN: Let's let it lie, then, until we reach 54(b).

MR. LEMANN: Unless you change 54(b), from quick reading, I think this Seventh Circuit case is probably rightly decided. It certainly isn't at all plain to me that you would not have had the appeal as the Rules now stand.

THE CHAIRMAN: Can't we let it rest until we reach

that rule?

MR. LEMANN: Yes.

THE CHAIRMAN: Is there anything else under this dismissal rule?

JUDGE CLARK: Not under dismissal.

THE CHAIRMAN: I should like to mention one thing that I have buzzing around in my head. Along in 1939 or 1940 we met and recommended two amendments to the Supreme Court. One was to add the Longshoremen's cases, which they did, because in the amended Rules they added a new set of cases to be governed by them. Then I have a vague impression that we recommended another amendment at that time that the Court threw out, something to do with dismissals where there was a receivership and it left the estate high and dry--involuntary dismissal. What was that?

JUDGE CLARK: That was under Receivers.

THE CHAIRMAN: It is not under this section?

JUDGE CLARK: It is discussed under 66.

THE CHAIRMAN: I will drop it. Let's not take it up out of order.

JUDGE DONWORTH: I made the suggestion to which the Chairman refers. My recollection is that the Committee voted me down, and it did not go to the Court.

THE CHAIRMAN: There was an amendment to one of the existing rules that went to the Court. I have an impression

relating to the dismissal rule, where there was involuntary dismissal in a receivership case.

JUDGE CLARK: I think the discussion grew out of that.

THE CHAIRMAN: Do you have our little report that we made to the Court at that time? Let's see what it was.

JUDGE CLARK: The recommendation is stated on page 179 here, and the actual recommendation that we made to the Court was--

THE CHAIRMAN: What rule did it relate to?

JUDGE CLARK: 66.

THE CHAIRMAN: Let's not take time on it, then. Let's take it up in order. I thought it relates to dismissals.

JUDGE CLARK: The suggestion was made generally. It grew out of a dismissal idea, but the suggestion was made general.

THE CHAIRMAN: We will drop it now, because it is not an amendment to this rule, as I understand it. I didn't intend to bring it up out of order.

We now come to Rule 42, do we?

JUDGE CLARK: Yes. On 42(b), "Separate Trials," it is the same sort of thing we have had before. There are two kinds of problems that come up there. I might say that the things I am discussiong now perhaps may be considered more textual than otherwise; they have some connection with Rule 54(b), and so on. The first is that we have several rules for separate

trials.

THE CHAIRMAN: What particular provision of 42 are you referring to?

JUDGE CLARK: 42(b), the general polish-off provision that the court "may order a separate trial of any claim, cross-claim, counterclaim, or thirty-party claim," and so on.

THE CHAIRMAN: All right.

JUDGE CLARK: First, we have three other rules which more or less deal with this subject: 20(b) and 21 (those are the joinder sections, where we give a wide joinder of parties provision and then say that the court may order separate trials) and the counterclaim rule, which is 13(i). First, perhaps, is the question of arrangement or statement. The wording is slightly different in each one. Our comment is this: "The substance, however, seems to be fairly consistent, and to date the varying phraseology employed, apparently has not given the courts any trouble." Our first question is, should we attempt a uniform statement or perhaps merge the statements into one rule, or should we let the matter stay as it is? As I said, as far as the decisions are concerned, I don't think it has given any trouble. The court grabs hold of any one of these rules it wants to and cites it at the time. The only thing I have seen about it is that it does worry counsel. Counsel get all upset, and they claim first one and then the other. When the opposing counsel answers, they say, "Why, here, you haven't

got joinder of parties. We want to go on to something else." I think there was a formal inconsistency in what we did before; that is, we referred to essentially the same matter in several different places.

THE CHAIRMAN: I don't think I understand just what the proposition is.

MR. DODGE: Take Rule 21. What is the difference in the language there to which you refer? You say Rule 21 states the same matter in different language.

DEAN MORGAN: "Any claim against a party may be severed and proceeded with separately."

JUDGE CLARK: There is a difference there. I don't know how serious it is. It provides for severances, which is technically a different thing from a separate trial.

DEAN MORGAN: Yes.

JUDGE CLARK: In a severance you split the action up.

THE CHAIRMAN: Then you have your separate trial. I see. If this hasn't given any trouble, I don't think we should change it. Certainly, as far as consolidating two or three rules, which upsets our numbering and all the references made in any decisions up to date, I am against it unless there is some good reason for it.

JUDGE CLARK: I don't know that there is any. Let me complete this along the line of Mr. Dodge's question. Look up above at section 20(b), "Separate Trials." Separate trials

"prevent delay or prejudice." Under 42(b), the one we are discussing now, there is no such qualification. I happen to remember that counsel made a big argument on that. It was mostly words, I guess, but they thought there was some significant difference between the two. Under 42 you could do it in any old case, and under 20(b) you could do it only to avoid delay or prejudice.

JUDGE DONWORTH: Mr. Chairman, when we were discussing one of the earlier rules--I think it was 13(i)--I brought up a point, and the Chair indicated he thought I was premature and that it really arose under Rule 42. The point is this: A suggestion was made in considering one of those earlier rules, that where there are separate trials and the court finds the same issue is involved in two or three different matters--like the original complaint and the counterclaim--the court, in disposing of the first issue, should say it was without prejudice to the matter, the same point, involved in another pleading.

Take the Ettelson case, which has been discussed here, where an insurance company filed a suit to cancel an insurance policy. The defendant filed a pleading which, under our Rules, they called a counterclaim, in which he sued for the recovery of the insurance, and the court ruled that the equitable matter should be tried first. As Senator Pepper pointed out a little while ago, if the plaintiff prevailed in that matter, there would be nothing left for the jury trial under the defendant's

counterclaim.

If we did adopt the suggestion that was there discussed, that where the same point is in danger of becoming adjudicated by reason of being in one pleading tried separately, as distinguished from another pleading and claim tried later, if we did say that the first ruling should be without prejudice and should not create res judicata, we did wrong. That is what I endeavored to say at that time, that if we put in a general rule preventing res judicata, the pleading of two different claims, we did wrong if, as a matter of essence, the adjudication on the first claim disposed of the second.

THE CHAIRMAN: Because it deals with substantive law, you mean?

JUDGE DONWORTH: No, not substantive law at all. Take the illustration that arose in the Ettelson case. If the issue for cancellation is tried first, it may dispose of the whole matter, and I think it would be absurd for us to put in any of our rules an idea to the effect that the hearing of that suit for cancellation shall be without prejudice to the defendant's counterclaim. That would be absurd, and yet that was the suggestion I understood was being made and which I wished to oppose at that time.

THE CHAIRMAN: When was that made? At this meeting?

JUDGE DONWORTH: Yes, the first day.

THE CHAIRMAN: I talked about that. I didn't suggest

that we put in the provision that it should be without prejudice. My suggestion was that under the judge rule, we authorize the court to separate the case into different issues and try one claim, for instance, before the others; that instead of entering separate judgment immediately, as the Rules now prescribe, he shall omit res judicata on the others; that if there was a common issue, he shall withhold the entry of a separate judgment until he has heard the other trial, too. That is a different meaning. That doesn't say it shall not operate as res judicata. It says that there shall not be any judgment entered immediately, forthwith, until he has tried the other issues.

JUDGE DONWORTH: Do you intend that? My idea is that in this suit to cancel the policy, it would involve the question of fraud and misrepresentation and all those things, and if the court decrees the policy cancelled, that should adjudicate the counterclaim on the policy.

THE CHAIRMAN: How does that arise under the problem we are now dealing with?

JUDGE DONWORTH: I thought it arose under the other, if the Chairman please, and the Chairman indicated I was premature.

THE CHAIRMAN: It arises under 54, and we are now considering 42, about whether we want to conform the language in 42 and 20(b), and so on, about the conditions under which

separate trials may be ordered. That is an entirely different thing. We haven't yet reached that point. I may be wrong about that.

JUDGE DONWORTH: Sometime or other, I want to make the point.

THE CHAIRMAN: It comes up under 54, as I understand it.

JUDGE CLARK: I should think that is the time, as I understand it, and, of course, I hope and expect that we will have a good discussion of that rule, because it does have various inconveniences, at least--maybe more.

JUDGE DOBIE: What is your recommendation about 42? Do you think these changes are important enough to make them, or should we leave well enough alone?

THE CHAIRMAN: Look at 20(b). I have been looking at the exact wording of these rules. I don't see very much difference in them. 20(b), on "Separate Trials," says, "The court.... may order separate trials or make other orders to prevent delay or prejudice." 24(b) says about separate trials that "The court in furtherance of convenience or to avoid prejudice...", as compared with the language in 20, which says "to prevent delay or prejudice." I don't see any substantial conflict or reason to conform them.

What is your other rule?

JUDGE CLARK: 21.

THE CHAIRMAN: What does 21 say?

JUDGE CLARK: "Any claim against a party may be severed and proceeded with separately."

THE CHAIRMAN: I doubt whether that dealt with severance, a slightly different thing.

DEAN MORGAN: Severance as to parties.

JUDGE CLARK: And then, 13(i): "If the court orders separate trials as provided in Rule 42(b)...." I am not pressing anything here. I think artistically, from the standpoint of a purist, we might well have kept these all in the same language or perhaps have had only one rule.

JUDGE DOBIE: I move we leave them as they are.

DEAN MORGAN: When we were going over this, Charlie, didn't we think it would be helpful to have these provisions, this one for severance particularly, so as to make it perfectly clear?

JUDGE CLARK: I guess so.

DEAN MORGAN: It seems to me that I remember we discussed severance.

THE CHAIRMAN: You suggest an amendment to it?

DEAN MORGAN: No; I think it is perfectly right the way it is. I am glad to have the specific mention, in Rule 21 particularly. I am not so sure about 20(b).

THE CHAIRMAN: There is a motion that we leave the verbiage of these three rules as is.

DEAN MORGAN: I second that.

THE CHAIRMAN: Even though it is inartistic as it stands. Is there any objection to that? If there isn't, we will let Rule 42(b) stand as is. Are we now down to 43?

JUDGE CLARK: 43.

THE CHAIRMAN: Do you have proposals for amendment to 43?

DEAN MORGAN: Only about fifty pages, that is all:

THE CHAIRMAN: That is discussion, but how about the recommendations? Let's focus on a proposed amendment somewhere, and you explain it.

JUDGE CLARK: I think first we ought to go to Mr. Morgan's suggestion, which is on a separate page, which in general is along the line of the Institute. What we have collected here is in the main, suggestions and comments and Dean Wigmore's criticism of the rule and his suggestion. But it seems to me that Mr. Morgan's suggestion is the more inclusive and the broader.

THE CHAIRMAN: What page is that on?

JUDGE CLARK: His is separate. You have to look through a different file.

THE CHAIRMAN: A different document? Do I have it?

JUDGE CLARK: You ought to have it.

DEAN MORGAN: Yes. It is a volume.

JUDGE CLARK: It was sent out about the same time.

JUDGE DOBIE: Dated February 6th, isn't it?

JUDGE CLARK: Eddie's letter to me was dated February 6th, and it was sent out to the Committee soon thereafter. It is quite a long document that I have here.

THE CHAIRMAN: I am not sure, Eddie, but I think my secretary concluded your report wasn't anything and she didn't ship it down to me.

DEAN MORGAN: What's that?

THE CHAIRMAN: I will have to have a copy of your report.

DEAN MORGAN: The reason I did it is that I had heard you suggested that we should put it in this form.

THE CHAIRMAN: I may have it here.

JUDGE CLARK: Maybe you were so engrossed reading the material I sent--

THE CHAIRMAN (Interposing): It is bound in here. Excuse me.

DEAN MORGAN: It is obvious that you have given it thorough consideration, Mr. Chairman. (Laughter)

JUDGE DOBIE: Is the question definitely before us as to whether we should adopt the Institute's Code of Evidence?

DEAN MORGAN: What my proposal does is practically to embody The American Law Institute Code of Evidence in Rules 43 and 44. It is perfectly obvious to me, Mr. Chairman, that we couldn't possibly give adequate consideration to this kind

of proposal at a short meeting of this kind, but I had copies of correspondence between you and the Reporter, in which it was suggested that this was the way to get the proposal up. Isn't that right, Mr. Reporter?

JUDGE CLARK: I think so.

DEAN MORGAN: It was to have some concrete proposal, knowing, of course, that it was bound to be subject to modification in discussion, and so forth, that we try to throw into the form of our Rules practically what The American Law Institute has done. I have omitted some of the chapters of The American Law Institute material, thinking that it would be the subject of debate whether the judicial notice section, for example, also should be included.

I think the first problem to discuss and one, I think, which this Committee ought to decide, is whether we are going to attempt to get authority to deal with the subject of evidence comprehensively. We have just a bob-tailed provision.

THE CHAIRMAN: Yes. It strikes me (I don't know how the other members feel about it) that if we were to undertake to go through the problem of evidence and prescribe rules of evidence to be embodied in these Rules, it would be almost as ponderous an undertaking and require as much time and discussion and meetings as all the other work we are going to do here. Even if we attempted it, my feeling is that we couldn't possibly get this work, plus the evidence, ready for January

lst, next.

DEAN MORGAN: You are quite right, sir.

THE CHAIRMAN: I feel that if we are going to take up this evidence business, it would have to be next year. Otherwise, we are just deciding, when we do decide to take it up, that we are not going to present these matters to the Court this year, and it will have to go over one more year.

DEAN MORGAN: If I may say so, I quite agree with that, but I should like, if possible, to get a decision from the Committee as to whether they think (1) that if we have authority to suggest rules of evidence, we should go ahead and do it (personally, I think we have), and (2) if we have not authority, we should ask the Court to give us the authority. Of course, if the Court doesn't want to deal with these things, it would be just a waste of time of all the members of this Committee, but to get the thing into some shape, so that the Committee would have a chance to consider the problem, I drafted it in this way. That is all I have to say about it now.

THE CHAIRMAN: There are two questions about authority. One is the question we discussed very early in our proceedings some years ago as to whether the statute is so drawn that it reflects a real intention on the part of Congress to authorize the Court to make rules of evidence. Our first haphazard guess at that--

DEAN MORGAN (Interposing): Was in the negative,

wasn't it?

THE CHAIRMAN: Yes, and we reversed ourselves on Rule 43.

DEAN MORGAN: And 44.

THE CHAIRMAN: We got our toe in the door there.

DEAN MORGAN: That is right; that is what we did.

THE CHAIRMAN: So I think we stand now committed by the Rules themselves to the proposition that we have authority to deal with evidence under the statute.

The other question is whether there is authority in the sense that the Court wants us to do it. They haven't said anything about it one way or the other explicitly, but when I asked for authority to call this meeting, I asked for authority to deal with proposed amendments to the existing rules, and my request wasn't broad enough to include authority to meet and get up a set of rules on evidence. So I shouldn't think we are at liberty to go into that thing unless we ask the Court whether they want us to do it.

DEAN MORGAN: I gather from what the Chief Justice said here that he would consider it improper at this meeting, in any event.

THE CHAIRMAN: I don't think the court would approve it. I think the Court really approved our original tentative report in 1935 (was it). We didn't think it ought to be undertaken at that time, at least, and they agreed to it. The Chief

Justice wrote me a letter and said the Court was in accord with that.

Then there is the final point, even if we have authority and the Court is willing to give it to us, that we can't possibly take it up now without carrying over our meetings and discussions probably into next year, and I don't know just how you want to bring the thing up, if we can't take it up now without defeating our efforts now. We have these amendments to put up to Congress, and we probably have this condemnation rule to put up to Congress, and we have our hands full for the rest of this year.

DEAN MORGAN: I agree with that, Mr. Mitchell, but I should like, if possible, to get your reaction and the reaction of the Committee as to whether we ought to put the question up to the Court as to drafting practically a code of evidence.

SENATOR PEPPER: May I suggest, Mr. Chairman, that the question is really included in any proposal to amend the Rules, because 43(a) now states the rules of admissibility of evidence in such a way as to exclude the methods suggested by--

THE CHAIRMAN (Interposing): I think, strictly speaking, you are absolutely right.

SENATOR PEPPER: It says, "All evidence shall be admitted which is admissible under the statutes of the United States," (that is of course) "or under the rules of evidence

heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held." A proposal to embody in the Rules the recommendation of The American Law Institute Code is in the nature of a proposal to amend this rule.

DEAN MORGAN: That is right; that is the way I have it.

SENATOR PEPPER: I should think that matter was within the scope of our authority. That narrows the discussion down to the question of whether so ambitious an undertaking is one which we can enter upon without unduly delaying our report on more urgent matters. The Chair has indicated--and I guess we all agree--that it is rather on that footing than on any other that we should decline to take it up now?

JUDGE CLARK: Mr. Chairman, may I make two or three suggestions about this? I don't know the time when we should do this, but it seems to me it is really part of our obligation to consider it, if we are going to try to keep up with the Rules, and I think the way to resume is to resume, to get it on the agenda somewhere, some way, if not for this meeting, perhaps for the summer meeting. I don't know when we are going to begin.

I want to add that it happens that our original rule happens to be one of the most criticized rules--not quite as much as Rule 12, but certainly it is one of the most criticized

rules, I think to a certain extent improperly, because they didn't realize what steps in advance were really made. That got us along the way somewhat. Nevertheless, it has been severely criticized, with a good deal of justice. There is a good deal of difficulty.

JUDGE DOBIE: In the Fourth Circuit it has been bitterly criticized all through the Circuit and has worked magnificently.

... The meeting adjourned at 12:23 p. m. ...

WEDNESDAY AFTERNOON SESSION

May 19, 1943

The meeting reconvened at 1:35 p. m., Chairman Mitchell presiding.

THE CHAIRMAN: Mr. Morgan, how would you suggest that we act on the matter of the evidence proposition?

DEAN MORGAN: My thought, Mr. Chairman, was that we don't want to waste the effort of the whole Committee in preparing and considering these rules as thoroughly as we must, if we have an intimation from the Court that it wouldn't pay any attention to them anyhow and would throw them out. On the other hand, I am sure that the method of procedural reform, both evidential and in pleading and practice, which this Committee has instituted is the one practicable way of getting real procedural reform, and on that account I am extremely anxious that we should attempt this thing, but I don't want to have it attempted in the face of clear rejection. I think it would be foolish to ask this body to go through all this material if it had the assurance that the Court would turn it down.

THE CHAIRMAN: I was wondering myself, whether or not the Court wants us to, and even if it does, that we are so fixed now that we couldn't take it up.

DEAN MORGAN: It can't be done today, I am sure, or this week. I am reasonably sure of that, and I am reasonably

sure that, although this was very carefully threshed out, as you know, in The American Law Institute by the Reporter, the Advisers, and the Council, and there was a good deal of it thoroughly debated on the floor of the Institute, the members of this Committee wouldn't want just to accept it on the say-so of anybody else; they would want a thorough examination of the rules.

THE CHAIRMAN: Is it your idea that, if the Court is willing, we could undertake consideration of this Institute Code during the present year?

DEAN MORGAN: We couldn't do it before October; I am quite sure of that. At least, it is my notion that the Committee wouldn't be willing to go through it as rapidly as that. I do think that in view of 43 and 44, we have a commission to take care of evidence.

THE CHAIRMAN: You mean from the Court or from the statute?

DEAN MORGAN: From the Court.

THE CHAIRMAN: I think that the situation about that is a good deal the same as about our appropriation. Last year, without any idea of leading to amendments, we wanted to take up the condemnation rule. We applied to Congress for an appropriation to do that work. The Marshal and a representative of the Supreme Court went before the Appropriations Committee and said what they wanted that money for; then the appropriation

was passed. But the language of it was so broad that the Court could use it for anything else connected with the Rules. When we decided to take this rule up, which we are doing today, which wasn't what we represented to Congress, I called the Chief's attention to the fact that we got the appropriation on certain representation and that although the appropriation technically was broad enough so that we could use it for this, I thought maybe they ought to consider whether they ought, informally at least, to talk to the Chairman of the Appropriations Committee and see if Congress would take offense at the Court's using the money for something else. This is about the same way.

DEAN MORGAN: I am afraid so.

THE CHAIRMAN: We asked the Court to call a meeting to allow us to consider amendments. Of course, we could make an amendment to 43 by incorporating the Institute Code in it. That is technically true, but it isn't quite cricket, I feel. I am not at all sure what they would do. If we went to the Court now and asked, "Do you want us to consider a code of evidence or don't you?" I don't know what they would do, but I have an idea they would say, "Well, your business is to consider things of that kind; and you come back and advise us whether you think that ought to be taken up or not, and then let us consider it." So I am not sure that we would get anywhere, and I was wondering whether it was desirable to bother the

Court this week. They are going to adjourn in another week or two, and they are hard-driven right now. We can't take the thing up until fall, and I wonder whether we ought to go to them now, if that is your idea, and ask, "May we take this up or may we not"?

DEAN MORGAN: As far as the tactics are concerned, Mr. Chairman, you know much more about that than I do. You and the Senator here would know.

THE CHAIRMAN: I don't claim to have any special knowledge on this thing at all. You want it brought up, and I was suggesting, if you want a vote on something, that you propose some kind of motion or resolution.

DEAN MORGAN: A resolution which I should favor would be that we postpone consideration of the amendment to Rules 43 and 44 until a later date and that, unless there is an indication that the Court would disapprove such a matter, we proceed to attempt to draft rules of evidence covering the entire field.

THE CHAIRMAN: Does that, then, postpone amendment to 43 from consideration now?

DEAN MORGAN: No, I shouldn't say that, because I am sure we couldn't do that in that time and do an adequate job. I think to do a hasty job on so large an order would be unwise. That is the way I feel about it.

THE CHAIRMAN: You mean you want to postpone the amendments to 43 which are up right now for consideration, even

though they don't involve--

DEAN MORGAN (Interposing): Yes, I should think it would be very bad tactics to amend it piecemeal now.

JUDGE CLARK: I should like to ask this. I don't know whether it has been really set, but there is a tentative feeling that we would come back rather soon, very likely in June. It looks to me as though, at a guess, that meeting wouldn't necessarily be so very long. We have made some changes, but I shouldn't think it would take very long to go over those. Would it be out of the way to have this on the agenda and look it over at that time?

THE CHAIRMAN: Rule 43?

DEAN MORGAN: Not at all.

THE CHAIRMAN: Here is a thing that you are up against, too. It makes me doubtful whether we ought not now to consider any minor amendments to 43 that are consistent with our present theory. These amendments have got to go out to the bench and bar of the country very soon. We adopted the policy before--and I assume we will again--that we wouldn't report a thing finally to the Court until we had given the bench and bar a look at it. It has been in my mind that the Reporter would get busy and come back here as promptly as he could, in the next two or three weeks, maybe, with his final draft of these amendments that we have agreed to, and we should have a meeting (I don't know just when--the middle or latter part of June)

and put the thing in shape that we are willing to have it go out to the bench and bar and get the permission of the Court to print it and distribute it and let the bar have the summer and early fall to look over our draft and come back by fall with any suggestions. We should meet, then, in October or November--somewhere along there--and consider what criticisms will come to us and put our report to the Court in final shape and send it in to them, allowing them a month or six weeks or whatnot before the first of January to decide if they want to file it with the Congress.

If we are going to get out a draft of these Rules to submit to the bar, we certainly can't do it this summer if we are going to put the code of evidence in there, which would mean that the whole thing, as well as the code, would go over for another year. On the other hand, if we decide to send these amendments out to the bar, the code of evidence would have to be taken up separately, and when it was worked on, then it would go to the bar. But in the meanwhile, we have sent out Rule 43, unchanged, to the Bar. Even if we were not to adopt the code of evidence, there are some modifications in 43 which seem to be wanted. What are we to do about that, as a practical situation? Are we just to let 43 go back to the bar this summer and say we are not going to change a word in it simply because there is a chance that next fall or the first of next year, we are going to substitute a code of evidence for it? I

just put that to you as a practical situation.

SENATOR PEPPER: Mr. Chairman, I suggest action along the line that might be expressed in a resolution, as follows: I move that it is the sense of this Committee that a consideration of the rules of evidence is within the scope of our responsibility, that the present consideration of those rules is not feasible, that we place them upon our agenda, and that with respect to the dissemination to the bar of the results of our work in other branches of the Rules, we take the instructions of the Court whether we should be permitted to include in the notice sent to the bar some indication that the matter of evidence has not been finally considered by the Committee or by the Court and that there is a possibility that a subsequent recommendation for amendment of Rules 43 and 44 will be submitted for consideration.

THE CHAIRMAN: May I ask the Reporter a question about that. Are any of these amendments to 43 that you have in mind today drawn on the theory that we will not go much beyond 43 on evidence? Are any of them so important that we ought to make them to 43, or can we get along well enough with Rule 43 as it is and in our report to the bar simply say that we have made no changes to 43 at present, because as it stands they are not very vital and there is involved the broader question whether we should deal with evidence to a larger extent, which, if it is undertaken, will have to be done later, and for that

reason we haven't attempted to make any minor amendments? Could we do that? Is Rule 43 working well enough in practice so that there is no violent trouble with it if it stands as it is for another year?

JUDGE CLARK: Yes, I think that is true. Let me say this specifically as to 43. We have made no suggestion except what is within the confines of the code. We suggested that if the code was not adopted, you might want to do something less. That is all on 43. So very clearly, you don't need to take up 43.

On 44, which is the proof of records, we have only one suggestion, which comes from the Department of Justice, and while I think it is good as far as it goes, I don't know whether it is very necessary either way. It is a suggestion on the question of certification of copies.

DEAN MORGAN: That is the very question I wrote to you about with reference to our code. Someone made the suggestion that the consul wouldn't make the certification. You said you investigated that at the time and that they said they would. That is all I know about it.

THE CHAIRMAN: I don't think that is a matter of any such importance that we ought necessarily to consider it.

What has been said here now leads me to the conclusion that we can pass over 43 and 44 entirely and do nothing to them at this meeting or the June meeting, because if we start tinker-

ing with these two rules, it is a sort of inference that we are not going to monkey with the broader field, and I can understand how these gentlemen feel about our doing that. It leads me to think that maybe we can solve the matter by leaving 43 and 44 untouched, simply saying that within the breadth of their present provisions, there are some amendments that might be made, but that we have concluded not to tamper with them at present because the question before the Committee is the broader one, which we weren't able to deal with at present, and we thought that pending a decision on that, we wouldn't touch these rules at all. If we did the other thing, it would look as if we were going to be satisfied.

DEAN MORGAN: Quite so.

THE CHAIRMAN: Would that meet your approval?

DEAN MORGAN: Yes.

SENATOR PEPPER: I think the motion that I made is satisfactory to Mr. Morgan.

DEAN MORGAN: Yes; I second it.

SENATOR PEPPER: I think it is exactly in line with what you have last said, sir.

DEAN MORGAN: Exactly.

JUDGE DONWORTH: Mr. Chairman, apropos Senator Pepper's resolution, it seems to me that the situation is really this: I think we are of the opinion that this code of evidence would be within our general jurisdiction, but it is an unusual

situation. This code, prepared with great care and investigated and considered with great minuteness by The American Law Institute, comes before the country with the strong endorsement of the author, for whom every lawyer in the country has profound respect as an authority on evidence, and it also has the support of The American Law Institute. But it is put before the country as a proposed statute or rule, in our case, to be considered by the law-making authorities or rule-making authorities of the different states and of the United States. Should we simply request the opinion of the Supreme Court until we have determined that it is a desirable thing to put into the Federal Rules? In other words, if we put the matter up to the Supreme Court, will they not expect us to advise them or give them an expression as to whether we think the code, in one form or another, should go into the Rules? The few lawyers with whom I have discussed the matter seemed to be of the opinion that it was premature to put this code into the Federal Rules in advance of any general discussion by the bar associations and by legislative committees and adoption by judicial councils or legislatures, as the case may be. In other words, to use a very plain expression, there is the question whether this is sufficiently seasoned in the minds of the bench and bar of the country to have it incorporated into the Federal Rules at this time or even next year.

What I am leading up to is whether we should adopt a

resolution which seems to imply that we deem it proper for us to go into this matter and to ask the opinion of the Supreme Court, unless it is our view that we do think that if we were advising the Supreme Court (as we have a right to do, I suppose), we would advise them that this code should be incorporated and made law in the Federal Courts. I am not clear that we are prepared to advise the Court to that effect.

THE CHAIRMAN: Does the resolution call for somebody to get an opinion from the Supreme Court on this thing?

SENATOR PEPPER: It wasn't put specifically in that fashion, but the clear implication was that if the Chairman found it possible to ascertain from the Chief Justice the temper of the Court, it would enlighten us as to our future proceeding, and what I wanted to do now was to settle the question along the lines suggested by Judge Donworth, that it is the sense of the Committee that the incorporation of rules of evidence in this body of Rules is within the scope of our responsibility, that its present consideration (for all the reasons that have been given) is not feasible, that it be placed upon our agenda for future attention, and that in the interval, an effort be made to ascertain whether we should proceed on that line, and if so, in the interval when promulgating the rules on other subjects, to make such a cautionary indication by way of note to the bar that no changes have been made in 43 and 44 because there was still under consideration whether a much greater

amplification of those rules should take place.

THE CHAIRMAN: That would suit me perfectly, personally, except for one thing. That is, there is nothing said about it in the resolution, but it has been suggested that I go to the Court about this thing at some time in the near future, and I want to state frankly what I would say to the Court if I went in and they asked, "Well, what do you think about it?" or "What are your views about it?" What I would say about it is this: that I think it is a subject that in due course the Committee ought to take up, but that they couldn't do it this year and get these things out. I would have to add something to that that is my own conviction, and that is why I don't want to be putting my convictions up to the Court and form any stumbling block for you. My conviction is that it would be a mistake for us to couple our report to the Supreme Court on our general amendments that we make, and to the Congress particularly, with a code of evidence, for the reason that I feel in the evidence code (and your own experience in the Institute demonstrates it) there would be a very lot of controversial things involved. If we put that and our report on this thing we are doing up to the Congress at the same time, we would start a row, I am sure, and it might sink us or delay us indefinitely on these things. It might get Congress to doing something to these. If the Chief asked me what I thought, I would tell him I thought we certainly ought not to try to have

any elaboration of rules of evidence go up to the Congress with our proposed amendments to the general Rules as they stand. I should like to see them put up and passed by Congress or tacitly approved, and not involved in any controversy over what is going to be a very controversial subject. You take the proceedings of the committee that drafted the Institute rules and all that, and you will find a very violent discussion about some of these things, and I even have a doubt in my mind whether we ought to put up the condemnation rule to Congress alongside of these amendments, whether the two things hook together, and whether one might not damage the other. I hardly think that is so.

SENATOR PEPPER: Mr. Chairman, nothing that you have said is in the least inconsistent with the thought that underlies this resolution. In fact, the resolution was stated rather carefully to make it clear that the limit to which we were going at the present time was a statement respecting the scope of our responsibility, the impossibility of attacking this problem at the present time, and merely asking the Court whether (not for the purposes of the report to be made next autumn and to be acted upon in January, but for future purposes) the Court were willing that we should, in promulgating the Rules for the consideration of the bar, make an explanatory note to the effect that we had not changed 43 and 44 because there was under consideration the possibility of a more radical revision.

THE CHAIRMAN: If you want me to go to the Court on it (I don't know why I should; somebody else would suit me just as well), would you be satisfied if I did that in October? You see, they adjourn in another week or two, and they are driven right now to write their final opinions. Dumping on the Court right now this broad problem of whether the evidence code ought to be considered I don't think would get much result from them.

SENATOR PEPPER: You see, Mr. Chairman, the suggestion that we add an explanatory note when we disseminate the Rules as to why we haven't revised 43 and 44 is something that we would have to get the green light from the Court on before they adjourned this spring, because we are proposing to make the dissemination, are we not, in advance of the fall term?

THE CHAIRMAN: All I need to ask them now, then, would be whether they have any objection to our putting in such a note.

SENATOR PEPPER: That is it; that is the whole thing.

THE CHAIRMAN: All right. I thought you wanted me to ask them to decide whether they were willing to give us a green light on the whole investigation.

DEAN MORGAN: Right now? No, no.

SENATOR PEPPER: No.

THE CHAIRMAN: Then I suggest that the resolution be passed, and I shall get hold of the Chief, if I can, and tell

him what this thing means and ask him if we can put in such a note on this rule when we pass it out for the bar to look over, without treading on the toes of the Court.

DEAN MORGAN: There is only one inquiry I wish to make, Mr. Chairman. You said that if the Chief asked your opinion, you would tell him thus and so. Suppose he goes further and asks, "Well, do you think that you ought later to consider the evidence code?" what will you be saying then?

THE CHAIRMAN: I would say that there has been such a very strong movement around the country for improvement in the rules of evidence, that unless the Court takes that view (which it hasn't taken), we haven't any power to make rules of evidence under the enabling act, and that at some time or other, (I wouldn't say it was this fall or next year) the subject ought to be tackled.

DEAN MORGAN: That is perfectly satisfactory.

THE CHAIRMAN: I don't mean that I would say that I thought The American Law Institute code ought to be adopted, but that it would be used as a basis for consideration. My personal view is that it is a very ponderous task. My idea is that we would have to have several meetings to thresh over the proposed code.

DEAN MORGAN: I am content with that.

THE CHAIRMAN: It would have to go to the bar, and there would be a lot of stir about that. It might well take us

a year to do the job.

DEAN MORGAN: Absolutely.

THE CHAIRMAN: That is what I foresee about it.

SENATOR PEPPER: May I make the further suggestion that there is nothing either in the resolution or in your suggested talk with the Chief Justice, Mr. Chairman, which in any way commits us to the code of The American Law Institute. We might decide, after further debate, that that wasn't what we were going to sponsor at all. We are not going to get the Court to commit itself in advance to any particular line of amendment, but merely get permission to give the subject further consideration, with a cautionary note to the bar that we have not amended two rules which have been widely criticized because the whole subject of expanding those rules is going to receive further consideration.

THE CHAIRMAN: I would have to tell the Chief Justice that I understand that there is some sentiment in this Committee that the matter ought to be allowed to stew a little longer before we take it up. That has been expressed here.

DEAN MORGAN: I don't think that. I think you have got far enough along that the code has been discussed all over the country.

THE CHAIRMAN: That may be so, but I couldn't go there and feel at liberty to tell the Court that as matters stand now, because I don't know that this Committee, for instance, is

in favor of taking up this evidence thing next year. I would not know that. I don't know whether you are or not.

SENATOR PEPPER: If I may make a suggestion, I wouldn't allow the question of the code of The American Law Institute to be drawn into the discussion.

THE CHAIRMAN: Let's pass that. I wouldn't be able to tell him how the Committee feels on the problem of taking up the broad idea of putting in a lot of rules of evidence covering the field of evidence in these Rules. I don't know. Judge Donworth has an idea of some kind, and some of us may have other ideas about it, I don't know. If you want me to tell the Judge anything, now is the time to speak up.

SENATOR PEPPER: I do think, Mr. Chairman, that if the motion passes, you will be able to say that the Committee regards the expansion of these two rules as within the proper scope of its responsibility, that we have no present intention of doing anything about it, but that we do want, in promulgating the rules for the criticism and discussion of bench and bar, to insert an explanatory note to the effect that the subject is under advisement and may receive future treatment, and that if it does, it is entirely premature to say along what line those ultimate suggestions will be, because my own individual view would be that it would be a great deal more satisfactory to have any proposed rules of evidence come before the Court as the spontaneous recommendation of this Committee, no matter

where we got them from, than to put it up to the Court that we had simply swallowed whole the recommendations of The American Law Institute. I think that would be unpopular with several members of the Court and, I think, possibly with the Chief Justice. I think the only use that we ought to make of The American Law Institute code is as a reservoir of information and supply which we can draw on to the extent that we think proper when we get round to it. Is that right?

DEAN MORGAN: That is all right, surely, but I will offer the entire reservoir!

SENATOR PEPPER: That is all right. The Chairman is going to speak for the Committee--

DEAN MORGAN (Interposing): Yes.

SENATOR PEPPER: --and at the present stage, it seems to me we ought to limit ourselves along the lines stated in the resolution.

MR. LEMANN: Wouldn't perhaps the best way of presenting this to the Court at the present time be to go ahead and frame the work that we would expect to put in our present draft to go out to the bar, and not magnify it, because, after all, that note, as I understand it, would be a very general statement and wouldn't commit anybody--the Committee or the Court. It would simply consist of three or four lines, saying, "The Committee is not proposing any changes to Rule 43 at this time because it has been suggested that the only thing that could

be done to affect it would be to present detailed rules, and as to that, the Committee has reached no conclusion and made no recommendation yet to the Court." If you have that in concrete form, and it goes to the Court along with the other recommendations, the Court has an opportunity to consider that note and to say whether they want it removed. If you want to, you might direct the Chief's special attention to it. Personally, I don't think that would be necessary. Wouldn't that be as far as you would need to go at this time, and wouldn't it accomplsih best, Mr. Chairman, your idea that our primary objective at the moment is to get permission to release our present feeling to the profession? Then put off until the fall the presentation to the Court of the general question of whether we should embark upon the drafting of a code.

THE CHAIRMAN: Yes. I am glad you brought that up, because it is in my mind, too. We have got to get the permission of the Court to hand our draft out to the bar, and I want to get it so as to issue the draft to the bar maybe in July. I have been wondering in my own mind how we are going to do that, because the Court is going to adjourn next week. If I wait to make that request of the Court until after they adjourn, then I may have to write to them around. I was wondering if I couldn't go to the Chief Justice now and have him sound out the Court in a moment or two and ask them if they are willing to have the result of our work go out to the bar immediately,

without the Court's studying it, if accompanied by the proper caveat that the Court hasn't had anything to do with it.

MR. LEMANN: Just as we did before.

THE CHAIRMAN: If he says all right, I wouldn't say anything to him about this evidence business; I would just submit to him personally, after our draft is ready, the draft, and there will be a note to Rule 43 stating that we haven't done anything with it because there is under consideration of the Committee, which they haven't acted on, as the Vice Chairman has said, the problem of a broader reach, and until that which is under consideration is determined, we thought it inadvisable at present to make any changes in Rule 43, which explains to the bar that we are really not approving everything that is in it. I could do that and say nothing more, and I don't see why we couldn't do that. If the Court said they were not responsible for it, we would not be committing them, even by inference, to the position that we should go on with the rules of evidence--not at all.

MR. LEMANN: I think that would be the best way to handle it.

THE CHAIRMAN: It is the simplest. I am afraid if I go to them and put this evidence problem up to them right now in a hurry, when the Court is about to quit, and it slaps them in the face a little bit, we may get an adverse action on it.

DEAN MORGAN: You might.

THE CHAIRMAN: It would be perfectly fair to the Court if we did it that way, as long as we were very cautious in wording our note so as not to make it appear that anybody is committed to this broader treatment. I think we would get it readily that way. The Court might adjourn and say, "Why, surely, this thing has to go out to the bar before the summer vacation. We won't be able to look at it--we are going on our vacations." If the Committee will submit the draft to the Chief Justice, and he says he doesn't think there is anything very pernicious in it that would embarrass anybody, out it goes, and there you have it. Would that be all right?

SENATOR PEPPER: I think that is exactly right, I should say. This resolution was merely an intramural resolution; it wasn't with the idea that you would take that and exhibit it to the Court. It is merely a statement of our attitude toward the whole thing, and the way in which you propose to handle it seems to me to be perfectly along the line of what Mr. Lemann suggested.

THE CHAIRMAN: It would relieve me of the embarrassment of going to the Chief Justice and saying, "Here, what do you fellows think about this broad question?" I don't like to bring that up. If that is agreeable to you, it means we will just pass over 43 and 44--there is nothing very violently bad about them--for the time being.

DEAN MORGAN: Is that resolution considered passed,

then? That is what they did in the other draft. They would come to THE CHAIRMAN: We might put it to a vote. Most of them would go SENATOR PEPPER: It is merely a statement of the sense of the Committee, and in so far as it implies a conference between you and the Chief Justice, that conference should follow the line that you and Mr. Lemann have worked out. I thought that was wor THE CHAIRMAN: With that understanding, all in favor of the resolution, with the accompanying explanation to it, say "aye." Carried. RGAN: I doubt that very much, Mr. Lemann. What I t MR. LEMANN: Mr. Mitchell, I was wondering whether in that note, just to get the sense of the group, we would be going too far if we took the temper of the profession by adding to that note saying this was under consideration, that nobody knew what the Committee would do or what the Court would do, that the Committee would be glad to have, especially from the bar associations and the bar, suggestions as to the advisability of drawing a detailed set of rules of evidence and submitting them to the Court. It might give us a chance to test Justice Judge Donworth's point that the profession isn't ready for it. had been I have in mind that I don't like to see Mr. Morgan or the Committee do a lot of work on this code, just to be told at the end by the Court that the profession isn't ready for it or that we are not ready for it. You see, when this draft goes out, the lawyers will talk about it, and the bar associations will probably appoint committees, as they did before, to study

them. That is what they did in the other draft. They would come to this point, and then I am hopeful that most of them would go on record saying, "We think that is a good thing." If they did, it would go a long way, I believe, with the Court to have them say that this is what the bar wants and that the bar is ready for it, and go ahead and do it. I thought that was worth bringing up now to see what the group thinks about the advisability of such a note.

DEAN MORGAN: I doubt that very much, Mr. Lemann. What I think would happen is that you would get your reaction only from the objectors. If you had put up to the bar associations generally whether we should have done this original job, you would have had an overwhelming negative vote, without any question. I have gone through the country on these Federal Rules, too, and have found a lot of vociferous objections to them. Take the Nebraska rules, where the court finally adopted our Rules for the most part. There was the most strenuous objection from the vociferous people, and when the chief justice presented it to the legislature, he said that the objectors had been much more vociferous, and so forth, than the supporters. I think you would just invite trouble if you did that. You would never have gotten these Rules through if you had started that way.

SENATOR PEPPER: Don't you think, Mr. Chairman and Mr. Lemann, that it is always heading for trouble if you put an

abstract question up to the bar. You become a kind of institute of public opinion, and you take a poll on a question which really doesn't fairly state the question at issue. The way in which it seems to me we ought to get the opinion of the bar, after deliberation and with the O.K. of the Court, at some future date after the rest of this matter shall have been disposed of, is on a concrete body of suggestions coming from us, which the bar then can be asked to approve or disapprove. Then we will get real criticism. But the bar as a whole will always vote "No" on an abstract question on whether there need be any change.

MR. LEMANN: I am inclined to think they would vote "Yes" on a general proposition much more than when you poke a lot of rules at them, some of which they don't like. They seem to be for it, but it is when you bring them what you want to do that they begin to fall out. That is open to question.

SENATOR PEPPER: That means that their expression on the general question wouldn't be very enlightening on the ultimate result.

THE CHAIRMAN: I would suggest, as long as the resolution is passed and we are passing Rules 43 and 44, and nothing will be in our report on them except this note, that as soon as he is able to do so, the Reporter draft a note and send a copy of it to the Vice Chairman and to Mr. Morgan and anybody else who wants to see it before our next meeting (he might send it

to all the members) and then get some suggestions back and make any revision in the note that may be accomplished that way before he brings it in to our next meeting. If there is any difference of opinion about the terms of it arising in the minds of any of us, they can be put back to the Reporter and ironed out, so that it will save our time at the next meeting. Is that agreeable? That will give everybody a shot at this note, including those who are especially interested in the evidence field and others who are not. Is that point all right?

MR. DODGE: Just as a matter of curiosity, there has been some suggestion that the present Rule 43 has been criticized a good deal, and all that you cite are law review articles and this long statement by Wigmore. Has there been any criticism of Rule 43 in the courts?

JUDGE CLARK: I think the criticism has been mostly academic.

DEAN MORGAN: Yes, I think so.

JUDGE CLARK: I don't think I know of anything that has been in the cases.

MR. DODGE: It has worked pretty well, apparently.

JUDGE CLARK: I think it has accomplished a good deal, yes. I think it was a definite step in advance. I don't mean to say we can't go further, but I think we did a good job there.

THE CHAIRMAN: We did the very thing we wanted to do.

DEAN MORGAN: Yes, we did just what we wanted to do.

THE CHAIRMAN: My impression is that they are academic. The thing that stands out in my mind is a very elaborate article in a law review by--

DEAN MORGAN (Interposing): A man named Green.

THE CHAIRMAN: Was that it? He bitterly criticized the rule because the rule says that whether the evidence is admissible or not should be determined according to more liberal views, state, Federal, or equity.

DEAN MORGAN: You can't find equity rules on evidence.

THE CHAIRMAN: All you talk about is admission by it. You don't say anything about inadmissibility. That was the gist of his article. It occurred to me you couldn't determine whether a thing was admissible without determining whether it was inadmissible or not. That is the sort of thing that I have in mind has been said about it. The real problem is whether we ought to go out in the field generally. Well, I guess that settles that.

We will go to Rule 45.

JUDGE CLARK: On Rule 45, Professor Sunderland had a suggestion which is in line with the suggestions made as to the scope of Rule 26, back in discovery. Look at what he says. We repeated it. It is the one that appears on our page 122 at the foot of the page. This refers to 45(d)(1). In place of the words "documentary evidence", you use the words "documents or tangible things which constitute or contain evidence relating

to any of the matters mentioned in Rule 26(b)." I think in the light of our discussions as to that rule, you can see the general purpose.

JUDGE DOBIE: A steamboat or a lawnmower or an automobile is not documentary evidence, is it?

JUDGE CLARK: Do you want to comment further there?

PROFESSOR SUNDERLAND: I think it is obvious that this is another effort to integrate the discovery system. We want to use the same terms, so that nobody can argue that the use of different terms means a different underlying idea.

MR. LEMANN: There is no criticism of the rule and no trouble that the operation has suggested, and this is just an embellishment, which I think is good.

PROFESSOR SUNDERLAND: It isn't an embellishment; it is an explanation. It removes an ambiguity.

MR. LEMANN: Nobody has found any trouble with an ambiguity, have they?

THE CHAIRMAN: I have the feeling, gentlemen, that when this report comes back from this Committee and we have the report, rule after rule, with the omitted matter bracketed and the additions underlined, we are going to take a look at it like this and it will look as if we picked things to pieces all along the line , and maybe we will have a little revulsive feeling about that and go back at that time and say, "Well, we don't like it. It looks as if we plastered the whole business

with amendments. We just wiped out nonessentials." We may do that. Is this consistent with the amendments we have already adopted at this meeting?

PROFESSOR SUNDERLAND: It carries them out.

THE CHAIRMAN: Have we made similar amendments, or is this the type of thing we have rejected?

PROFESSOR SUNDERLAND: It is exactly the thing we have done in every other instance.

THE CHAIRMAN: Suppose we adopt it, and then we will be in a better position to form a judgment as to how bad an appearance we make on these amendments when we see the whole thing collectively. Don't you think it will work that way?

JUDGE CLARK: I think this was the real issue: This all goes back to the scope of discovery and depositions and the tendency of some courts to be worried as to whether it had to be admissible in evidence. We have expanded it to include the discovery of things which may lead to things which are admissible. This is just the same point, making this consistent with what was done in 26(b). There are cases on this whole series there, quite a good many cases, that have raised question about the extent of the discovery.

THE CHAIRMAN: What is your pleasure about it?

JUDGE DOBIE: I recommend its adoption.

MR. LEMANN: Is this the same rule that the Reporter recommends change of on page 124, which Mr. Dodge just called

my attention to?

JUDGE CLARK: This is 122. I am going to bring that up. It is the same rule, and it is the same general problem.

MR. LEMANN: It is the same paragraph.

JUDGE CLARK: If you want to, take up that other one, too.

MR. LEMANN: Apparently Mr. Sunderland has suggested one change in this paragraph, and Professor Clark has suggested another. Maybe we should vote on them separately. I just wanted to be sure I understood.

THE CHAIRMAN: Do the amendments overlap?

JUDGE CLARK: They are somewhat different ideas. One is as to the order of the court. This one is as to the definition of what is to be sought.

THE CHAIRMAN: My question is this: If we adopt one, will that necessarily include the other, or may we adopt both?

JUDGE CLARK: I should think you would adopt both or one or none. I don't see why the questions are not different, even though they relate to the same provision of the rule.

THE CHAIRMAN: Maybe we should consider your amendment on 124. They are closely related.

JUDGE CLARK: All right; I will discuss it. If you will look at that same rule, 45(d)(1), you will notice that the first sentence, which is the one we have been immediately thinking of, speaks of "the issuance by the clerk of the district

court for the district in which the deposition is to be taken of subpoenas for the persons named or described therein." Then it goes to the subpoenas for evidence: "A subpoena commanding the production of documentary evidence on the taking of a deposition shall not be used without an order of the court." The question has been raised, "The order of what court?" There seems to have been some ambiguity as to whether it was an order of the court where the deposition is to be used or the order of the court where the deposition is to be taken. I suggest that I should think it is rather clear that it is the order of the court where the deposition is to be taken.

DEAN MORGAN: That is the court referred to in the previous sentence of the same paragraph.

THE CHAIRMAN: The court in one jurisdiction hasn't power to issue a subpoena out of his clerk's office good in any other district, except in special cases, and under the old system I am familiar with, the present statute, if you took a deposition in a district outside of the district in which the case was pending, you had to apply to the clerk of the court sitting in that district, not in the district where the action was pending.

MR. LEMANN: That is what we provide for.

THE CHAIRMAN: It doesn't explicitly say here.

MR. LEMANN: The preceding sentence says it.

THE CHAIRMAN: Yes, it does. How can there be any

doubt about that?

DEAN MORGAN: I don't see how anybody can make a mistake on that.

JUDGE CLARK: You remember, Mr. Mitchell, the comment you made.

THE CHAIRMAN: What was it?

JUDGE CLARK: Your comment was "that the rule should provide that the subpoena to compel a witness to testify at the taking of the deposition or to produce documents ought to be issued only by the court in which the deposition is to be taken".

THE CHAIRMAN: I know, but I didn't say the rule didn't mean that already.

JUDGE CLARK: "---with the possible qualification that the court in which the action was pending might issue the subpoena if the deposition is to be taken and the subpoena served within one hundred miles of the place of ultimate trial, even though without the district where the action is pending."

THE CHAIRMAN: You see, I call attention to the fact that even though the deposition was to be taken outside the district in which the action was pending, still the court in which the action was pending might have jurisdiction because the statutes now allow them to do it if it is within a hundred miles of the place of trial.

JUDGE CLARK: Excuse me.

MR. DODGE: I was going to ask, why should you have to bother the court with that matter, anyway?

JUDGE CLARK: That is my further point. That is the point that I really want to bring up. Why should we have an order of court here? I shall have to say right away that we discussed this before, but, of course, that was five or six years ago, and I should like to raise the question again. It has been raised to me several times. Judge Hincks, who is a very sensible person, says, "Why in the world bother both the court and the parties about it?" I don't quite see it myself. I couldn't explain just why it was necessary, when it is not necessary up above in (a) and (b). That is, in the case of a subpoena of this kind, a subpoena for documentary evidence for use at a trial, you don't require a court order, but under (b) the person against whom the subpoena is directed can get protection. Why shouldn't the same provision be here?

MR. LEMANN: The reason historically, I think, is that Mr. Wickersham especially proposed this limitation. You remember he was very much concerned about possible abuse of these discovery provisions, and my recollection is reasonably clear that he thought that when you wanted to get documents, you ought to get an order of court in connection with depositions for discovery. I had occasion a few years ago to get a subpoena for production of books of account and quite a lot of papers. I went to the judge, and I got it. The other side

moved to quash it as calling for too much. I suppose he could have moved to quash it if I had gotten a court order. So I don't suppose it makes any great practical difference. That was the idea that was behind the original provision, that was put in with malice aforethought.

SENATOR PEPPER: Isn't there something in this, Mr. Chairman? If you look at (f) under 45, you observe that failure without adequate excuse to obey a subpoena is deemed to be contempt of the court from which the subpoena issued. That is the court in the jurisdiction where the deposition is to be taken. If there is a possibility that you may have to discipline a witness, isn't it rather important that something shall have been done by that court in the way of authorizing the issuance of the subpoena if, in case of disobedience, you have to come back to him to punish the witness for contempt? It seems to me that (f) indicates pretty clearly that there is no occasion for amending (1), because that makes it perfectly clear that the order of the court there referred to must be the order of the same court which has jurisdiction to punish for contempt, if there is disobedience.

JUDGE CLARK: I think, Senator Pepper, that you are correct as to this point on the court. I still query why any necessity is found as to one type of subpoena only. You will notice that under the subpoena for deposition without documentary evidence, there is no such requirement, and there is no

such requirement for documentary evidence to produce at the trial. I think it is not only something of a nuisance to parties and courts, but you have to be right on your toes in reading the rule to get the difference. Actually, I take it that a subpoena just for testifying and a subpoena for testifying with documentary evidence are pretty close. In the trial I think you are going to ask for them and get them indiscriminately. Here we are making a sharp distinction between them, which I really don't see the necessity for.

SENATOR PEPPER: I was just envisaging a case in which, without going to the court in the jurisdiction where the deposition is to be taken, a subpoena is obtained from the clerk and served, commanding the production of a lot of documentary evidence, and if the person to whom the subpoena is addressed doesn't produce, the person issuing the subpoena then goes before the court (who hasn't heard of the thing at all, doesn't know a thing about it) and tries to put the witness in contempt. The court is a little irritated and says, "Why, I never would have authorized the issuance of a subpoena for all this stuff, a carload of documents. I am not going to hold him in contempt." It seems to me it is different where you are dealing with two jurisdictions, where your action is pending in one jurisdiction, and in the ancillary jurisdiction you are trying to invoke judicial authority to compel the attendance of a witness. It just occurred to me that the fight would come

not over the failure of a witness to come to give oral testimony on deposition, but over the failure of somebody to produce the documents prayed for, and that maybe it would shorten the whole proceeding if you asked for the judicial authority to subpoena those documents in the first instance. I don't press the point.

THE CHAIRMAN: If it weren't done with notice to the other party, the judge wouldn't know what it was about. He would issue it as a matter of form. I agree with the Reporter; I think we might strike it out. My recollection of the thing is that our reason for it was this: The subpoena duces tecum, which is oftentimes oppressive and unreasonable, is for a witness to appear at the trial and produce the stuff. He appears and produces it before a judge, or he comes before a judge and explaines the difficulties and the impropriety of it. He has a man right there trying the case, who can then step in the breach and say whether it is right or wrong. Whereas, if you just go to a clerk of a court 400 miles away and get a subpoena duces tecum to produce stuff before a notary public, they come in before a notary public. The notary public doesn't know anything about it and has no power to protect anybody. That is the thought back of it.

I have a very distinct recollection of it because I think maybe I was partly guilty for the provision of that kind.

My idea is that we strike out that clause requiring

that subpoena duces tecum on a deposition be backed by a prior order, and simply have the provision that the subpoena may be issued for the purpose by the clerk for the purposes named and described or for commanding the production of evidence. But I think we ought to do one more thing that is brought out by my comment that he read. We say here, as it stands, that any subpoena for a deposition shall be issued "by the clerk of the district court for the district in which the deposition is to be taken". That sounds all right on its face, but that means that even though it is within a hundred miles of the place of trial and the court which is going to try the case has power to issue the subpoena, we go to the judge in another district, who knows nothing about the case, and have his clerk issue the subpoena. It seems to me it ought to read so that it will bring about this result: That the subpoena ought to be issued by the clerk of the District Court for the district in which the deposition is to be taken, unless the point of taking the deposition is within a hundred miles of the place of trial, in which case it ought to be issued by the clerk of the court in which the action is pending. That would bring back matters of contempt right to the judge who is going to try the case in all those situations. That is what I meant by that comment. I don't know how you would word it, but it seems to me that it ought to be perfectly clear.

JUDGE CLARK: Let me ask you this: The next subdivision,

(2), has a good deal on this. I don't know that I have it right at hand. Doesn't the next subdivision cover it pretty much?

THE CHAIRMAN: It hasn't anything to do with this, has it? Subdivison (2), you say?

JUDGE CLARK: It is how far away you can make him come.

DEAN MORGAN: "A nonresident of the district may be required to attend only in the county wherein he is served with a subpoena, or within 40 miles from the place of service..."

THE CHAIRMAN: I think that Rule (d)(1) ought to provide that this be issued by the clerk of the District Court in which the action is pending, that service can be taken within the area in which that court's subpoenas run; if not, then by the clerk in the district where it is to be taken.

PROFESSOR SUNDERLAND: I think the rule is wrong on that point.

THE CHAIRMAN: Yes. In other words, why go to the clerk of a court that doesn't know anything about the case--

PROFESSOR SUNDERLAND (Interposing): You shouldn't.

THE CHAIRMAN: --to get a subpoena which may be the basis for contempt, when the very judge in the court where the action is pending has power to issue a subpoena within that area?

PROFESSOR SUNDERLAND: That doesn't make sense.

THE CHAIRMAN: No. That is the way it works, and that

is why I made that comment.

JUDGE DONWORTH: I am informed that the protective effect of the last sentence in (d)(1) has been nullified by a local rule in the Southern District of New York to the effect that an order of court may be had ex parte and without notice for just this sort of documents.

MR. DODGE: That is the way it is always done, isn't it, by notice and motion for a subpoena?

JUDGE DONWORTH: This was intended to involve discretion of the court and not an ex parte ruling.

THE CHAIRMAN: My suggestion is that you strike out the last sentence in subdivision (1) of Rule 45(d) and then add after the word "therein" words to this effect: "or demanding the production of documentary evidence"; then that the Reporter revise that provision appropriately and bring it back to us so as to make it clear that the clerk issuing the subpoena may be the clerk of the court in which the action is pending, if it is within the statutory limit of a hundred miles, or whatever it is; and, barring that, then you go to the clerk of the court in the place where the deposition is to be taken. I don't know just how to phrase that, but that is a detail.

MR. DODGE: Reserving the power of the court to quash or modify the subpoena.

JUDGE CLARK: That was what I was going to speak of. If you look at our suggestion on page 134, you will see that we

provide the protective provisions of (b).

DEAN MORGAN: Would that be necessary if you just drop out the last sentence? Wouldn't all the provisions of paragraphs (a) and (b) apply to the subpoena in (d)?

THE CHAIRMAN: You don't need any protective provisions. The subpoena isn't worth anything except as a basis for contempt proceedings, and if a man doesn't obey it, you go in to the judge in the court whose clerk has issued the subpoena and ask to have him compelled to testify or punished for contempt. That automatically brings before the judge the question of whether the subpoena is a reasonable one or not. I had many cases of that kind in practical experience, without any protective rule at all. It just automatically works that way. You don't need any protective provision.

MR. DODGE: Why wouldn't that apply under (b) also?

DEAN MORGAN: That same thing would apply to (b), to the subpoena issued under 45(a), and you have the protection given specifically for that in (b). I thought it was not limited.

THE CHAIRMAN: The truth is, I think that would be true all the way through as a practical matter.

DEAN MORGAN: I should think, if you wanted to cover it, Charlie, you could say that the provisions of subparagraphs (a) and (b) shall be applicable to these subpoenas.

JUDGE CLARK: That is what we did say on 124.

DEAN MORGAN: (a) and (b)?

JUDGE CLARK: We said, "but in such event will be subject to the protective orders set forth in subdivision (b) of this rule."

DEAN MORGAN: But it seems to me you want the provisions of (a) in there so as to make no doubt that the subpoena can require the production of documentary evidence. You see, if you strike out the second sentence and say, "the provisions of (a) and (b) should be applicable", I think that would be the way to do it.

JUDGE CLARK: Yes, that is the way I have that.

THE CHAIRMAN: Have we got the effect that we want to bring about clearly stated, so we can vote on it, leaving it to the Reporter to revise the verbiage and bring it back to us at the next meeting?

MR. LEMANN: The effect is to eliminate the requirement of an order of court for the production of documentary evidence on a taking of a discovery deposition.

THE CHAIRMAN: That is one effect. The second is to take care of the point I have made that you ought not to go to the clerk of the district in which the deposition will be taken if the original subpoena of the court in which the action is pending runs in that area. The third is that the protective provisions, (b) or whatever they are, ought to be referred to or renewed in (d). Those are the three things.

MR. LEMANN: Of course, the fourth thing would be to incorporate Mr. Sunderland's language--

PROFESSOR SUNDERLAND (Interposing): With reference to 26(b).

MR. LEMANN: --that the report as adopted would cover Mr. Sunderland's suggestion.

THE CHAIRMAN: Are we ready to vote on that?

MR. LEMANN: I should like to ask first if there are many districts where you can go a hundred miles and get out of the district.

SENATOR PEPPER: There are a great many in our part of the world. The District of New Jersey and the Southern District of Pennsylvania are just across the Delaware, and the District of New Jersey and the Southern District of New York are just across the Hudson.

PROFESSOR SUNDERLAND: Northern Indiana is all within a hundred miles of Chicago.

THE CHAIRMAN: In New York, you can go a hundred miles over into New Jersey.

MR. LEMANN: And get in three or four districts, I guess.

JUDGE DONWORTH: I am told that a Philadelphia subpoena runs in downtown New York but not in uptown--a hundred miles.

SENATOR PEPPER: I move the resolution containing the four matters that have been specified, plus the language

suggested by Mr. Sunderland, and that the whole thing be referred to the Reporter for restatement.

... The motion was regularly seconded ...

JUDGE CLARK: Just a minute. Mr. Moore is trying to instruct me here as to the statute, and I must say I can't get it immediately. Perhaps he had better state it.

PROFESSOR MOORE: Mr. Chairman, my understanding is that the statute which authorizes the subpoena to run outside the district and compel a person to attend within a hundred miles applies only to compel him to attend court. I doubt whether it applies to a deposition hearing.

MR. HAMMOND: I was going to raise the same point. Here is the statute, but it doesn't say. It says "Subpoenas for Witnesses"; page 654 there.

THE CHAIRMAN: "Until September 9, 1928," (I don't know what that means) "subpoenas for witnesses who are required to attend a court of the United States may run into any other district."

JUDGE CLARK: Read at the very end, after the date--the last two sentences.

THE CHAIRMAN: The end of the statute: "Provided that in civil cases no writ of subpoena shall issue for witnesses out of the district in which the court is held at a greater distance than 100 miles from the place of holding the same without the permission of the court being first had upon proper

application. After September 28, subpoenas for witnesses who are required to attend a court of the United States in any district may run into any other district, provided that in civil causes the witnesses living out of the district in which the court is held do not live at a greater distance than 100 miles of the place of holding same."

There is another Federal statute that provides expressly for subpoenaing witnesses to appear to give depositions. We ought to have that. It was before these Rules were adopted. That is provided for. Whatever the statute says, maybe we could provide for it.

JUDGE CLARK: I think that is true.

JUDGE DOBIE: That hundred-mile provision is very important to us, where a court sits in seven places and you haven't any divisions. For example, I had a suit that was brought in Danville, where the plaintiff lived in Lynchburg, where sympathy was very strong for him. The reason he brought it in Danville was that he had to get four witnesses in Winston-Salem, and that was the only place in the district within a hundred miles of Winston-Salem.

THE CHAIRMAN: You see, the real object of this statute, about a hundred miles, was not so much how far the writs should run as to how far the witnesses should travel.

DEAN MORGAN: (e)(1) talks about a subpoena going without the district within a hundred miles.

THE CHAIRMAN: That is for hearing at place of trial.

DEAN MORGAN: Hearing or trial specified in the subpoena. The subpoena will tell him to come for a hearing before a notary public.

THE CHAIRMAN: "When any party in such suit applies to any judge of the United States Court in such district or territory where a subpoena commanding the witness therein to be named to appear and testify before said commission...." That is the perpetuation of evidence. There was a Federal statute (I can't lay my hands on it) which provided for writs of subpoena to be issued out of the Federal Courts to require a man to give a deposition.

JUDGE CLARK: I should think we could clearly make the provisions of (e) apply, if we want to. As a matter of fact, as you will see from my comment on (e), there is a little question whether (e) doesn't amend the statute, anyhow.

DEAN MORGAN: That is what I was thinking.

JUDGE CLARK: You think it does?

DEAN MORGAN: Yes.

JUDGE CLARK: I quite agree.

THE CHAIRMAN: Anyway, we agree that if the law permits it, we ought to provide in the Rules that if the deposition is to be taken within an area where writs of subpoena of the court in which the action is pending run, that clerk ought to issue the writ.

DEAN MORGAN: That is a fundamental principle.

THE CHAIRMAN: Beyond that, then the clerk of the court where the deposition is taken. We will pass the resolution with the understanding that the Reporter will check that up and iron it out and come back here with a provision. All in favor of the resolution say "aye"; opposed, "no." It is carried.

JUDGE CLARK: If I may, I shall bring up this little question on (e).

THE CHAIRMAN: That is subdivision (e) of Rule 45?

JUDGE CLARK: That is it, and section (1). In our notes we have said that the substance of this statute (which is 28 U.S.C. s654) is continuous. Actually, the wording here makes in one respect a modification which, in the case where it applies, might be important. I suppose our note may be a bit misleading, because we don't in this aspect substantially continue the statute. That is, we vary it. That one case is that the statute makes the important distance, the distance a hundred miles from the place of living, and we have made it a hundred miles from the place of trial to the place of service. To take the instance we put here, "Thus it has been argued that under the statute a witness living in Washington, D. C., could not be served with a subpoena in New Haven, Connecticut, where the subpoena was issued by the Southern District of New York." They catch him in Connecticut within 75 miles of the place of

trial; his residence is in Washington, which is more than a hundred miles away. Under our rule that service, I take it, is clearly good; that is under the terms of our rule; under the statute, probably not.

THE CHAIRMAN: What you mean is that your note is wrong. You don't mean any amendment to the rule.

JUDGE CLARK: I should think not.

MR. LEMANN: Suppose this fellow lives in Washington and runs up to New Haven for a day, and you serve him with a subpoena to give his deposition in New York. If he hadn't run up to New Haven for a day, you couldn't have made him go to New York.

THE CHAIRMAN: Subdivision (d) says that "A nonresident of the district" (that is the fellow you are speaking of) "may be required to attend only in the county wherein he is served with a subpoena, or within 40 miles from the place of service..."

JUDGE CLARK: That is a subpoena for a deposition.

THE CHAIRMAN: Oh, yes.

JUDGE DOBIE: Subpoena for a non-jury hearing, I suppose.

MR. LEMANN: I think that applies even to 30. I should also like to ask if I could be served with a subpoena today to testify in the District of Columbia next week.

DEAN MORGAN: Why not?

JUDGE CLARK: In a criminal matter.

MR. LEMANN: Could I be required to stay here next week? I have had that question put to me recently. Do you know the answer?

JUDGE CLARK: Under rule (e), I guess you could be in a civil case.

THE CHAIRMAN: We are not within a hundred miles, are we, of the District?

JUDGE CLARK: Of the District of Columbia.

MR. LEMANN: We are right in the District.

THE CHAIRMAN: I was thinking of our being in New York.

MR. LEMANN: I am here, and if I am served with a subpoena to appear and testify next week, do I have to stay here until next week?

THE CHAIRMAN: That has always been so.

MR. LEMANN: Suppose I am served with a subpoena to testify next month.

JUDGE DOBIE: You can go and come back. You don't have to stay here. You can go home and come back.

MR. LEMANN: I have just had that question up. I didn't check it myself, but my associate counsel who advised me, checked it and said we couldn't do it. I have a witness who lives in Florida and comes over to New Orleans on business visits every now and then. I am going to try the case in New Orleans in July. I said to my associate, "We will serve this fellow with a subpoena on one of his visits here so he will have

to come back, and we won't have to go to Florida and examine him."

DEAN MORGAN: He is under privilege.

MR. LEMANN: He is on his own business. My associate counsel cited me a case that said you couldn't do it, that the fellow didn't have to come back, that you couldn't make him do that.

SENATOR PEPPER: You would have to tender him with hotel accommodations, too, unless he is to sleep in the police station in the meantime.

DEAN MORGAN: Practically all the cases say there is no privilege in state courts in a case of that kind.

MR. LEMANN: I can serve him today with a subpoena to come back in July, and he will have to come back in July and testify. That is a little tough on him.

DEAN MORGAN: It may be tough on him, but that is the question you are talking about. It is a question of power.

MR. LEMANN: I have been cited at least one case on the subject that said you couldn't do it. We decided we would go to Florida and do it. I am going to wire home that we don't have to go to Florida. That is fine. We will catch him in New Orleans several times between now and July. He will have to come back to us; we won't have to go to him.

DEAN MORGAN: Unless you have a peculiar statute.

MR. LEMANN: This is a suit in Federal Court.

DEAN MORGAN: There is no privilege there as far as I know, unless you come in on judicial business.

SENATOR PEPPER: Mr. Chairman, what are we on at the moment?

JUDGE CLARK: We are on the meaning of a rule we wrote in 1936 or so.

DEAN MORGAN: We don't know what we mean yet, so I think the Reporter had better clear it up.

JUDGE CLARK: I remember that in a case where I wrote the decision, I asked what it meant. (Laughter)

JUDGE DOBIE: Did you answer yourself?

SENATOR PEPPER: Which rule is it?

DEAN MORGAN: He can't remember what answer he gave.

JUDGE CLARK: I can't, as a matter of fact. I think I ducked it, as usual. Here is what I said in that application of Tracy that was cited. This was a case trying to subpoena the union leader, Dan W. Tracy, and bring him up to New York. I think they caught him in New York. As I remember it now, he was attending a big banquet and they served him in New York to appear in New York; his residence was in Washington. He fought it on the ground that his residence was in Washington.

I said, "Furthermore, although it was not discussed below, there may be a question of law whether an attendance before a master in New York City can be compelled of a witness resident in Washington, D. C., and served while only temporarily

in New York at a public meeting some days prior to the day attendance is commanded." That is Monte's very case. "This would concern the meaning of the word 'live' in 26 U.S.C. 26 limiting the testimony of non-residents to those who do not live at a greater distance than 100 miles of the place where court is held, as well as the question whether Rule 45(e) of the new Federal Rules change this statute."

THE CHAIRMAN: I tell you, at the rate we are going now, we will finish Friday night about eleven o'clock. This matter of a fellow being on a temporary round and making him stay in the area or go back home and pay his own travelling expenses back is a new problem. I suggest that it be referred to the Reporter. He can look up the prior statutes in the Federal law and come back here with a supplemental report at our next meeting. If he thinks it ought to be doctored with an order to prevent an injustice, he can submit a proposal. I don't think we are prepared to settle it, because we don't know what the law is, what the old statutes were, or anything.

PROFESSOR SUNDERLAND: I make that motion.

THE CHAIRMAN: That it be referred to the Reporter for a supplemental report.

SENATOR PEPPER: Second.

THE CHAIRMAN: If there is no objection, it is so ordered.

JUDGE CLARK: I think that covers it under that.

THE CHAIRMAN: We will pass now to Rule 46. There is no harm in that, is there?

JUDGE CLARK: Rule 46, we say, is working pretty well, we think, and therefore we have no suggestion, but we do quote Dean Wigmore so you will see what he has to say. He says, "This identification of the purposes of the two expedients is a fundamental error", that we haven't understood what we were doing, and so on.

DEAN MORGAN: I think we knew what we were doing, all right, in that particular case.

JUDGE DOBIE: I move we pass it.

THE CHAIRMAN: With no objection, we will go on to 47.

JUDGE CLARK: I don't think there is anything there. There are several of these rules that I think we can pass rather rapidly.

THE CHAIRMAN: Rule 48.

JUDGE CLARK: Same.

THE CHAIRMAN: We pass to 49.

JUDGE CLARK: I think there is nothing in 49 that I know of.

THE CHAIRMAN: Rule 50.

JUDGE CLARK: In 50 there are several suggestions of one kind or another. Rule 50, of course, is a rather important rule originally, and we have made some suggestions of considerable importance. First, perhaps the most important suggestion

we make is in Comment III.

THE CHAIRMAN: What section does this relate to?

JUDGE CLARK: I want to go back and take them in order, so let's start in with 50(a).

DEAN MORGAN: Do you think there is any question about the power of the court to dismiss without prejudice even when the motion is for a directed verdict? I should suppose there is no question he could do it if he wanted to. Certainly it has been done on me several times.

JUDGE DONWORTH: That really draws the distinction between final judgment and a nonsuit.

DEAN MORGAN: That is right, or the court doesn't want to preclude the man. He may be able to fill this later, although he doesn't now say that he will be able to do it. I should take it the court had the inherent power to do that. I don't think we need to say so.

JUDGE CLARK: The question, of course, is whether there is any doubt about the rule. Professor Atkinson, the draftsman of the Missouri rules, sent in the suggestion, and Mr. Moore, I guess (was it you), has included in his book that there is a difference between the two rules. Have you?

PROFESSOR MOORE: No, I wouldn't think so.

JUDGE CLARK: You don't? It is a question. I guess we all agree what the law ought to be. It is whether the law or the rule is that way. If any change were made, it would be

to add at the end of this section: "Upon motion for a directed verdict by a party opposing a claim, the court, whether so requested or not, may dismiss the claim without prejudice if justice so requires."

THE CHAIRMAN: Under the existing law, if the fellow says he thinks the motion for a directed verdict will go against him, he can ask the court, under Rule 41, to dismiss without prejudice, and it is in the discretion of the court to do it.

JUDGE DONWORTH: It ought to be.

THE CHAIRMAN: Are there any cases in which it has been decided that he can't?

PROFESSOR MOORE: No.

JUDGE CLARK: Mr. Moore says "No."

THE CHAIRMAN: Under the old system, I have frequently actually been in cases where the defendant makes a motion for directed verdict; the plaintiff sees matters are going against him, and he says, "Hold on, Your Honor." Even though the judge has said, "I think I shall have to direct a verdict," he speaks up and says, "I should like you to grant leave, then, to dismiss without prejudice under Rule 41" (or whatever the rule then was) "because I am caught unawares on the effect of one, and I ought to be a right to retrial." I have never known any difficulty about that.

JUDGE DOBIE: I should think he would have that power

under 41, but if there is any obscurity--

THE CHAIRMAN (Interposing): There being no decisions holding that he hasn't, it is a matter of discretion whether he will or not. The judge can even suggest it himself, if he wants to; he can invite the man to move for dismissal without prejudice. If justice requires, the judge ought to call his attention to his right to do that, and he would be unfair to his client if he didn't get that right. A good judge would do it.

JUDGE CLARK: Would you think it desirable and would this be the kind of case where we would make a note and say that this has been suggested, but we recommend no change because we think it is included?

THE CHAIRMAN: Exactly.

DEAN MORGAN: That is it.

THE CHAIRMAN: That is just exactly what I think our Rules ought to do, because a lot of good, honest people have made these suggestions.

DEAN MORGAN: Surely.

THE CHAIRMAN: We should not just pass them over.

JUDGE DOBIE: I move it be left as it is.

THE CHAIRMAN: Of course, I don't think you have in your notes to explain our action as against every little picayunish suggestion that has been made, but where there is some substance to it, let us say we concluded not to accept

that suggestion and amend 50 because it is perfectly plain under 41 that the plaintiff has a right to jump in and ask permission to do that or even for the court to suggest it. That will satisfy the fellow who made the objection, and it will educate the bar. If there is no objection, we will not consider that amendment. Is there anything else in 50(a)?

JUDGE DONWORTH: Mr. Reporter, in that note you are going to add, you have in mind, the express provision in 41(b), reading, "Unless the court in its order for dismissal otherwise specifies"? You have that in mind?

JUDGE CLARK: Yes.

JUDGE DONWORTH: I think that is right.

JUDGE CLARK: It would be with prejudice unless steps are made by the court to make it without.

Comment II is still on that same 50(a), and Wigmore says that we have three different things here and ought separately to number them, that each is a different thing. In one sense he is right. I think they are three different things, but I don't know whether that necessarily means that we have to subdivide them.

JUDGE DOBIE: I don't think that is vital.

THE CHAIRMAN: No. We will pass on, then, to 50(b), is it?

JUDGE CLARK: Yes, subdivision (b).

MR. LEMANN: 50(a).

THE CHAIRMAN: We have just finished 50(a).

MR. LEMANN: Haven't you another on 50(a) on page 131?

JUDGE CLARK: Yes; Mr. Lemann is correct. It deals with what happens under (b), but we suggest an addition to (a) to bring (b) into effect. The situation is this: Under the present wording of the rule, subdivision (b) (that is the reservation of decision and considering it after the verdict has been brought in) does not come into play unless a motion for directed verdict is made at the close of all the evidence. It has been said that Rule 50 does not do away with the necessity for a motion for directed verdict in order to raise a question of the sufficiency of the evidence, but emphasizes that necessity, and a motion for judgment notwithstanding the verdict may be entertained only if a motion for directed verdict has been made. A motion for judgment notwithstanding the verdict, standing alone, does not present the question of the sufficiency of evidence for the trial judge, and obviously not for the appellate court. Normally, the careful practitioner will make a proper motion for directed verdict, but occasionally this will be overlooked, as is demonstrated in the Baten and Aetna Casualty cases, above.

We believe that the interests of expeditious litigation warrant the elimination of this rather technical requirement. This could be done by altering what is now the last sentence of Rule 50(a) to read:

"At the close of all the evidence, each party shall be deemed to have made a motion for a directed verdict on the ground that he is entitled to judgment as a matter of law. If a motion for a directed verdict is made at any other time or on any other grounds, the specific grounds therefor shall be stated."

In one way you could define what might be accomplished by this as expanding the scope of the position for judgment notwithstanding the verdict. Now your motion for judgment notwithstanding the verdict has to rely on a previous judgment for a directed verdict.

MR. LEMANN: According to these decisions.

THE CHAIRMAN: Why not? What do you do by this thing except to say as we now have it that if you move for an instructed verdict, you have to state the specific grounds for it? Now your amendment says that you are deemed to have made the motion, although you haven't made it, and you don't have to state any ground for it.

MR. DODGE: You can appeal from the judge's decision without ever having called the point to his attention.

JUDGE CLARK: It seemed to us that on the whole the way this is now going practically, it leaves a little trap for the foolish practitioner.

THE CHAIRMAN: I just don't understand what you are trying to do. As I read your amendment, it says, "At the close

of all the evidence, each party shall be deemed to have made a motion for a directed verdict...."

JUDGE DOBIE: So that he makes the motion later without having done it.

PROFESSOR CHERRY: This is piling one "deemed" on another. We have already deemed that the judge has reserved. Now we deem that he made what we deem he reserved, even though he didn't hear it.

MR. LEMANN: You don't deem he has reserved unless you have made the motion for directed verdict. Then you deem. This is to cover the case where counsel, in excitement, inadvertently fails to move for directed verdict. Then the jury comes in and brings a verdict against him. Then he wants to make a motion to set aside the verdict and give him judgment anyhow. He wants to make the same motion that he might have made for a directed verdict. The courts have held he can't do it after the jury has come in. I suppose the argument is that he ought to be able to do it at any stage of the proceeding, in effect, just as he can make a motion for arrested judgment. If he comes in at any time while the case is in the District Court, he should be permitted to present to the trial judge the question of whether all the evidence in the case is enough to support a jury verdict. What happened in these cases the Reporter cites is that the fellow failed to do it before the jury retired, and then it was too late to do it after the jury came in.

The Reporter proposes that you let him do it after the jury comes in. Is that a fair statement?

JUDGE CLARK: Yes, that is a fair statement, I think. May I call your attention to a still more recent case, which is found in my supplementary material on page 39, a rather interesting case? That is United States v. Harrell, in the Eighth Circuit, 133F.(2d) 504. In that case the court said: "Since the Government failed to move the trial court, at the close of the evidence, for a directed verdict on the ground that the evidence was insufficient to sustain a verdict for the appellees, and since the Government took no other equivalent action, it is not entitled as of right to a review of the question of the sufficiency of the evidence to support the judgment." It discusses these cases and goes into Rule 50 quite a little. That seems to be quite a flat statement.

"But the Government contends that the question is one which this court may, and should in this case, decide under the rule that a Federal appellate court, in order to prevent a manifest miscarriage of justice, may notice an apparent error not properly raised on the record, and with this contention we feel constrained to agree in the circumstances of this case."

They discussed it, and it ended up reversed.

THE CHAIRMAN: One of the things that we insisted on when we adopted Rule 50 was that when a man made a motion for

a directed verdict, he state exactly what he was talking about, so as to prevent trapping the other fellow or taking advantage of some technical omission which could be immediately cured. Now you turn around, and you don't have to mention the directed verdict or state any grounds. In addition to that, you say, "At the close of all the evidence, each party shall be deemed to have made a motion...." Then you say, "If a motion for a directed verdict is made at any other time or on any other grounds, the specific grounds therefor shall be stated." At what other time would you make a motion for directed verdict except at the close of the evidence?

JUDGE CLARK: At the close of the plaintiff's case.

DEAN MORGAN: That is the close of the evidence for that purpose, isn't it?

MR. DODGE: That is any other grounds.

JUDGE DOBIE: It has been done at the end of the plaintiff's statement of the case.

THE CHAIRMAN: It says in the rule that it can be made at the close of the evidence offered by the opponent without having reserved the right to reopen, and so on.

MR. LEMANN: This is the main argument that appeals to me. I just went through a painful jury case where I was a witness. If you are not trying jury cases all the time, my observation is that you have to be on your toes to watch your Rules, even now, and I have some sympathy with the idea that

the rules of the game are that everybody have a fair whack all through so that no advantage is taken. The motion for a directed verdict was made all right in this case, but I can see, under the pressure which lawyers are under, what happened, apparently, in four of five cases here on appeal might happen. We asked, "Why don't you let the fellow come in after the jury verdict and raise all the questions he could have made before? What is the harm?"

JUDGE DOBIE: You have the jury going out to consider their verdict, and all that, holding up the trial, when if that had been brought to the judge's attention, you might have obviated all that.

JUDGE DONWORTH: He is going to lie low on a vital point of the case that could be cured like that.

MR. LEMANN: That is the only thing.

JUDGE CLARK: Let me speak in answer to that. I suppose "on the ground that he is entitled to judgment as a matter of law" may not state all we have in mind. That language, of course, is practically the judgment notwithstanding the verdict ground. The real ground, of course, if anything were to be done, is that the evidence is insufficient in law to go to the jury. That is the only ground intended here. Any other ground would have to be expressly stated. That is the question here.

THE CHAIRMAN: That is the very kind of case where you ought to state your grounds.

JUDGE CLARK: If it is stated, of course it is stated. If it always happens that way, it is stated. I don't see that that is anything that is any particular warning to the Judge. That is always a question.

DEAN MORGAN: It is practically always argued. The judge asks, "Wherein is it insufficient?" and he has to tell him, and so forth. It seems to me this is just inviting motions of this kind.

THE CHAIRMAN: Afterthoughts.

MR. LEMANN: The plaintiff has closed and the defendant has closed, and the plaintiff moves for a directed verdict or the defendant moves for a directed verdict--either side.

JUDGE DOBIE: And under our Rules, the judge has given these instructions as the last thing, so that the man has all the notice in the world. "Have I issued all the instructions?"

MR. LEMANN: The suggestion is that the judge asks, "Well, what are these motions based on?" That is, if he gets them. It is the idea that he should have that opportunity. Both sides having closed, the defendant explains why he thinks the case hasn't been proved. The plaintiff says, "Well, Judge, I overlooked that. I grant that. Let me reopen this case." They then have an opportunity to reopen the case. I guess it would be pretty hard to get from most judges.

DEAN MORGAN: Oh, no. You get it right away, as a matter of course.

MR. DODGE: You mean after the jury has come out?

DEAN MORGAN: Before you send them out.

MR. LEMANN: Just on a small point.

PROFESSOR CHERRY: If there is any chance that he can make it good, he gets it.

THE CHAIRMAN: There is another thing about it. We have just been talking about a case where the plaintiff slipped on his proof of something, and somebody makes a motion for an instructed verdict and the fellow sees it is going against him and saves his bacon and justice by jumping up and saying, "Why, Your Honor, maybe there is a shortage of proof here that I can't supply, but instead of having a directed verdict, I want it dismissed without prejudice." What is the use of all that if you are going to have a motion for instructed verdict, I assume, made without pointing out any defect, and then the fellow loses his right to save himself that way? Then when the motion for a judgment notwithstanding the verdict comes in, he is gone. The only way the court can save him there is by an order for a new trial, which he might not be willing to do.

JUDGE CLARK: He can still move to dismiss without prejudice, if the judge wants to let him.

THE CHAIRMAN: After verdict?

JUDGE CLARK: Yes.

JUDGE DONWORTH: That would be unusual after verdict, very unusual.

THE CHAIRMAN: I guess we all know what the amendment is. Are we ready to vote on it? Is there more than one case, Charlie, in which a question of that kind came up in court?

JUDGE CLARK: Yes, I think that we have about four cases, as I have it in mind.

THE CHAIRMAN: Did they all hold that the appellate court had a right to?

JUDGE CLARK: I think most of them held that the appellate court didn't have a right. In United States v. Harrell the court said there was manifest injustice against the Government and went ahead notwithstanding the rule. I think the other three went the other way.

DEAN MORGAN: You see, this is just an invitation not to do anything until you get the record and find out whether you have a hole in it; that is all it amounts to. That is what the Government did in this case, undoubtedly. They got the record for some other purpose and then found this hole in it.

THE CHAIRMAN: Plaintiffs' lawyers will roar at this. They don't like directed verdicts, anyway, and now you patch this thing up so that you have a motion like that on you and you don't know it, and you don't know what the grounds for it are until after the case is all over.

MR. LEMANN: I think it rarely happens. I am surprised that it happens this often. The lawyers overlook it. Invariably in this system plaintiffs move for directed verdicts,

don't they?

MR. DODGE: It is their elementary duty.

MR. LEMANN: It is like washing your face when you get up in the morning.

THE CHAIRMAN: I think the Government ought to hire lawyers who know enough to move for a directed verdict. They never would have saved a private client's case by any such decision as that.

The question is on the adoption of this addendum to Rule 50(a) on page 131 of the Reporter's report. All in favor of the addition say "aye"; opposed, "no." It seems to be lost.

JUDGE CLARK: The next point is still on (b), and it is how the practice that we have set up in (b) would work with one or two developments. It is a matter that has caused some trouble.

THE CHAIRMAN: This is on 50(b)?

JUDGE CLARK: Yes, on the reservation of motion. May the appellate court act under (b) when, after the verdict, counsel has not renewed his motion or has not made a motion for a judgment notwithstanding the verdict. Judge Learned Hand and others have set out a practice which in effect is to consider that the failure of the judge to vacate the verdict and judgment is in effect a denial.

THE CHAIRMAN: Are you stating in another way that the question is whether, in order to have an upper court entertain

an application to set aside the verdict and to grant judgment notwithstanding the verdict, you must in the lower court have made a motion for judgment notwithstanding the verdict? Is that what you are talking about?

JUDGE CLARK: You must have renewed your claim after the verdict.

THE CHAIRMAN: By a motion for judgment notwithstanding. I am firmly convinced that it was our intention to require that the motion be made. The rule may not be certain enough, because it says he may move to have the verdict set aside.

MR. LEMANN: The Fourth Circuit decided it is not necessary. Personally, I don't see why you should have to make it over again. I understand Judge Dobie doesn't.

JUDGE DOBIE: I wrote the opinion in that case and followed Judge Hand in the other.

THE CHAIRMAN: It has been cleared up, has it?

MR. LEMANN: Four times.

JUDGE DOBIE: It has not been upheld. Each time they held there was not enough evidence. In the Halliday case they held there was very clear evidence that the man was totally disabled when, after the time he claimed, for three years he got a large salary as an automobile agent, going all over North Carolina--but we won't go into that.

THE CHAIRMAN: Then they haven't settled the question.

JUDGE DOBIE: In each case they dodged it, saying there

wasn't enough evidence. There is always enough evidence in the case of a disabled veteran.

MR. LEHMANN: Judge Dobie, isn't it fair to say that in each case they assumed that the point could be presented without having renewed the motion in effect for directed verdict? Then, when they got to considering, they said, "Well, there is no ground to set aside the verdict on the facts of the particular case."

JUDGE DOBIE: In most cases, as I remember it, they said, "We won't go into it because there isn't enough evidence for the jury."

THE CHAIRMAN: They said, "It isn't necessary to consider the point, because even if you had made the motion, there isn't enough evidence." I think we ought to clear it up one way or the other.

MR. DODGE: I hadn't supposed that we meant to require it. We say that the defendant may, but in many cases the defendant would be perfectly satisfied, after a lengthy argument on his original motion, that he couldn't persuade that judge to change his view and would say, "I will tell my rights on the appeal," and let it go. If there is any doubt about his ability to do that, I think we ought to clear it up.

JUDGE CLARK: You will see suggestions on page 133. There is a quotation from Judge Hand in the Conway case sent in by a gentleman. We took the general suggestion and put in a

recommendation at the end of Rule 50(b). Then we dropped a footnote for a more lengthy one. I should think the shorter one did it.

DEAN MORGAN: What is the use of having a 10-day limit on the motion?

MR. DODGE: That is Judge Learned Hand's statement. Judge Hand's statement was a very sensible one.

MR. LEMANN: I thought it disposed of it.

JUDGE DOBIE: We debated it at great length in the Fourth Circuit, and all of us agreed on it--Soper, Parker, and myself. I wrote the opinion in the Halliday case. One thing I said was that if we are wrong, for God's sake, let's get the Supreme Court to decide. I said, "I am satisfied in this case there certainly isn't enough evidence that that fellow was disabled." I am still satisfied of that, the Supreme Court to the contrary notwithstanding. If you know anything about disabled veterans' cases, you know that one-half scintilla is enough--more than enough.

JUDGE CLARK: You are not suggesting that the Supreme Court may have committed an error?

JUDGE DOBIE: No, no; nothing of that kind.

JUDGE CLARK: The Supreme Court, as I understand, has granted certiorari four times to bring up this matter. Each time they have said, "We do not reach it because it should have gone to the jury anyhow."

DEAN MORGAN: I think it must be cleared up, but you have to take this 10-day limit out of here, haven't you, if you don't have to make it? What is the use of the 10-day limit if you go right up without a motion?

THE CHAIRMAN: You see, the inconsistency of that treatment is that our whole rule says, by its express terms, it reserves the question. The court's action in denying the motion to direct is equivalent to saying, "I don't rule on it at all. I reserve decision on it." Now I make the point that if you don't make your motion for judgment notwithstanding the verdict, you haven't any error on the appeal because the court has reserved decision on the point and never has been forced to make one. The whole basis of this rule is that the court is deemed to have reserved decision and made none. How can you reverse him on appeal?

MR. LEMANN: When he enters judgment on the verdict, isn't he in effect then denying the motion for directed verdict?

THE CHAIRMAN: The judgment is entered by the clerk 10 days before this motion is made. It goes in automatically. The judgment is entered right away, and the verdict is in. The court himself doesn't make any ruling unless he is asked to. He says, "I reserve decision on it." He keeps on reserving it and never does pass on it until it is put up to him in a motion. If you don't make that motion, when you go to the Circuit Court of Appeals, you have to show error, and the only thing you can

show is that you made a motion to direct and the court said, "I won't decide it now; I will reserve it." How can there be a reversal for error if you haven't pressed the court by a motion to decide that reserved question?

JUDGE DOBIE: The only reason we put that in there in connection with that case was to get around that hideous local decision.

THE CHAIRMAN: That is why we had to put it in that way.

JUDGE DOBIE: I am in favor of clearing it up now.

MR. LEMANN: What happened in these two cases in the Circuit Courts of Appeal, one of them being Learned Hand's decision?

JUDGE CLARK: They all followed that view.

MR. LEMANN: What happened? How did they get away from the technical difficulties Mr. Mitchell has just suggested?

JUDGE CLARK: They held--

MR. DODGE (Interposing): The judge reserved his decision.

JUDGE DOBIE: That there was enough evidence to go to the jury. It was just affirmed.

MR. DODGE: He directed the verdict.

JUDGE CLARK: Judge Hand said: "It is not necessary that he should deny the motion once again; his failure to vacate his first order is enough."

THE CHAIRMAN: The trouble is that the Judge entirely overlooked the fact that the rule is drawn on the whole theory that the question isn't decided; it is reserved. The rule says that.

MR. LEMANN: The point I was asking is whether the Courts of Appeal have overlooked the point that you have made. That doesn't indicate that the point isn't good.

THE CHAIRMAN: The point is as plain as daylight under the terms of the rule. I don't think they have. They have simply said, "We won't pass on the question whether it is necessary to make the motion or not, because the evidence isn't good enough to go to the jury anyway."

MR. LEMANN: Hand didn't say that. I don't believe the others did. I don't know. Hand didn't say that. He said directly that he didn't need to do it over again.

JUDGE DOBIE: We said it, directly citing the Conway v. O'Brien case.

THE CHAIRMAN: Judge Hand's opinion is erroneous, I think, in assuming that the court has really made a decision on a motion to direct.

JUDGE DOBIE: It really has, Mr. Mitchell. It really has reached a decision on it, and we just put this reservation thing in here, as I said, on account of the Redman case, you know.

DEAN MORGAN: Under our Rules, Mr. Mitchell, doesn't he reserve decision only in the case where he refuses to grant

the motion?

PROFESSOR CHERRY: If he doesn't grant it.

THE CHAIRMAN: No. "Whenever a motion for a directed verdict .... is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion." He is just saying, therefore, "Well, the common law rule that the Redman case decision was justified on, was the practice of the lower court, to reserve decision, not to decide the question really, and to take the verdict subject to a later determination as to whether the evidence was sufficient or not." We did that and had to do it that way, so it is quite apparent that on the face of the rule, it is correct to say the judge has made no decision; he has reserved it.

PROFESSOR SUNDERLAND: When he enters the judgment, in effect he makes that decision.

DEAN MORGAN: He doesn't enter it.

THE CHAIRMAN: He doesn't enter it.

PROFESSOR SUNDERLAND: It is his judgment. They have to appeal from that judgment.

THE CHAIRMAN: Let me ask you this: If the court says, "I will reserve the question for decision," and the rule says that the way you ought to bring up the point again to decide the reserved question is by motion, and no motion is ever made and the court's attention is never called to that and isn't asked

to rule on it, just because under some other rule the clerk has entered a judgment the day after the verdict was made, that is no action of the judge. It doesn't amount to a decision of the reserved question.

PROFESSOR SUNDERLAND: He says he reserves the decision, and then finally he enters a judgment, we will say, for the plaintiff, who isn't entitled to it. When he enters that judgment, the judge is responsible for the judgment. When that judgment is entered, it involves the error in regard to that case.

THE CHAIRMAN: Do you think there is an error by the court in that, when the question of deciding the reserved point is never brought to his attention and he is never assumed to act on it, especially when the Rules provide a means of bringing it to his attention? Would you expect the judge of his own motion, without an argument for a directed verdict, to go back and scratch his head after the verdict is in, without the parties saying a word to him, and make a decision on that reserved question?

PROFESSOR SUNDERLAND: If the parties don't raise the point, they don't get a chance to argue it, but the judge makes the decision.

THE CHAIRMAN: I don't think he makes the decision at all.

JUDGE CLARK: Could I go away from this a little?

Whatever the rule may mean--and that is a little water over the dam now--isn't this in the interest of expedition, anyway? It seems to me that what we were trying to do was to get away from the Redman case, and now we are away from it. Now why can't we think of what is desirable? It does seem to me that this is really very desirable. I don't see that there is any question of calling this to the attention of the judge or anything. The judge, as we know, practically, has acted.

DEAN MORGAN: We don't know that, Charlie. In numerous cases I have tried, I have asked for directed verdicts and had the judge to say, "I am going to deny it now because I would like to have the record before me on this. When I get the record before me, I shall know whether your contention or the plaintiff's contention is right as to what the evidence is," and so forth.

JUDGE CLARK: Then he does nothing more about it. It goes to the upper court then, and it is a clear error and can easily be corrected. Yet you have to go back to the old Slocum idea there and have to try it over again. It seems to me it is just a waste of judicial effort.

MR. LEMANN: If these decisions are wrong, the appellant is out of luck, isn't he? He just failed to renew that motion; he has just lost his case because he didn't renew a motion that he had once made. If Mr. Dodge is right (I have no experience to speak of with jury cases), jury lawyers do assume

that once they have made the motion, they don't have to repeat it. If the interpretation suggested here of the Rules is correct, these decisions are wrong, and that fellow is out of luck if he doesn't appeal. He has to appeal.

JUDGE DONWORTH: It seems to me that the point is that in the Slocum and Redman cases, it was held that the sole remedy of the defeated defendant was a new trial. We made a rule here that if he moves within 10 days after the verdict to renew his motion, then he is not bound by the Slocum and Redman cases to get only a new trial. He can go right back to the essence of his original motion. The question is, are we right in limiting his recourse to this short-cut method, to a motion made within 10 days after the verdict? It seems to me that is the point.

MR. DODGE: Did the Circuit Court of Appeals enter judgment for the defendant in that case?

JUDGE CLARK: That is what they did, didn't they?

PROFESSOR MOORE: Yes.

MR. LEMANN: Page 111.

MR. DODGE: Treating this later determination as implying a decision by the District Court on the motion or by the appellate court.

JUDGE DOBIE: In the Conway case they did; they entered judgment for the defendant, and I know we did in the Halliday case. We entered judgment for the United States. It was an

insurance case.

MR. DODGE: Is the Reporter's amendment designed to make it clear that it goes to the Circuit Court of Appeals with the power to make final judgment, if the case has been fully tried?

JUDGE CLARK: That is the intent. It is to embody what the Circuit Courts have done in these cases.

MR. DODGE: If there is any doubt about the meaning of the rule, I should think we should do that.

JUDGE CLARK: As I understand it, quite a little sentiment is expressed here that those cases ought to be overruled. My idea was that that was a good way to do it, a short-cut. Really, what it comes down to, I take it, is this: Practically, you can assign as error the failure to direct a verdict--in short language.

DEAN MORGAN: That is right. Then, if the appellate court doesn't have power, you get a new trial. That is your notion.

PROFESSOR CHERRY: Mr. Reporter, do you quite do that? You speak about the denial of the motion for a directed verdict. Now our rule invites the judge not to rule on the motion at all. Suppose he actually reserves, as distinguished from being deemed to reserve, when he denies. This amendment wouldn't take care of that, would it?

THE CHAIRMAN: No.

PROFESSOR CHERRY: You are predicating all this in this amendment on an actual ruling and disregarding any question of its being brought up again later. But suppose he does what we have invited him to do in the rule as it now is, and he says, "I will do as that rule says; I am not going to pass on it at all." How are you going to deal with that situation?

JUDGE CLARK: In the first place, if the wording isn't sufficient, that can be discussed and worked on. This is the question of the principle of the thing. I have no doubt at all that the judge actually acts on this. The idea that the clerk is making the judgment is just absolutely unreal. I have sat in jury cases. I can't conceive of any clerk that I know of taking a verdict and entering a judgment unless the court says so.

DEAN MORGAN: What are you talking about? That is the way it always is done--practically always.

THE CHAIRMAN: I practiced law in the Federal Courts in the Northwest for twenty-five or thirty years, and they had a rule there or a practice of the clerk's entering judgment on the verdict forthwith, and the judge didn't have a thing to do with it.

DEAN MORGAN: Rule 58 says so in so many words.

JUDGE CLARK: That is why the judge has accepted the verdict. It is part of the process.

THE CHAIRMAN: What do you mean by "accepted"? Let's be accurate about it. He doesn't do anything about it. The

rule doesn't provide that he shall.

MR. LEMANN: In this case that I was speaking of in Texas, what you suggest happened, Mr. Cherry. He said, "It is always my practice in the case of any complicated case to take the motions for directed verdict made by both sides under advisement. I will take them under advisement." He took them under advisement. The jury brought in a verdict. I don't think it occurred to either side that they had to come in and renew those motions. He then said, "I will hear argument after the jury verdict has been brought in. I will hear argument on this verdict and the case." He heard verbal argument and had briefs. Then he rendered a judgment sustaining the verdict.

I would have supposed, knowing very little about judicial procedure, that where a judge did what you suggest and what this judge did, especially reserving the motions for directed verdict, that he would then in due course afterwards render a judgment, Professor Cherry.

DEAN MORGAN: You just visualize this thing in an ordinary court now. The court says, "If I deny this motion, I have to reserve." Do you think he is going to take the time and hold the jury there all the time necessary to determine then whether he ought to direct the verdict? Certainly not. He passes it as a matter of course, and you get your record and make your motion for judgment notwithstanding the verdict. That has become a common practice, and that is the only place

he really ever considers it.

THE CHAIRMAN: There is something fundamental that we are forgetting. If we provide for the rules to work this way, if you make a motion for a directed verdict and it is denied, the judge rules on it right then and there and it is denied. Under the Redman case, you can't get the judgment notwithstanding the verdict. The only thing that the Supreme Court said in that case and in the case that preceded it was that at common law there was a recognized practice for a judge to reserve decision, to take the verdict subject to a later ruling on the motion to direct, and that if you do it that way, the trial court and the Court of Appeals has a constitutional right to grant judgment notwithstanding the verdict, and that if you don't do it that way, it is a violation of the Constitution and a denial of a jury trial. That was the effect of the Redman case, and they have never gone beyond that.

We took the Redman case literally and provided for reserving the point. Then we took another step: Even though he said he wasn't going to grant it or deny it, we said that shall be equivalent to holding the case over for later disposition, reserving it according to the common law. It was done that way so that it would be constitutional and proper in the Federal Court to get a judgment notwithstanding the verdict.

The Reporter says that we dodged the Redman case, so we can go right back now to the thing the Redman case says

can't be done and the earlier decisions say can't be done. We are going to wipe out all this business about reserving and treat, as Judge Hand did erroneously, an actual ruling made before the verdict was rendered denying it, and not reserve it. If you break down the structure in this rule about deeming the question reserved and requiring the court to rule on it afterward, leaving it as an undecided question until after the verdict, you have knocked down that machinery, and you are going to make your rules in such shape that they do not comply with the requirements of the Redman case. How can we say that we have dodged the Redman case up to date and then turn around and knock down all the machinery in the rule that enables us in the Federal Court to get a judgment notwithstanding the verdict? The Supreme Court would have to overrule the Redman case and say it isn't necessary to reserve the question for later decision before that rule would be safe. If you think they have done that, all right; but I haven't seen any decision to that effect.

MR. DODGE: The real object of this rule was to enable the appellate court to enter final judgment.

THE CHAIRMAN: That is it.

MR. DODGE: It was not merely for a new trial.

THE CHAIRMAN: That is it.

MR. DODGE: Are you sure in Learned Hand's case they did enter final judgment and not merely order a new trial?

DEAN MORGAN: They sent it back?

PROFESSOR MOORE: That was the mandate, sir, but the case went to the Supreme Court and was reversed on the ground that there was sufficient evidence to go to the jury.

PROFESSOR CHERRY: The Supreme Court didn't reach the question.

DEAN MORGAN: It hasn't really been decided.

MR. LEMANN: What did the C.C.A. decide? Did they order a new trial or did they enter final judgment?

PROFESSOR MOORE: The mandate was judgment for the defendant.

MR. LEMANN: That is a final judgment.

PROFESSOR MOORE: Yes.

MR. DODGE: What you have in mind, Mr. Chairman, is that in order to save his rights, the party must proceed in this way.

THE CHAIRMAN: That is the way it was intended, and I think it is manifest on the face of the rule that the machinery we have set up in compliance with the Redman case establishes a reservation of the question. It says that even though the court says he is denying it, he really isn't deciding it; he is reserving it. We leave the case in such shape, whether he expressly says he has reserved it or whether he has merely been deemed to reserve it, that the District Court hasn't made a ruling on it, and you can't get a reversal in the Court of

Appeals on any alleged error when the court hasn't ruled on it.

MR. DODGE: Why couldn't you do it in the manner the Reporter has suggested, which really seems to me just makes another presumption that the judge has denied the evidence. The first is the presumption that he has taken it under consideration. Then you come along and say that you presume he has denied it after having taken it under consideration. That is, in effect, what he is proposing here.

THE CHAIRMAN: You mean it is the judge's job to stir the lawyers up and bring the point before him? Is that it?

MR. LEMANN: No. I think we are just providing a means by which we are protecting the lawyer, as far as we can, when he has once made a motion for directed verdict. He has made a motion for directed verdict; the judge has denied it. That is what has happened. After the judge has denied it, the case has gone to the jury, and the jury has brought in a verdict. The lawyer says, as Mr. Dodge says many of his acquaintances feel, there is no use in bringing this up again. I argued it fully before the judge, and he refused to direct the verdict. He proceeds to take his appeal. Then all of a sudden he is confronted with the idea that these new Rules put him out of luck, that he should have repeated his motion, and the Fourth Circuit have said they don't think so.

THE CHAIRMAN: I think you are stating their decisions strongly. They haven't decided it. It didn't confront them,

because they said it wasn't necessary.

MR. LEMANN: I was just taking it from the Reporter. He said they had decided it.

JUDGE CLARK: The Supreme Court said that. The Circuit Courts have certainly said the other.

MR. LEMANN: I was taking the statement from what he said. From Hand's opinion, his language indicates to me that he said that.

MR. DODGE: Here is Judge Dobie's case. Did that go to the Supreme Court on certiorari?

JUDGE DOBIE: Yes. They reversed it on the ground that there was enough evidence to go to the jury.

MR. DODGE: You entered a final decision in that case although they hadn't moved.

JUDGE DOBIE: We certainly did.

JUDGE CLARK: Here is the original Learned Hand case, showing the judgment reversed and the complaint dismissed.

MR. LEMANN: If the statement by the Reporter of the results reached by the Circuit Courts is correct, we are certainly going to upset the profession, I think, if we say that those results are wrong, I should imagine from what has been said here. The average lawyer thinks he doesn't have to repeat this thing. He has made his motion for a directed verdict; he has argued for it.

JUDGE DONWORTH: He may not have made it. This doesn't

require him to make it.

MR. LEMANN: In these cases he did make it, didn't he?

JUDGE DONWORTH: He has made the motion.

DEAN MORGAN: He has to make a motion for directed verdict.

MR. LEMANN: I am assuming he has made it.

JUDGE DONWORTH: All right.

MR. LEMANN: He has made the motion in fact, and it was argued, and the judge, after hearing the argument, said, "I deny it; the case goes to the jury." The case goes to the jury; the jury brings in its verdict, and the lawyer says, as Mr. Dodge puts it, "I have argued this fully. What is the use of going back to the judge to reargue it or even ask him about it? He has made up his mind he isn't granting it and has said so. I am going to appeal." Then he arrives in the appellate court, and he is told, "You are out of luck here, my boy, because you didn't renew that; you didn't go back to that judge." I should hesitate to reach that result even if I didn't have, as I understand it, the Fourth Circuit Court already saying the result couldn't be reached.

MR. DODGE: There certainly is ground for the position taken by Judge Hand and Judge Dobie's court that those words, reserving for future decision, refer to a future decision by the appellate court or by the District Court. He said, "When such a motion is denied at the close of the evidence, the judge

is deemed to have submitted the action to the jury, subject to a later determination, which is the equivalent of a reservation. It is not necessary that he should deny the motion once again; his failure to vacate his first order is enough. Hence, it is proper here to dismiss the complaint." That cites two other Circuit Courts of Appeals, the Third and the Eighth. If there is a conflict of authority or any doubt on that, I think we certainly ought not to run any risk under the Redman case.

JUDGE CLARK: I should like to add one thing more. In Howard University v. Gassell in the Court of the District of Columbia, 126 F.(2d) 6, a decision written by Groner, with Miller and Edgerton, he discusses it and reaches the same conclusion. Then it is reversed and remanded with instructions to dismiss the complaint, and in that case certiorari was denied, whether that means anything or not.

MR. DODGE: That is what Judge Dobie did. They sent it back to be dismissed below.

MR. LEMANN: I think it is possible to take the view that we needn't change it. The Fourth Circuit Court has decided it is the proper way, and we needn't do more. The only suggestion to the contrary is that the Supreme Court granted writs in three of these cases and denied it in this one. In the three that they granted it in, they didn't change the rule that the Court of Appeals had laid down, but simply said that upon the facts, the case should have gone to the jury and the

jury's verdict should stand. Am I right about that? I don't think that was casting the legal point in any doubt. I think we could leave it alone.

DEAN MORGAN: Hold on. Did the Supreme Court in reversing say that they didn't touch the other point or mention it? That leaves it doubtful.

JUDGE CLARK: Yes, they said, "We do not reach that point."

DEAN MORGAN: The Supreme Court of the United States said they weren't deciding that.

JUDGE CLARK: But in the latest case in the series they denied certiorari. This Howard University case is the latest of all.

MR. LEMANN: There they did have to reach the point. All you can say is that they went to sleep at the switch if they denied the writ when they shouldn't.

DEAN MORGAN: Then they say it was an important public question.

MR. LEMANN: That would be an important question, though.

MR. DODGE: Isn't the simplest way out of it to change the rule slightly to read in substance that in order to save his rights, the moving party must make the motion?

THE CHAIRMAN: That is what I should think, that in order to obtain a decision on the reserved question, within 10

days after the exception to the verdict, the party who moved shall move.

MR. LEMANN: You change the results reached by these courts.

THE CHAIRMAN: Monte, that would be true, and fundamentally I don't think any of these courts have taken into account the reason for all this rigmarole we have in this rule. It may be that the Supreme Court, in denying that writ in that case, had made up its mind that the whole basis for the Redman case was phony and that in the Federal Courts, either the trial court or the upper court can grant judgment notwithstanding the verdict even though the court didn't follow the common law practice and reserve the question for later decision. I wouldn't say that that isn't so. Maybe they have come to the conclusion that all the rigmarole that the Court went through in the Redman case to allow a Federal Court to grant judgment notwithstanding the verdict was all poppycock, anyway, and that it ought to be just the way it is in a good many state courts, that even though he doesn't reserve the question and the trial court decides flatly at the trial that he won't direct the verdict, you still can get a directed judgment notwithstanding the verdict.

If we are going to proceed on that theory, the Redman case is no longer operative in the limitations on this right, and the findings of the Redman case, which are that there shall

be a question reserved and not decided, do not apply. Then I think we want to reconstruct this rule and cut out all this stuff about reservation and one thing and another. But if we are still sticking to the Redman case as the foundation for a rule that allows the Federal Court to grant judgment notwithstanding the verdict on appeal, and so on, then I think we ought to be consistent and treat it as a reservation and require that the District Court make a ruling on the question he has reserved and hasn't decided. It seems to me we have to go one way or the other. With all respect to these Circuit Courts, I feel that they didn't quite appreciate why all this rigmarole was in here, the constitutional problem, which the Supreme Court has never yet taken a back-trail on.

JUDGE DOBIE: Speaking for one Circuit Judge, I knew why all the rigmarole was in, because I taught the Redman and Slocum cases thirty years in the classroom.

MR. LEMANN: Further to defend the Circuit Courts of Appeal, which are not so ably represented, there is a note to our rule that says just why we went to the rigmarole, and it refers to the Slocum case. So I think even a Court of Appeals Judge could know.

JUDGE DONWORTH: Mr. Chairman, there is a medium, of course, in the Redman and Slocum cases and also in these rate decisions. The suggestion of the Reporter on page 50 goes too far, as the Chairman has so clearly pointed out. The suggestion

of the Reporter is that "At the close of all the evidence, each party shall be deemed to have made a motion for directed verdict...." We have discussed that, and we know why that is not fair. It allows him to suppress his real ground. This rule could be modified to read something like this, under (b): "Even though a party does not expressly so move after the verdict or after the discharge of the jury without a verdict rendered, the failure of the court to vacate the denial of the motion for directed verdict is a denial of the motion for directed verdict," and then go on with those consequences.

My suggestion is that the motion for directed verdict must, in fact, be made. Otherwise, it is very, very bad. But if that motion is in fact made, then I think after either the rendering of a verdict or the failure of a verdict, we could dispense with the second stage here, the renewal of the motion, and say that it is deemed to be renewed.

JUDGE CLARK: May I just throw out this? In accordance with what Judge Donworth says, it seems to me the essential of the Redman case was the reservation of decision. That is presupposing the making of the motion, and of course that is here. So I don't see but that we are following the Redman case. I don't quite see why we are not. Here everything turns upon the fact that a motion for a directed verdict has actually been made, and then it has been reserved, and so far, the Redman course has been followed. The only question is whether when

the thing has gone to judgment, you should have what frankly does seem to me just a formal re-hash of the question. Judge Donworth, of course, covers that if you accept that view. That is what the courts, in effect, are driving at, that the failure to grant the motion after the verdict or any other time, is a denial of it.

THE CHAIRMAN: Of course, you are visualizing a case where the court heard full argument on the motion to direct. You aren't quite right in your assumption that that is the way it always happens. I agree with Mr. Morgan, I have sat in dozens and dozens of jury cases where the court has said, "I don't believe I will decide this motion to direct. I think I will take the verdict." So many judges would like to take the verdict because they think they might make an error acting on the motion, and then that would mean a new trial. So they take the verdict. They believe that the defendant ought to succeed, but they take the verdict, hoping that the jury will find for the defendant; and if they don't, then they have in mind deciding the motion to direct in favor of the defendant. I have seen judge after judge who doesn't decide anything on the motion to direct. He just makes up his mind that he doesn't want to bother with the argument then, that he will take the verdict anyhow and see what the jury does with it. Then when the parties come before him on a motion to direct, he will give due consideration to the question. That happens over and over

and over again. To say that he has made any decision at all on the point in situations of that kind just isn't a reality. He doesn't.

MR. LEMANN: What happens in those cases?

THE CHAIRMAN: They always make a motion for a judgment notwithstanding, and that brings the issue right up to the judge. Then he sees what the verdict is, and if he finds the jury hasn't disposed of the case the way he hoped they would, he is confronted with a real decision, and he makes it.

Let me tell you this. In the state courts that I have practiced in where this system applies, you always have to make a motion for judgment notwithstanding the verdict.

DEAN MORGAN: You can frequently join with it a motion for a new trial.

MR. LEMANN: There are differences of points of view, resulting from the systems to which one is accustomed. My observations, which are very limited, would indicate that the practice in other sections is not the same. Of course, that affects the lawyers.

MR. DODGE: The cases that you speak of, Mr. Chairman, are not uncommon, of course, but in most courts the cases where the judge has to reserve the question expressly, if he is in doubt about it, are a very small minority of the cases. In my experience, the judge almost always passes fully on the question and, if he thinks it is right to do so, directs a verdict. In

one case out of twenty, perhaps, he will do as you do, hope the jury will settle it and reserve the point.

THE CHAIRMAN: You have good judges in Massachusetts, but around the country generally, they like to let the jury take a crack at it.

MR. DODGE: We haven't got very good ones, I am sorry to say.

JUDGE DOBIE: I don't know how you can say realistically that the judge hasn't done anything there. If you are a District Judge and a man comes before you and says, "Your Honor, I make a motion for a directed verdict," what he says is, "I want you to take this case away from the jury and not let the jury have any discretion in it and decide in favor of the defendant." If you say, "No, I don't want to do that," or if you fail to do it, you certainly have acted on it. If you say, "No, I won't take that responsibility," you have taken it and you have denied it. But I don't think you can say that the judge hasn't done anything there.

MR. DODGE: If there is any question about the applicability of the Redman case, getting away from that danger, I should think we ought to make this thing mandatory.

THE CHAIRMAN: I have a doubt in my mind, if the thing is put to the Supreme Court again, whether they would say, "We don't agree with the Redman case, the holding that the old Court made in years gone by that you couldn't get a directed

judgment notwithstanding the verdict in a Federal Court on appeal unless the trial court reserved the question. We don't think that is a denial of a jury trial, and we don't think there is anything in it." It may be that the Court feels that way about it. I am not sure that they don't. You know how badly they assailed the Supreme Court all around for reaching that decision. The courts are not in sympathy with it. I have the feeling that in these Circuits that were never in sympathy with the requirement that the question be reserved in order to get a judgment notwithstanding the verdict, their decisions and judgments are included by their total lack of sympathy with the Redman case and the conditions in the Redman case entirely. They have been juggling around this way with this rule in order to get rid of the whole business. They don't take any stock in it. If anybody can convince me that the Supreme Court feel that way about it, I would be in favor of doing the right thing and cutting all this rigmarole out of this rule.

Of course, you can solve it by saying that within 10 days after exception to the verdict, the party may move for judgment nowithstanding the verdict; and you can say, if that isn't done and if the court doesn't within those 10 days or after the motion is made, set aside the motion and grant judgment notwithstanding the verdict, he shall be deemed to have decided the reserved question. That is perfectly plain,

isn't it? That is along the lines of Judge Donworth, but to me it puts the thing up in a little more orderly way.

MR. LEMANN: Why not do it that way, Mr. Chairman?

THE CHAIRMAN: I can't see any objection to it. In that way, the effect of it is this: It gives the party who moved for a directed verdict the right to go before the court and argue his point, if he wants to do it, but it also puts the court on the spot and says if they don't make the motion and the court doesn't rule on the reserved question of his own motion within 10 days or 20 days, the court shall be deemed to have decided the thing adversely. It puts the court on the spot.

MR. LEMANN: It protects the rights on appeal.

THE CHAIRMAN: The technical view that I have, which I have never been able to satisfy in my mind, is that you can't reverse a lower court unless you do something. If you make him do something or say that if he doesn't, it is equivalent to doing something, then you sort of have an error there. That has always stuck in my crop about this business of reversing when the reserved question was never decided.

MR. DODGE: You would make it mandatory.

DEAN MORGAN: No; he would make it the other way round.

THE CHAIRMAN: I think it would be an orderly way to do it, and I don't see any reason on earth that it shouldn't be done. I see the other point of view, and as far as I am concerned, it would be perfectly satisfactory if you stated

explicitly that the party may move, but if he doesn't, and if the court of his own motion doesn't decide the reserved question within 10 days, he should be deemed to have decided it. That is what you are trying to do.

MR. LEMANN: That accomplishes the result, and it is a question now of draftsmanship. I move that the Reporter be requested to draft the rule along the lines suggested by Judge Donworth and the Chairman, which would accomplish the result of supporting the decisions that have been reached on that.

DEAN MORGAN: Is this just what the Reporter has suggested: "Even though a party does not expressly so move, the failure of the court--"

THE CHAIRMAN (Interposing): What page is that on?

DEAN MORGAN: Page 133.

JUDGE DONWORTH: That is the Reporter's second suggestion.

DEAN MORGAN: "--to vacate the denial of the motion for a directed verdict after the verdict is rendered is a denial of a motion to set aside the verdict."

THE CHAIRMAN: Where is that?

DEAN MORGAN: On page 133, just before the black line.

JUDGE DONWORTH: This fails to provide for the case where no verdict is rendered and the jury is discharged. That should be covered.

THE CHAIRMAN: I think that amendment of the Reporter

is all right, except I think there ought to be a time fixed for the court to act. "Even though a party does not expressly so move, the failure of the court to vacate the denial of the motion for directed verdict...."

JUDGE DONWORTH: Make it manifest that the judge may act of his own accord, without any motion, and that if he doesn't and there is no motion, it is to be taken as if it were a denial of the motion.

THE CHAIRMAN: With a word or two changed in that, it is all right.

JUDGE DONWORTH: It should provide for the case of discharge of the jury with no verdict.

THE CHAIRMAN: Let's go to tea.

PROFESSOR CHERRY: It should provide for the case where he doesn't deny, but reserves. I think that is another thing to go into.

MR. DODGE: What are you going to do with a case such as I had, where he held it up five years?

... Brief recess ...

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THE CHAIRMAN: Gentlemen, we will proceed. I take it it is the sense of the meeting that the matter be referred to the Reporter to make these changes in Rule 50 that we have expressed agreement about.

I want to say one thing more myself. I have argued previously in favor of sticking to the principle that we have in the rule, but I never took any stock in the original decision of the court that it was unconstitutional to grant a judgment notwithstanding the verdict. I think a partial recession from that by this reservation business didn't go far enough. I am fed up with this rigmarole. I am ashamed to go out to the bar. We have one rigmarole that says that even though the judge decided the thing (the motion to direct) he should be deemed not to have decided. We have added another rigmarole that even if he hadn't decided a rigmarole for judgment notwithstanding the verdict, he shall be deemed to have decided. I am ashamed of it, and I have asked the Reporter to make a draft of Rule 51 as you directed it here today, and to bring us back another draft on the theory that all this stuff about reservations is wholly unnecessary to justify a judgment notwithstanding the verdict in the upper court; and I am going to buttonhole the Chief Justice and hand the two things to him and tell him we are fed up with the rigmarole business and we are ashamed of it. If the court is disposed to brush the whole thing aside (as very likely they are) we recommend that

they adopt a simple rule and then sustain it when it comes up and get rid of it. I think it is an abomination. There isn't one lawyer in a hundred who knows why we have all this rigmarole in here. I think we are a bunch of don't-know-whats to have such a foolish lot of stuff. That is the way I feel about it.

MR. DODGE: Departing from the theory of the Redman case and assuming that they will correct the doctrine.

THE CHAIRMAN: Departing from the theory of the case, that repealed the Redman case.

MR. DODGE: Slocum.

THE CHAIRMAN: The Slocum case, and holding that the limitations of the Redman case about reservations aren't really necessary.

MR. DODGE: That part of the Redman case.

THE CHAIRMAN: Yes. I have a very strong hunch we might get that, but I think we ought to tell the court frankly that we don't like all this assuming-he-has-when-he-hasn't and assuming-he-hasn't-when-he-has business.

JUDGE DORIE: General, I believe that if the Slocum case went to the Supreme Court now and we didn't have any of these rules and they had to pass on it, I don't believe it would get two votes.

JUDGE DONWORTH: Unless it were a disabled veteran. (Laughter)

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PROFESSOR CHERRY: Then they wouldn't reach the question.

THE CHAIRMAN: I'll tell you. At the next meeting of this Committee if we feel we want to slam it up to the Court, I would be willing to draw a rule flatly disregarding all these limitations in the Redman rule and put a note on it.

JUDGE DONWORTH: A ruling in our favor at this time is ex parte, and I believe there will be some very bright, active lawyers arguing the matter when it is attacked later on.

THE CHAIRMAN: If they say to us, "We have to keep these rigmaroles in there," then my conscience is clear; but I don't feel like keeping them in now without giving them a chance to say we can take them out. That is the way I feel about it.

We will go on, Mr. Reporter, to 51.

JUDGE CLARK: Perhaps you would like to pause briefly on comment II?

THE CHAIRMAN: What subdivision does that go in?

JUDGE CLARK: This is the same one, 50(b). In Montgomery Ward v. Duncan, the Supreme Court took up the practice where the party against whom the verdict has been rendered makes a motion for judgment notwithstanding the verdict, together with a motion, joint or alternate, for a new trial. According to the procedure in the Duncan case, if alternative prayers are presented the trial judge should rule

on the motion for judgment and then he should also rule on the motion for a new trial. If he orders a new trial conditional on the reversal of the judgment on the other, you see he has covered it all. The Supreme Court, I think, has indicated that that is the correct procedure. I don't know that anything more needs to be done. We have had suggestions that that was somewhat in doubt as it was before the Supreme Court's decision and somewhat in doubt as to the method of appeal. But we believe that the Duncan case covers it enough.

THE CHAIRMAN: Is that the case where the motion for a new trial was joined with a motion--

JUDGE CLARK (Interposing): That is it, yes, sir.

THE CHAIRMAN: Would you please tell us just exactly what Roberts held in that case? I read that opinion twice and I'm not sure.

JUDGE CLARK: Mr. Moore, what did Justice Roberts hold?

THE CHAIRMAN: Let me put this case to you and see if I understand what Roberts did. Suppose a motion for judgment notwithstanding the verdict, and a motion for a new trial are joined, are heard by the court, and he grants the motion for judgment. Therefore, he doesn't have to bother with the motion for a new trial. It goes to the Circuit Court of Appeals and they reverse his order for judgment notwithstanding the verdict, saying that there was enough evidence to go to

the jury, and they remand it. The trial court has never passed on a motion for a new trial, in which he has considerable discretion. What did Roberts say happens in a case like that?

PROFESSOR MOORE: In that particular case he said it should be remanded back to the District Court to rule on the motion for a new trial; but he said that the District Court in proper practice was to rule conditionally on the motion for a new trial at the same time. If you rule that the motion for judgment notwithstanding the verdict should be granted for the defendant, he ought also to say, "If I am wrong on this"--

THE CHAIRMAN (Interposing): "I would grant a new trial."

PROFESSOR MOORE: "Or I will not."

THE CHAIRMAN: I see. Then, there isn't anything we need to do about it.

JUDGE CLARK: I should think we didn't need to.

From Mr. Koenigsberger we have had some suggestions as to what he is particularly worried about.

PROFESSOR MOORE: There is one other problem, Mr. Chairman. Suppose the plaintiff has offered a certain line of evidence that was rejected; he nevertheless gets a verdict. Justice Roberts suggested that the plaintiff ought to cross-assign error so that if the plaintiff's evidence was erroneously admitted the appellate court might remand for a new trial rather than affirm the judgment for the defendant.

THE CHAIRMAN: Did he really say that you should cross-assign error when you were not an appellant? Did he say anything more than that the party ought to point out the situation and ask that the judgment be--

PROFESSOR MOORE (Interposing): I think he did talk about cross-assignment of error.

THE CHAIRMAN: I never directed my mind to the theory that the man who wasn't an appellant could assign any error. Often you have a case where a judge decides a case on one ground of several available, and the appellant claims that the judge was wrong about that. Then the respondent is at liberty without any cross-assignment of error to appellant to put in his brief an argument that says that even though the lower court was wrong on this ground, the record shows that he had another good ground on which he could have done it and, therefore, you ought to affirm. That isn't a cross-assignment of error. It is just simply a pointing out to the upper court that there is another ground on which the judgment ought to be affirmed even though the trial court was wrong on the one reason he chose.

PROFESSOR MOORE: He did, however, use that term.

THE CHAIRMAN: I think it is unfortunate because there are a lot of lawyers who think they have to assign errors in a case like this; respondent has to assign errors. I never could understand how a respondent who didn't take an

7 appeal was in a position to do that.

PROFESSOR MOORE: He said, "We see no reason why the appellee may not, and should not, cross-assign error, in the appellant's appeal, to rulings of law at the trial, so that if the appellate court reverses the order for judgment n. o. v., it may pass on the errors of law which the appellee asserts nullify the judgment on the verdict."

THE CHAIRMAN: Is there anything we can do about that in the rule? That is an appellate practice.

JUDGE CLARK: I shouldn't think that we could. On page 135 I have raised the dread specter of Erie R. Co. v. Tompkins in this connection, but I suggest that we turn over the page rapidly. There may be a problem that our state law applies there. Of course, we can't do anything about it.

THE CHAIRMAN: All right, Rule 51.

JUDGE CLARK: Rule 51, objections. We pointed out first Justice Chesnut's very good discussion of this subject in the A. B. A. Judicial Administration Monographs, and his approval of this rule. Our real suggestion comes in lieu of comment II. A suggestion has been made to insert between the word "file" and the word "written" in the fourth line of Rule 51, the following: "and serve on the adverse party."

I am frank to confess that I suppose that that was a natural thing to do, and that whenever I have sat with a jury, that always has been done. But it turns out that some

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Judges didn't think that was necessary, and it had not been done everywhere. I think it is reasonable to have the other party know your request.

JUDGE DOBIE: Isn't it pretty general to have the judge call the parties before him and discuss instructions?

JUDGE CLARK: I should think it was, yes.

THE CHAIRMAN: The only amendment you ask to Rule 51 is as to these requests to charge. If they are presented by one party they shall be handed to the other side as well as to the judge.

JUDGE CLARK: That is it, yes.

THE CHAIRMAN: I don't like the looks of an amendment like that. The party always knows that they have been handed to the judge. It would be a strange lawyer who wouldn't hand a copy to his adversary.

MR. HAMMOND: It has been done in several cases, I understand from the Department. They have given requests to the judges but they haven't given a copy to the other side.

JUDGE DOBIE: I thought the practice was pretty general to talk them over.

MR. HAMMOND: They may not even know that they have given them to the judge.

JUDGE DOBIE: I can't conceive of a lawyer under this rule now not knowing what instructions the judge is going to give.

THE CHAIRMAN: It is what requests are made.

JUDGE DOBIE: Oh, requests.

JUDGE CLARK: This came in from the Tax Division. I understand my brother sent in the suggestion on behalf of the Tax Division, saying that it did happen.

MR. HAMMOND: It actually has happened, I understand.

THE CHAIRMAN: The opposer may file and serve on his adversary, is that it?

MR. HAMMOND: On the adverse party.

THE CHAIRMAN: To insert after the word "file" in the fourth line of Rule 51. "serve on the adverse party."

JUDGE DONWORTH: The judge ought to take care of that.

MR. LEMANN: He always would ask, I should think. The other side sees it.

THE CHAIRMAN: I should think so. What is your pleasure with that amendment?

PROFESSOR SUNDERLAND: I move it be inserted.

THE CHAIRMAN: All in favor of inserting say "aye". Opposed "no". I will have to have a showing of hands. All in favor of inserting raise their hands.

... Three hands were raised ...

THE CHAIRMAN: Opposed.

... Seven hands were raised ...

THE CHAIRMAN: It is lost.

JUDGE CLARK: That is all on that.

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THE CHAIRMAN: Rule 52.

JUDGE CLARK: 52 is our old friend the findings rule. We have made quite a little discussion in the light of cases that have come up. There has been quite a little on findings of one kind and another; and passing over (unless you want to read them) the discussion from the cases, we make a recommendation on page 141 which we hope may be helpful. The discussion, we hope, will bring it up. We say:

"We doubt, however, if it is worthwhile or desirable to attempt to reopen the question to the extent wished by district judges. On the other hand, the rule may be clarified somewhat, and we can perhaps at least get away from findings prepared by counsel after the decision. Accordingly, we recommend that the following sentences be added after the first sentence in subdivision (a):

"'Such findings of fact and conclusions of law may be incorporated as a part of, or filed separately but contemporaneously with, an opinion or memorandum of decision. They are unnecessary on a decision of any motion, including motions under Rules 12 and 56.'"

MR. DODGE: Why do you need that last? Who would claim that was--how could anybody claim that on a motion you had to file findings of fact and conclusions of law?

JUDGE CLARK: Not only has the point been raised,

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but some of the judges in New York file findings on a motion for summary judgment, a decision--yes, they actually have done it. I might add that it was one of those cases where the winning party brings around something that was signed.

MR. DODGE: You are speaking here only of actions tried upon the facts without a jury?

JUDGE CLARK: Yes. Our second comment is a small question along that line. I think Mr. Mitchell had something on that. We have this down as being his suggestion:

"In all actions tried upon the facts without a jury, including cases tried with an advisory jury, the court shall find the facts specially," and so on.

Then we add the suggestion above which does, I think, (I hope it does) three things. The first one is that it allows the facts to be in the memorandum of decision. That has been a sore point with the judges in particular because they felt (and I would agree with them) that a reasonable opinion, memorandum or decision will necessarily have the facts in it, and usually is better than the dry rehash of the memorandum furnished by counsel afterward. The Interstate Circuit case in the Supreme Court is held by many district judges to say that that practice is not proper. In the Interstate Circuit case they held that the opinion was inadequate as a finding, but I doubt if they wanted to go quite as far as the district judges have gone. I don't believe there is any reason why

12 findings in the memorandum of decision are not all right. I know we take them when we get a good opinion. We call it a finding. That is the first thing.

The second one, is to have the findings made as a part of the decision and not prepared afterward by counsel. The practice that has developed with us (and I guess it has been rather general) in the Southern District and which we have said was improper, and I don't know whether we can stop it, is that the judge will make his decision and then call for findings of counsel; and when those come in they are utterly worthless. I can hardly think of a case where they amount to anything. They are either one of two kinds. One of the most usual kinds when the district judge has written a good memorandum of decision, is simply to take his memorandum of decision and chop it up into paragraphs with numbers. I recall one case of Judge Rose's who wrote a very careful patent decision. Then he called for findings of fact. His decision was filed early in June. The next step in the record was that same decision already printed in the record reprinted as findings of fact under numbered paragraphs filed in September; and then rather curiously nothing more happened until February when they entered a judgment.

The other thing that happens is that you find a detailed argumentative statement of winning counsel which we have often found is inconsistent with the memorandum in small

ways, and it is so obviously an argument of the winning counsel and not the judge's idea that it doesn't help any. So, that is the second thing.

THE CHAIRMAN: Where is your amendment to forbid the judge from taking proposed findings from the lawyer? I don't find it.

JUDGE CLARK: We don't forbid that.

THE CHAIRMAN: What are you talking about then?

JUDGE CLARK: That the judge at the time he makes his decision also files his findings, and that any request for findings or suggestion as to findings be made before the decision.

THE CHAIRMAN: Where is the amendment?

JUDGE CLARK: That last part is in comment III at the foot of the page. The part that I have been talking about, about the judge's decision is that the finding--

THE CHAIRMAN (Interposing): I don't find anything at the foot of the page which contains anything that requests of findings must be--

JUDGE CLARK (Interposing): Page 141.

THE CHAIRMAN: Must be made at the time his opinion is filed.

JUDGE CLARK: That appears at the first suggestion that I was reading; higher up--the suggestion in the end of the first paragraph:

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"Such findings of fact and conclusions of law may be incorporated as a part of, or filed separately but contemporaneously with"--

JUDGE DOBIE (Interposing): In that opinion you don't have to designate them that way, do you?

JUDGE CLARK: I should think not. It is the words "contemporaneously with, an opinion or memorandum of decision."

THE CHAIRMAN: Does that force him to make his findings contemporaneously with his opinion? It says he may do it but it doesn't say it has to be.

JUDGE CLARK: I should think so. If it should be made stronger or perhaps clearer, all right. But that is what was the intention.

THE CHAIRMAN: I hesitate to forbid a judge to make any findings if he wants to later.

JUDGE DOBIE: I think that is the practice, General, to hand down his findings of fact and conclusions of law with his opinion.

THE CHAIRMAN: Let's take these up now in the order in which they appear in the rule. The first one in order as it appears in the rules would be the suggestion that I made in the very first line of Rule 52(a) to insert after "without a jury" the words "including cases tried with an advisory jury." The question came up and there is some correspondence that I had with some judge or someone, and it is perfectly plain that

a case tried with an advisory jury is not, strictly speaking, a case tried upon the facts without a jury, but still it is necessary for the court to make a finding of his own. He may accept the finding of the jury or he may not, so that it is really an oversight on our part. I think it ought to be corrected.

MR. LEMANN: Have there been many cases with an advisory jury?

THE CHAIRMAN: I don't know, but we have no provision in the rules for the judge to make any findings.

MR. LEMANN: It is just another question of degree of importance. If we were writing the rules over, I would put them in; but it is just a question--

JUDGE DOBIE (Interposing): If we change part of this rule up there--

MR. LEMANN (Interposing): If you are going to change part of the rule anyhow we can make the change. I don't think I would change it just for this.

JUDGE DOBIE: That first comment up there--Judge Caffey was the judge who chiefly objected to that. He said it was an infernal nuisance in a number of cases where a judge had written an opinion.

THE CHAIRMAN: We are talking about whether we ought to amend the thing to require some findings where there was an advisory jury.

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JUDGE DOBIE: Yes, he was saying that he didn't know whether it was important enough to change the rule. I say if we change the one up above, I think this ought to go in there, too.

THE CHAIRMAN: It just flashed on me. I have forgotten how it was brought up.

MR. LEMANN: I would put it in the category of a good many other perfecting things that haven't given any trouble. I think it would be better psychology not to include it.

THE CHAIRMAN: We are sticking in a thing that seems to me to be foolish, but evidently some judges are in doubt about it as to whether they have to make findings on a motion. We are saying he doesn't have to do that; that is in the same category.

MR. LEMANN: I agree, and that is what Judge Dobie was saying, if you were going to change this rule in some other particulars, put them all in. I agree with that. So the question now comes up on the other suggestions.

THE CHAIRMAN: Do you want to consider the other amendments first, then? We will pass that, then, and won't act on it, and take up the recommendation of the Reporter.

JUDGE DOBIE: I like that first one, but I don't know that you ought to have said to absolutely cut the judge out in making these findings after he hands down an opinion. Sometimes

he might want to hand down an opinion and decide the case, and then make his findings in detail later.

JUDGE DONWORTH: Sometimes he reconsiders and changes his findings.

JUDGE CLARK: Of course, the case of reconsideration certainly changes his findings. It is expressly provided in the second part of the rule that he can. I don't know--this is really, after all, more of an admonition than otherwise. There isn't anything you can do to excommunicate a judge if he doesn't follow the finding rule absolutely. The only thing is that you can send it back, and you get rather tired sending back cases. I simply say I don't think the finding is worth anything if it isn't a part of the decision.

THE CHAIRMAN: You mean if it isn't contemporaneous with it.

JUDGE CLARK: Yes, I say that as a practical matter, because the only reason for not filing it then is that you want counsel to do it, and when counsel do it, I think it is a total waste.

PROFESSOR SUNDERLAND: Would this provision require an opinion in every case?

THE CHAIRMAN: No, it may be incorporated as an opinion.

PROFESSOR SUNDERLAND: It may be one or the other, two alternatives. It seems to imply that it must be one or the

other.

MR. LEMANN: Don't most judges file them at the time they reach their decision? Our district judges always make their findings and conclusions when they decide the case.

JUDGE DORIE: That is the proper time, but I don't know whether you want to make that--

MR. LEMANN (Interposing): I ask is that happening often? Does it come in long afterwards, as in the case you referred to, or is that an isolated case?

JUDGE CLARK: That has gotten to be very usual in the Southern District. In fact, several of the judges established a machinery of decisions, and it was even printed in the New York Law Journal that you should do thus and so after the decision. The winning party will file findings; the other party will file objections, and then there will be a hearing, and so forth. You will find it, for example, in some of Judge Rose's opinions in various cases setting up the practice. We have said definitely in opinions--we haven't tried to state any absolute requirement because we have had no authority, but we have said definitely that we don't care anything about findings made that way. I don't know how much we are going to discourage the district judges from doing that. I know we have discouraged some of them because some of them are now making their findings along with the opinions. But I think before we said anything about it that the usual practice

in the Southern District had come to be to do it that way, and there was terrific delay to get something that was just to get an express answer, not a body politic.

THE CHAIRMAN: You don't prevent the judge from getting assistance from counsel in the matter of his findings by merely saying that the findings must be filed contemporaneously with his opinion. If he can't write and file an opinion without findings, and he wants to get the lawyers', he can just withhold his opinion and ask for findings. It is just a rigmarole that doesn't get you anywhere, and I don't see much--

JUDGE CLARK (Interposing): As a matter of fact, the latter course, it seems to me, is not only all right, but we provide for it expressly in the provision at the foot of the page. I think it is perfectly all right. It is the function of the judge to ask the lawyers to assist and it is the function of the lawyers to assist. I must say that I wouldn't dissent on the ground that it is rigmarole. I think it is all the difference in the world. It is the difference of the judge's having all the assistance counsel can give him, whether by findings or otherwise, and then deciding, making his own decision, or it is the question of having the winning counsel trying to get up something to bolster up the opinion.

MR. LEMANN: In other words, the judge can say to counsel when they have finished their argument, "Plaintiff,

you submit to me your proposed findings and conclusions that you want me to adopt; serve them on the other side so he can present his objections. Defendant, you do the same and serve them on the other side. I will take them along with your briefs and decide the case." On reflection, I think that is what our judges are doing. It seems to me a pretty good idea. It is part of the process of submitting the case to the judge. Then, he has the help of counsel. It helps to focus attention on the controversies between the lawyers as to law and fact. The only question there in my mind is whether we need to stiffen up the rules to make them do it.

PROFESSOR CHERRY: Isn't the fundamental thing, Mr. Reporter, that we still have to overcome the objection which obtained before the rules in so many districts that the opinion was the thing, and you don't bother with findings unless you found the case was going to be appealed, and then you put in findings for the purpose of stating the opinion, and not for the purpose of deciding the case? Isn't the whole thing--

DEAN MORGAN (Interposing): Yes, we try to make them do it first.

PROFESSOR CHERRY: We have tried by the rules to enforce the notion that findings are the decision with or without an opinion.

JUDGE DONWORTH: One abuse which I don't think we can prevent, is that the winning counsel gets in and rides--

prepare findings; and every doubtful point is decided in his favor on the facts. He sews up the appellant. I don't know of any way to stop it.

MR. LEMANN: I had that exact thing happen to me, and he took the findings of the opposing counsel and didn't change a comma or even correct an ungrammatical statement. But I think it hurt him in the upper court because we had cases (one or two) that said that findings prepared--you see, the record showed findings submitted and findings adopted; and it had been decided that findings in that shape carry a minimum of weight with the upper court because they are just a rubber stamp.

I don't know how you can prevent the judge if he wants to do it, except by pointing it out to the appellate court.

PROFESSOR CHERRY: If he does it in that frank way you are all right because you get the results you speak of.

THE CHAIRMAN: Charlie, as to your proposal in the second paragraph under comment I, in the first place, it says either "may be incorporated as a part of, or filed separately but contemporaneously with an opinion," and so forth. First, there are two questions raised by that. If they are part of the opinion or filed separately or contemporaneously with an opinion or memorandum of the decision, it is necessary that

there be an opinion. The court may merely make brief findings and then order judgment, and then write no opinion. Don't you think, as I read it, that it means that an opinion is necessary, and secondly,(as I read it) that if there is an opinion, the findings must be contemporaneous with or a part of it? What happens if they are not? What is the result? If he does file an opinion and doesn't file his findings contemporaneously, what is the effect under the rules? Are the findings no good?

JUDGE CLARK: We don't state any penalty, it is true. I suppose that the upper court can still consider them for whatever purpose it wants to. Since I don't think it ever considers them for any purpose in that event anyhow, it probably won't add anything to it. Our first point, I think, you are doubtlessly correct on. Maybe, it should be--

THE CHAIRMAN (Interposing): Make it read this way. "If the opinion or memorandum of decision is filed, the findings of fact and conclusions of law may be incorporated in it or filed separately or contemporaneously with it."

JUDGE CLARK: I think that is the way to do it.

THE CHAIRMAN: Do you think it is all right to demand that it be filed contemporaneously with it? There is no harm done even if the judge doesn't do that.

JUDGE CLARK: I think so. As a matter of fact, what is the penalty now if they don't file findings? That, I may

say, is not an easy problem to handle. I can remember two cases where we sent them back for findings, but I can remember many more cases where we have said in effect, "Oh, what the hell."

THE CHAIRMAN: I see.

JUDGE CLARK: There isn't much penalty now, actually.

THE CHAIRMAN: The question then is on this amendment. It would read this way:

"If an opinion or memorandum of decision is filed, the findings of fact and conclusions of law may be incorporated as a part of or filed separately with but contemporaneously with the opinion or memorandum." And it goes on, "They are unnecessary on a decision of any motion, including motions under Rules 12 and 56." What is your pleasure with that?

JUDGE DOBIE: Why would it include motions under Rules 12 and 56, when you say they are unnecessary on the decision of any motion?

JUDGE CLARK: Why put in those?

JUDGE DOBIE: Yes.

JUDGE CLARK: Of course, those were the cases that almost always come up, and Rule 56, the summary judgment rule, is the more important one. I suppose it is just being particular. The cases that I have run into, I think, have been almost always under 56, and, as I said, we have had the claim

made that there shouldn't be findings, and we have had findings made on motions for summary judgment. You couldn't very well do it the other way. It would be a little dangerous to say they are unnecessary on a motion for summary judgment.

JUDGE DORIE: Why not say that they are unnecessary on the decision of any motion? That is broad enough to include the whole crowd, isn't it?

THE CHAIRMAN: It seems less necessary almost for summary judgment than for any other one because he can't grant it except where the facts are undisputed. Why should there be findings of fact unless they are disputed?

PROFESSOR SUNDERLAND: Findings of fact are derived from a lot of affidavits that you have to cull through to find out what they do prove. It seems to me it might be quite appropriate sometimes.

THE CHAIRMAN: That isn't a real finding of the upper court; that just simply amounts to a condensation, a condensed statement, of the facts admitted by the affidavit. The finding is a determination by the judge as to what he thinks on the evidence the facts are, whether there is more or less dispute about it.

PROFESSOR SUNDERLAND: I think that is true.

THE CHAIRMAN: What is your pleasure with it?

MR. TOLMAN: I move its adoption.

THE CHAIRMAN: Is there any further discussion? All

in favor say "aye". Opposed. It is carried.

SENATOR LOFTIN: That includes cases by a jury?

JUDGE CLARK: That includes comment II, then also; the suggestion under comment II?

THE CHAIRMAN: No, that is the next one.

JUDGE CLARK: That was Mr. Loftin's question.

SENATOR LOFTIN: I understood we did amend it; we include that language.

THE CHAIRMAN: Not necessarily.

JUDGE DOBIE: I move that we include the cases tried with an advisory jury.

THE CHAIRMAN: Is there any discussion? All in favor say "aye". That is agreed to.

There is a third one here.

JUDGE CLARK: To carry out the same idea, the additional matter is, "if presented, they must be delivered to the court before the action is finally submitted to it." Of course, that does carry the direct implication that you can do it, as well as the time limit on it.

JUDGE DOBIE: It doesn't necessarily mean that if they are not presented at that time the judge can't consider them?

JUDGE CLARK: As a matter of fact, of course, there is a whole system of amendments that is provided for anyhow.

JUDGE DONWORTH: Wouldn't it often happen that the judge would forget or overlook some facts in his memorandum of

decision, and the lawyer would want to call his attention to them and say, "I think your Honor ought to find on this point"?

JUDGE CLARK: Judge Donworth, isn't that rather completely covered by (b) anyway? You see, there is a rather extensive provision for all that.

MR. LEMANN: He doesn't have to call the attention of the court to the absence. It seems to me that the suggestion is rather meaningless, Mr. Reporter. I don't think it can do any good. Here again I may be repeating what we decided; we wanted the provision that findings are not necessary; and then in (b) we have the provision that the sufficiency of the findings may be raised whether or not the party raising the question has made an objection to such findings or made a motion to amend them. In view of those provisions, as to which there is no suggestion of change,(we debated them fully) I can't see that this language should be of any practical effect to the lawyers. If you told them that they didn't have to make the requests you repeat that. Then you simply say, "Well, if you do present them, present them before the judge writes his opinion." He doesn't have to present them at all to begin with.

JUDGE CLARK: I can't say that it is absolutely necessary. I thought it helpful to clarify along the line we were pushing in.

THE CHAIRMAN: In a practical situation you are

27 asking the lawyer to prepare requested findings and have them all ready before the evidence is finished; before he knows what the evidence is; and in the hurly-burly of a trial if you don't know before the case starts what the other fellow is going to prove and what his witnesses are to say, how is he going to get his findings ready when the case is finally submitted? It is submitted when the evidence is closed, and only that afternoon some witnesses have testified to something. In 99 cases out of 100 a lawyer is pressed for time. He may have some requests to find ready, but the course of a trial requires change, and he says, "May I have five days, your Honor, to submit some findings?" The judge says, "Sure." I don't think this rule would mean anything anyway. The judge will relieve him from it. It is unreasonable to ask a man to have findings in his pocket before the evidence is in; and in the course of a trial it is pretty hard always to get them ready.

JUDGE CLARK: I don't feel very strongly about this, but I think I ought to say that I don't think such an interpretation of the rule, before the matter is finally submitted to the court and the matter of submitting briefs and so on, is very usual. Certainly, the rule doesn't interfere with the usual practice. He says, "How long, gentlemen, do you need for your briefs?" They usually say, "Two months." The judge cuts them down to two weeks each. Then, it is his suggestion,

"When you file your briefs, do you want me to make any findings? Put those in."

MR. LEMANN: You would have to define what you mean by "submitted" and your idea of of the word "submitted" and the frequent use of the word, as the Chairman has indicated, are not the same. You would be using a word about which people might disagree. I don't think it is any more than a very pious admonition.

THE CHAIRMAN: What you really mean is that the findings shall be delivered to the court before he files an opinion.

MR. LEMANN: Yes.

THE CHAIRMAN: That is a different thing.

MR. LEMANN: That, of course, would have to be done anyhow because you have just put in a provision that he must make the findings. He is bound to get them before then.

JUDGE DOBIE: I move that third one, number three, be left as it is.

THE CHAIRMAN: Is there any further discussion? It is moved that we not adopt the provision that the request of findings must be delivered to the court before the action is finally submitted. All in favor of the motion say "aye". Opposed. It is carried.

JUDGE CLARK: There isn't anything more. I made a comment on (b), the amendment that the Supreme Court has

held in the Leishman case--that a motion to amend didn't suspend the time for appeal. I stuck in a query as to whether this didn't postpone things, which it probably doesn't, even if the Supreme Court said so. Perhaps, I ought to add that Mr. Moore in a leading treatise says that we intended it to have this effect, and the Supreme Court is right.

THE CHAIRMAN: Where is that proposal?

JUDGE CLARK: It isn't a proposal for a change here. It is just a discussion of the effect of the amendment as suspending the final judgment and the time for appeal.

THE CHAIRMAN: A motion to amend findings or to make additional findings? Wouldn't the entertaining of that motion operate to stop the running of the time to appeal, is that what you are wondering about?

JUDGE CLARK: The Ninth Circuit so held, and the Supreme Court took it up and reversed.

THE CHAIRMAN: That settles it for us, I guess.

DEAN MORGAN: That is where judgment had been entered on the findings, of course, because you don't appeal until you get a judgment anyhow.

JUDGE CLARK: That's it.

THE CHAIRMAN: There is nothing we can do about the question of withholding the right of appeal anyway by a rule.

JUDGE DOBIE: I think we can pass that by.

THE CHAIRMAN: Is that all on 52?

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MR. DODGE: Pardon me just a moment. There is one point on Rule 52 which I must raise. It has been called to my attention by a very good lawyer in Boston, and his suggestion is also supported by page 40 of your supplemental suggestions.

JUDGE CLARK: I am glad you brought that up.

MR. DODGE: A great number of courts have discarded our rule without hesitation. We forgot, I think, when we provided that the findings should not be set aside unless plainly erroneous, that there are many cases where there is no dispute in the testimony, where a case is all submitted on documentary evidence requiring inferences or where there is no conflict in the testimony, and it is only a question of inference. The courts have held uniformly, I think, in spite of this rule that in cases like that no prima facie weight is to be attached to the judge's decision below, because the appellate court is in exactly the position he was in; and this memorandum sent to me, cites a lot of cases to the effect that that always has been the law on the equity side, that where there is no conflict in oral testimony the appellate court stands in the same position as the trial judge and is not to give weight to his finding. This memorandum states (with two recent Federal cases) that that has been the rule of the Federal courts in equity, and that, therefore, our rule on its face, limits the power of the appellate court in equity while extending it in law. In view of that and in view of the fact that all these

31 courts listed on page 40 (various Circuit Courts of Appeals and others) have discarded our rule when it came to such a case, we should insert the words "upon conflicting oral testimony" shall not be set aside unless clearly erroneous.

THE CHAIRMAN: You mean conflicting depositions. How is that?

MR. DODGE: And depositions. That is one of the cases cited here in the Circuit Court of Appeals of the Second Circuit. The case was wholly heard on depositions and affidavits.

MR. LEMANN: The point is, Mr. Mitchell, that on depositions, the trial court has no better chance to reconcile the contradictions than the appellate court because he doesn't see the witnesses. That is the theory, isn't it, Mr. Dodge, that where the confliet is in testimony given in open court the trial judge sizes up the witnesses and he is in a better position to see whether they are lying or not? But if false testimony is taken out of court the trial judge has no better chance than the upper court. I had an occasion to check the law a couple of years ago and these cases undoubtedly state the law that the rule does not apply where the testimony was taken out of court.

DEAN MORGAN: That was the rule before our rule, yes. There is no doubt about that. But it wasn't true that way with reference to non-conflicting testimony because the

testimony may be such that on the record it seems to be all right, but the witness' demeanor may have been such that the trial judge didn't believe a word he said.

MR. LEMANN: That is right.

DEAN MORGAN: So, it ought not to be.

MR. LEMANN: The word "conflicting" is not the important thing. It is the point of whether it was taken in open court.

DEAN MORGAN: Yes, if it was taken in open court.

JUDGE CLARK: Mr. Chairman, may I suggest that I hope we don't do that although I realize that the courts have been doing a great deal of their own accord. I think without doubt the reason they do it is that they cite the old cases. That is what happened in most of these cases. In a recent case in our circuit (I wasn't sitting on it), Norment v. Stilwell, decided in April, Judge Swan was sitting, and he said, "The evidence being written, it is our obligation to review it," and he cited an old case. I called his attention to it and protested that I thought he wasn't following the rule, and then he suggested that the rule had some ambiguity because of this reference to testimony.

MR. DODGE: I think we should make our rule consistent with the uniform decisions of the courts and not have them overrule our rules in every case that comes before them.

JUDGE CLARK: The difficulty of that is that we were

33 trying to get a uniform formula of appeals for all cases, and that means that you have small variations in formula. I don't believe that you will find one that you can get if you start changing, that will apply to all these cases, but what almost always happens is that you have some documentary evidence and some oral, and what are you going to do in a case like that? A further thing is that in one sense this is just a formula. It is a fairly workable one, too. We don't have any hesitation (I don't think any appellate court does) in dipping in when we think an incorrect result has been reached. We can use it under the formula, but if you have variations of the formula, I think in a way it is terrifically misleading. Counsel will get this and that and they will say that in "X" case we went the other way, but "in our case we have a different formula." After all, we approach it in much the same way, whatever the formula is, and these small variations, I think, are invitations to counsel to rake up appeals and other things that don't make any difference.

JUDGE DOBIE: It might if there is no conflict in the evidence, but there are certain inferences of fact to be drawn from it, and the inferences drawn by the court in that case might be of great value to the upper court, and ought not to be set aside. In the recent Longshoremen's case the Supreme Court went very far. They said that the finding of the deputy commissioner even on the question of jurisdiction,

should not be set aside unless there was apparent error.

MR. DODGE: That is where he had--

JUDGE DOBIE (Interposing): There was no conflict whatever in the evidence.

MR. DODGE (Continuing): --oral testimony before him and drew inferences.

JUDGE DOBIE: But no conflict whatever in the testimony.

MR. DODGE: Here is one case where the evidence consisted of an agreement of counsel, the written agreement of association of a certain company, interrogatories to the defendant and his answers, a deposition, several checks, the by-laws of a company, and certified copies of certain papers; the questions of fact, the court held, in the case at bar stand before this court on appeal as they stood before the judge of the superior court; and proceeded to deal with it without attributing any weight to his findings because they stood in exactly his position. All these courts before whom these questions have come, have dealt with it that way right in the face of our rule. I think our rule ought to be consistent with the uniform decisions of the courts and that it ought to be rightly expressed because if the appellate court is in the same position as the trial judge, they ought not to be called upon to give great weight to his finding.

DEAN MORGAN: Does this sentence in Rule 52 apply

only to cases where there was no right of trial by jury?

THE CHAIRMAN: No, it applies to cases with jury where, under the old law, findings were conclusive if there was any evidence to support them. It was a sort of compromise, because the equity rule, of course, allowed a fuller examination into the evidence than the old statutes, that we set aside by this rule in jury-waived cases, provided for findings of facts.

DEAN MORGAN: It was my understanding that we did that deliberately.

THE CHAIRMAN: The whole business comes down to amount to nothing, except the word "clearly" in our rule. The thing reads: "Findings of fact shall not be set aside unless clearly erroneous." If you made it read, "Findings of fact shall not be set aside unless erroneous," you would accomplish what you are after, wouldn't you?

MR. DODGE: No, because I agree entirely that they should be clearly erroneous, according to the familiar rule of cases where there is conflicting testimony. If the facts are all submitted to the appellate court in exactly the form in which the judge below had them, and there is no question of seeing and hearing witnesses, I think the appellate court should not be giving prima facie weight to the decision below.

THE CHAIRMAN: If you struck out the word "clearly", you would leave the upper court to form its own judgment as to

whether they were erroneous or not, wouldn't you?

MR. DODGE: I wouldn't leave out the word "clearly".

JUDGE DOBIE: It would be monstrous. Of course you can't set aside unless they are erroneous.

MR. DODGE: Findings of fact, either upon controverted testimony or upon oral testimony, shall not be set aside.

JUDGE CLARK: I am quite clear that this idea that you shall make the appellate court review the evidence is entirely false. I don't care what these cases have said. I think you could go through every one of those cases and there wouldn't have been a difference in result if they applied our rule as written. That is one reason that I think all this argument about getting the appellate courts to review the evidence is a delusion. I think that is true of all the arguments on administrative findings. I can't conceive of it. We have it come in twenty volumes at a time. The way we work is to start with the trial court's view and then work backwards, so to speak. I think that you can tell us all you want that we have got to examine all the evidence, and we are not going to do it. I say again that no matter what they say here, these are excuses after they have made their decision, and I think it is a little confusing that they do. I think that is an invitation to counsel which actually is not true. I think it would be rather unfortunate to add to the kind of invitations you make to counsel. I think on the whole, this theory of honest rule has

worked pretty well. There is nothing that I know of that can work absolutely perfectly or mechanically, but it is a good, workable formula.

MR. DODGE: It has been disregarded by all these courts.

JUDGE CLARK: I don't think it has.

MR. DODGE: Here is the Circuit Court of Appeals in the Seventh Circuit saying that a District Court's findings where the evidence consists of documentary evidence and depositions is "subject to free review unaffected by presumptions which ordinarily accompany .... findings on controverted issues." You cite the Ninth Circuit, the First, the Seventh, the Ninth again, the Seventh again, and the Eighth--Circuit Court of Appeals decisions which have simply disregarded the statement in the rule.

MR. LEMANN: They have construed the rule.

THE CHAIRMAN: I am surprised at that, Bob, because I haven't read all these Circuit Court cases, but I remember very distinctly when Rule 52 was drawn, I went throught the decisions of the Supreme Court of the United States, case after case, and wrote down exactly what they had said the rule was in equity cases about the effect of findings below, and I am sure that the expression here, "Findings of fact shall not be set aside unless clearly erroneous," (including the phrase "clearly erroneous") "and due regard shall be given to the opportunity

of the trial court to judge of the credibility of the witnesses", is practically a precise statement as to what the Supreme Court has said over and over again before these Rules were adopted as to what the modern rule in equity is. So we adopted this rule, and we said in our note to the rule when we adopted it that it was a summary statement of the rule in equity cases as repeatedly announced by the Supreme Court. Were we wrong about that?

MR. DODGE: All of those cases were cases of conflicting oral testimony, and I think the rule has never been that where there wasn't any conflicting testimony or any question of the credibility of witnesses, weight of this character should be given to the decision below.

DEAN MORGAN: That is in equity that you are thinking of.

MR. DODGE: In equity.

DEAN MORGAN: But on the common law side where the jury was waived, there was no question about it.

JUDGE DOBIE: That is in Williams against the Drydock Company, and we had a case very much like it. There is no question whatever about the facts. They are all agreed on. The question was whether it came under the Longshoremen's Act. The court said that the findings of the deputy commissioner, particularly when approved by the court, as to whether it came within the purview of the Longshoremen's Act, shall not be set

aside unless there is apparent error.

JUDGE DONWORTH: That is a different proposition.

MR. DODGE: That is inconsistent with all these late decisions since our Rules.

THE CHAIRMAN: My feeling about it is that I don't care what formula you prescribe; I think Charlie is right about that. Even if you said that the great weight should be given to the findings of the trial court and that the presumptions are that they are right unless clearly erroneous, and all that, if the upper court in the review of a case tried by a judge without a jury makes up its mind it wants to reverse it, it won't have any difficulty at all in saying it is clearly erroneous. They can manage it, and there is no way of checking it. On the other hand, if they don't want to reverse and make up their minds that they are satisfied the findings are all right, and they don't have a different view, they will simply say, "Well, we won't set them aside. They are not clearly erroneous." I don't think you can help matters any by modifying the formula.

MR. DODGE: They have expressly disregarded our rule and have said so.

JUDGE CLARK: In some cases. They happen to be only the aberration cases. I am sorry we didn't cite the cases the other way. I know I have written them the other way. They are just some cases.

MR. DODGE: I have done my duty to the Boston lawyer and also to my own feeling about it by bringing up the question. It doesn't seem to meet with general approval.

JUDGE DONWORTH: I think Mr. Dodge's motion has a lot of merit. It would confine this "due regard" clause to cases where it has some logical and reasonable application.

PROFESSOR CHERRY: "due regard" does it already.

MR. LEMANN: I think the reference to credibility of witnesses, which is what Mr. Cherry has in mind, indicates the basis for the rule, and that is what has influenced the courts in laying down the law as Mr. Dodge has stated. The courts have had no difficulty. He is perfectly correct, and his Boston friend is perfectly right, I am sure, because I have checked it. I had a case of my own where it happened, and I went through the cases. But my feeling is that if the courts have construed it correctly as they have, we should be content to leave it with these correct constructions and that the bringing in by us of recommendations for changes which make no change in this rule in the light of these cases, would amount to an adoption of these cases on well-settled general principles. That is a satisfactory way to leave it. Any new formula that you get, it would perhaps start a newly focused controversy. The courts have dealt with this language and have reached the correct result. If we leave it alone, I think we are approving what they have done. It seems to me that might be the best way

to show our approval.

MR. DODGE: All right. You think the court may properly construe our rule as it stands.

MR. LEMANN: Yes, I do, Mr. Dodge.

DEAN MORGAN: I disagree entirely with that, but I don't want to change the rule. I think they have misconstrued the rule as it is stated, without the slighest question. Their statement of their construction of the rule is certainly a misconstruction of the rule. There is no doubt about it at all, because this applies just as well to jury-waived cases as to equity cases. This rule that you have given was the original equity rule. We intended to make a compromise between the equity rule and the other one. We adopted this thing. That was the statement made here in the debate. So there isn't any question that the language there misconstrues the rule. There is no doubt about it.

MR. LEMANN: I never would have intended to adopt a different rule. I would have intended to do just what the courts have done.

MR. DODGE: I withdraw the suggestion, not on the grounds stated by Mr. Morgan, but on the grounds stated by Mr. Lemann.

SENATOR PEPPER: Mr. Chairman, after a somewhat lengthy experience with the trial of cases in the appellate courts, I think there is nothing more futile than an attempt to

define by rule what an appellate court is going to do with facts found below. If they are against you, and the facts below have been found against you, they declare that while they might not have reached the same decision, they feel bound by the decision below. If they are for you, they say, "We are in as good a position as the court below. We will examine the question de novo." The Supreme Court of the United States goes so far as to say that the interpretation given by the Board of Tax Appeals to an Act of Congress is a decision of fact by which the Court is bound (Laughter), which is another way of saying that the judicial power of the United States is vested in the Board of Tax Appeals.

JUDGE CLARK: Senator, they are judges.

SENATOR PEPPER: We are just kidding ourselves by imagining that we are going to control, by any rule that we adopt, what the courts of appeal are going to do with findings of fact below. If it wasn't insulting to the judiciary, I would feel that if we struck out "Findings of fact" all the way down to "findings of the court", and just let them roam, we would be doing what is realistic. That is my observation.

JUDGE DOBIE: I move that the rule be left as it is, Mr. Chairman.

THE CHAIRMAN: Is there any further discussion? It is moved that the provision in Rule 52(a) about setting aside findings of fact shall not be altered. All in favor say "aye";

opposed. Carried. Is there anything else on Rule 52?

JUDGE CLARK: No.

THE CHAIRMAN: We come to Rule 53, "Masters."

JUDGE CLARK: On Rule 53, on "Masters," the first is just a general comment on the appointing of masters, but I don't think there is anything to be done there. The second refers to subdivision (d), and Mr. Follmer, who is the clerk for the court of the Southern District of New York, objects to the requirement that the clerk mail a copy of the order of reference to the master and to other rules stating similar requirements of obligations on the clerk. His office is a very busy one; there is no doubt about that. He thinks that any obligation of this kind is burdensome. There has been no complaint from other districts.

THE CHAIRMAN: What paragraph in the rule are you talking about now?

JUDGE CLARK: The particular one at this moment is 53(d)(1). As a matter of fact, he makes it general. There are several places in the rule where the clerk is supposed to send an order. One of them is the notice of the order itself. But this one in particular is 53(d)(1). There is also another one in 53(e)(1).

THE CHAIRMAN: The one in (d)(1) is that when an order of reference is made, "the clerk shall forthwith furnish the master with a copy of the order of reference." Is that what he

objects to?

JUDGE CLARK: Yes.

THE CHAIRMAN: Is there another one in that subdivision?

JUDGE CLARK: Not in that one. The next one is in (e).

THE CHAIRMAN: Let's see precisely what they are.

JUDGE CLARK: (e)(1). The master shall file his report. "The clerk shall forthwith mail to all parties notice of the filing."

JUDGE DOBIE: I move that that be left as it is.

JUDGE DONWORTH: Second.

SENATOR LOFTIN: Who does he think ought to do it, if he doesn't?

THE CHAIRMAN: He thinks the fellow ought to run up to his office once a week and find out if they have been filed.

SENATOR PEPPER: Yes.

DEAN MORGAN: Or have a clerk stationed in his office.

THE CHAIRMAN: What is your recommendation about Mr. Follmer's suggestion?

JUDGE CLARK: I wouldn't support it.

DEAN MORGAN: It has already been moved and seconded that it stand as is.

THE CHAIRMAN: With no objection, it is so ordered.

PROFESSOR CHERRY: We shed a tear for that particular clerk.

THE CHAIRMAN: What is next?

JUDGE CLARK: The next is only a comment. Maybe I shouldn't raise it. It is a comment on the effect of findings again, because you have somewhat the same question here. We say in 53(e)(2) that the master's findings shall stand unless clearly erroneous. There are some judges--and again it is mainly the Seventh Circuit--who say that when it gets to the appellate court, it is the District Court's findings and not the master's that are important. We have fooled around a little with it in the Second Circuit, although I think that the latest decision by Judge Learned Hand covers it pretty well when he says that "the question is the same in this court as it was in the district court."

THE CHAIRMAN: Is there nothing to be done about it?

JUDGE CLARK: I don't think we can do any more about it. In fact, as appears in the case of the other matter, we might even make it worse.

SENATOR PEPPER: Is this case that we have just voted on, retaining the provisions of 52(a), the only case in the Rules where we undertake to regulate the procedure in an appellate court? This is a definite statement as to what a Court of Appeals or the Supreme Court may do or not do. I was wondering whether there are other cases. We have usually scrupulously refrained from trying to tell these Circuit Courts of Appeals what to do, but here we tell them.

THE CHAIRMAN: In a sort of half way. We said, "Findings of fact shall not be set aside unless clearly erroneous". I suppose after the lower judge makes his findings of fact, if an effort were made to set them aside, he couldn't set them aside unless they were clearly erroneous. We don't say they shall not be set aside on appeal. We just dodge around the corner on it.

JUDGE CLARK: There was a definite reason. We went into this quite a good deal at the time.

SENATOR PEPPER: I didn't mean to take time on it. It seems to me an anomaly.

JUDGE CLARK: We did it to get uniform law. We were uniting law and equity. That was the main reason.

JUDGE DOBIE: Have you any suggestions here?

JUDGE CLARK: No.

THE CHAIRMAN: Have we any more on 53?

MR. DODGE: Yes, one point I have to raise at the request of citizens of Massachusetts. Two of the District Judges have spoken to me--Judge Wyzanski and Judge Ford--about a difficulty arising under the requirement, under paragraph (e) of this rule, that the master shall file with his report a transcript of the evidence. They have had the difficulty there of a stenographer being present before the master, as required by the master, but of neither of the parties wanting a copy of the evidence. With the mandatory requirement that the evidence

be filed, there was the question of who was going to pay for it.

THE CHAIRMAN: Mr. Dodge, all he has to do is to get an order from the trial court relieving him from filing it.

MR. DODGE: What?

THE CHAIRMAN: An order from the trial judge.

MR. DODGE: To relieve him from filing it?

THE CHAIRMAN: The trial judge can certainly relieve him from filingin the order of reference.

MR. DODGE: The difficulty here, I think, was that the original reference was in the regular form, and the rule required the master to report the evidence. At the end of the trial before the master, neither party ordered a copy and, therefore, there was nobody under Rule 80 who could be charged with the expense. It troubled Judge Ford a good deal. He wrote a five or six-page opinion, of which he sent me a copy here.

MR. LEMANN: How does it get before the judge? He just has the report of the master?

MR. DODGE: He just gets the report.

MR. LEMANN: Does the other side object?

MR. DOGE: There was a motion by one of the parties to strike the report because the master failed to file with the report a transcript of the proceedings. This was a bankruptcy case, to which our Rules applied. The creditors alleged in support of their motion that there was fatal violation of Rule

JUDGE DOBIE: What did he hold?

MR. DODGE: He finally held that under the bankruptcy order which made our Rules applicable, the court had the right to modify the Rules in particular procedures.

DEAN MORGAN: Good for him:

MR. DODGE: In this proceeding not requiring a report of the evidence to be filed.

SENATOR PEPPER: This was a motion by the fellow who had refused to pay for the filing of the transcript, to set aside the report because he failed to pay the cost of it?

MR. DODGE: Yes. There was a large group of creditors who were petitioners.

SENATOR PEPPER: I shouldn't have thought it would take five pages to dispose of that.

THE CHAIRMAN: It seems to me also, Mr. Dodge, under subdivision (e), it says that the master shall file with his report "unless otherwise directed by the order of reference, ...a transcript of the proceedings and of the evidence...." That certainly doesn't require the master to file such a transcript if he hasn't got it. There is no rule there requiring that there shall be a transcript, that somebody will pay for it, and the master has done his duty by filing his report without it. Certainly the object of the rule wasn't to compel the master to provide the transcript. I don't think there was

anything wrong with what he filed, if he wasn't given a transcript which he could filed.

MR. DODGE: The order is mandatory that you shall file a transcript of the evidence. May I submit this opinion of Ford's to our Reporter so that he may consider whether there is anything in it?

JUDGE CLARK: Very well.

THE CHAIRMAN: Are we through with "Masters," Rule 53?

JUDGE CLARK: I think so.

THE CHAIRMAN: If there is nothing more, we go to 54, "Judgments."

JUDGE CLARK: I think 54 is one we want to consider with some care, but first as to subdivision (a) there are two minor things, as to the definition of judgment. There is a suggestion in the Ninth Circuit that an order is not a judgment for purposes of appeal. That, I think, is clearly against the express statement in (a). I take it nothing could be done about it, but that is the situation.

There is a problem that comes up in connection with summary judgment, where we speak of a partial summary judgment.

THE CHAIRMAN: You are talking about Rule 54(b) now?

JUDGE CLARK: 54(a).

DEAN MORGAN: Definition of Judgement.

JUDGE CLARK: A partial summary judgment is for the most part only a pre-trial order. It often is not really a

judgment, and that has raised question in the cases in connection with the summary judgment rule, Rule 56. We are trying to redefine somewhat the partial summary judgment in order to get away from that difficulty. I want to put you in mind of that, but unless there is some objection, I should think we should pass that until we get to 56. What is a partial summary judgment? We are going to say that it is something which isn't a judgment.

DEAN MORGAN: It is an adjudication.

JUDGE CLARK: Yes; that is it. Then, if you wish, we shall pass to Rule 54(b). Certainly in the Second Circuit, and somewhat in the other Circuits, we have had our troubles over it a great deal. We have discussed here a good many of the cases and have come out with a suggestion which appears on pages 150 and 151. I don't think that it will end all question of final judgment, but I wonder if it may not help some. The material we insert is underlined.

"When more than one claim for relief is presented in an action, the court at any stage, upon a determination of the issues material to a particular claim and all counterclaims arising out of the transaction or occurrence which is the subject matter of the claim, may in writing expressly direct the entry of a separate judgment disposing of such claim. In the absence of such express direction, and whenver other claims remain for adjudication, it shall be presumed that the

adjudication so made is provisional only and subject to modification or change before final judgment is entered."

Without going over all our troubles, I think perhaps if I stated one or two, you can visualize the question.

The Supreme Court, in defining this rule, has followed what I think was our intent and said that it depended on the facts or occurrences. The division is made on that basis. All the claims arising out of one occurrence are to be considered as a single unit. That is what we have somewhat tried to do. In one particular case, which was a suit against the New Yorker magazine by William James Siddis, mathematical genius at Harvard (he sued because they had written an article entitled "Where are they now?" which brought out, among other things, that he was only a bookkeeper in a hall bedroom in Boston), suit was brought in three counts. The first count was a claim that there was a common law right of privacy which had been violated. The second was that there was a violation of the New York statute, the New Yorker magazine being published in New York. You understand that the action was entirely about one issue of the New Yorker which contained the article. The third count was a claim under the law of some states for malicious libel. The defendant moved to dismiss the first two counts, raised no question about the third count. The trial judge, in writing a careful opinion on the law, decided that there was no common law right of privacy and, so far as the

New York statute was concerned, it was fair comment, and so held that those two counts were insufficient. Thereupon, counsel presented to him, and he signed, an order dismissing those two counts.

Then the appellant had the question of what to do about it and did what they generally do there, apparently--promptly appealed to us. The case came before us, and my colleagues in effect said, "While the matter is here, why shouldn't we decide it?" I was given the opinion to write, so I wrote a decision affirming on the merits, and then I dissented from my own opinion and my colleagues and said that I didn't believe it was a final judgment. I thought the publication of the article was the occurrence, and all the rest went along with it. Certiorari was denied in that case about two years ago. I was interested, a week or so ago, when one of the judges from the Southern District came up and said that they were now getting around to trying the question of malicious libel, which had been standing all this time, and that there was a motion made before him to amend to claim now a violation of a right of privacy and to allege that the article was false. Originally that hadn't been in. He decided that he would now grant the amendment. He wanted to have some support of the idea that he could grant the amendment, which to my mind would reinstate the whole question that we had decided. I gave him a curbstone opinion that I thought probably he was wrong. At

any rate, that is the question before him.

I think that illustrates the kind of question that comes up while a thing is still pending. As I said, I don't know that there is any way that we can settle the question of what is a final judgment, which has always been difficult, but it has seemed to me that in many cases the District Judge doesn't think of the consequences. It comes to him quite naturally. A matter is argued before him; he expresses a view on it, and then the parties go ahead and they draw an order which turns out to be final in the judgment of counsel. I puzzled over it. I don't know what more we could do. If there is something more we could do, I should like to.

I think this is one step, and this step is an attempt to make the District Judge think about what he is doing and at least when he enters his judgment, make sure that that is what he intended and wasn't just what counsel did after he had written a memorandum.

SENATOR PEPPER: Wasn't your curbstone opinion inconsistent with your dissent? If that wasn't the final judgment, so that you could appeal from it, then was it res judicata so that leave to amend couldn't subsequently be granted?

JUDGE CLARK: Yes, I should think so. We may have the case up to us again. I should think it couldn't be res judicata unless it was final, or, the other way around, it was final and the majority of the court decided it was final, and, therefore,

being res judicata, how much could you still bring up? What was res judicata?

THE CHAIRMAN: Is that the case that you wrote me about, and I suggested that the trial court in a situation of that kind, where he decided one claim involved a question that was common to several and hadn't decided the others, in order to prevent a final judgment going on the one claim (it would have to be appealed, involving this res judicata question), ought to reserve his entry of judgment on the claims decided until he had passed on the others? Is that the one?

JUDGE CLARK: I am not sure. We have had several. It may have been. We have had fully a half dozen.

THE CHAIRMAN: Your amendment here is calculated to draw the attention of the District Court to the problem, at least, and give him a chance to withhold the entry of judgment on the one claim until he has disposed of the others.

JUDGE CLARK: Yes, and I think that is your suggestion. That is just what I hope it does. It makes the judge think that he is making a whole lot of work certain for the appellate court but maybe for himself, too, as this case I have indicated shows. Of course, it won't change the situation where the District Judge thinks it is funny and wants to give the appellate court something to worry about, and sometimes I think that they may be thinking that. But at least it does put the issue to him.

MR. LEMANN: Wouldn't he be able to do under this just what he did in the case you had? You said the lawyer went around and got him to sign an order dismissing the count. He could do that same thing here.

DEAN MORGAN: It would then be only provisional, and wouldn't be final under this rule.

JUDGE CLARK: That is true.

MR. LEMANN: If the lawyer had the count dismissed, then he would bring around to the judge a finding expressly directing entry of a separate judgment. Then the second part of that amendment wouldn't be applicable, because the presumption created there is applicable only in the absence of an express direction. Of course, the judge in your case could have reached the result that you have in mind by not signing the order when that fellow brought it around, and could have said, "My boy, I think we had better hold this until I dispose of the case." He didn't. He signed the order dismissing, and the fellow then took a pencil. I just wondered if the same thing could happen under the amendment.

JUDGE CLARK: There is no question that the judge can do just the same, and unless we make some quite different approach, we can't stop him, as I see it.

MR. LEMANN: Justice Douglas, commenting apparently with approval, said that the purpose of these Rules cited on page 146 of your notes was that the result promotes the policy

of the Rules in expediting appeals from judgment which terminates the action with respect to the claim so disposed of. The trial court is not finished with the rest of the litigation. He cites the debates in the Institutes. He says that is what we wanted to do.

THE CHAIRMAN: He didn't think about cases where one is disposed of involving an issue that was going to be res judicata, and where all the others are settled. He didn't think about that when he said what he did.

MR. LEMANN: Probably not.

THE CHAIRMAN: My suggestion about it originally, probably wrong, was that instead of just making it discretionary, as this amendment does, as to whether the judgment on the one matter should be entered before the others are disposed of, to place a prohibition on the lower court against entering a separate judgment on one claim if that claim involved an issue that was also involved in the others and which would be rendered under res judicata. I am not sure I am right about that.

MR. LEMANN: It seems to me that would be the best way to handle it, if that is the trouble.

THE CHAIRMAN: I was worried whether there might not be some cases where that was proper. You might try the issue again.

JUDGE DONWORTH: That is the point I tried to raise.

THE CHAIRMAN: Try it again.

MR. LEMANN: Then his language should apply in many cases that you should get through.

THE CHAIRMAN: If you tried the thing in one case and made a finding and conclusion, and the effect of that was to dispose of all these other cases, the judge is going to reach the same conclusion in the other ones. Why not let him enter it and take it up? What is there res judicata on the untried claims?

MR. LEMANN: It seems to me you are sort of on the horns of a dilemma here, Charlie, that maybe you don't want to do this, and if you do want to do it, you ought to do it.

JUDGE CLARK: Of course, I have said right along that I am not sure there is any complete answer. There is another extreme that you could go to: You could provide that you never enter judgment at all until all claims are disposed of.

DEAN MORGAN: Arising out of the same transaction, you mean.

JUDGE CLARK: No; all claims. But that is a little harsh because of the wide joinder provisions. That was the rule asserted before these Rules.

DEAN MORGAN: But you didn't have such a wide joinder provision.

JUDGE CLARK: That is true. Once you begin to separate, it is very difficult, it seems to me, now that the Rules in

effect contain a prohibition against entering judgment here. If you look at the first sentence, it is cast in the affirmative form, which I should think would carry a negative. "When more than one claim for relief is presented in an action, the court at any stage, upon a determination of the issues material to a particular claim", and so on, may end it, and I think the converse is implicit.

THE CHAIRMAN: What do you mean by "converse", that he may not enter it?

JUDGE CLARK: He may not enter it when it is a different--wait a minute.

MR. LEMANN: He can do it only when it arises out of the same transaction.

JUDGE CLARK: When it settles all the things arising out of a particular occurrence. That is what I meant.

MR. LEMANN: Also, this is permissive. He need not do it even in the case to which it applies.

JUDGE CLARK: Exactly. But in spite of all that, they do this regularly; we have them dumped in our laps, and then the question is, what shall we do with them and shall we throw them back?

MR. LEMANN: Why throw them back?

JUDGE CLARK: On the theory that it isn't a final judgment. Take the kind of cases I have indicated. Another case we had was the case where this first came up, the Collins

case, a case where the claim was plagiarism of a play and unfair competition as to the title. Those are pretty much the same thing; the evidence is a good deal the same, and so on. Take the case, as I said, we have pending at the moment where there was an action brought on a contract, and the defendant claimed that it exercised the power of cancellation and under that same power of cancellation, was entitled to some money back. The court granted the motion to dismiss the original claim, but held the counterclaim for trial. We have an appeal, even though the counterclaim, which is on this very same language, the contract, is still pending.

THE CHAIRMAN: In a case like that, where it appears on the record that he has entered judgment on a particular claim but he hasn't disposed of all counterclaims that arise out of the same transaction, why don't you vacate the judgment and send it back on the ground that this allows separate judgment only after he has disposed of all the counterclaims?

MR. LEMANN: I am wondering if your rule doesn't do all that we can do, because you can't leave the Courts of Appeal to decide all the questions, you know.

JUDGE CLARK: The Chairman asked, "Why don't you send it back?" I should think probably we would, but--

THE CHAIRMAN (Interposing): It is plainly a partial judgment entered without authority under the rule, because there is a counterclaim that hasn't been disposed of that arises out

of the same transaction.

PROFESSOR CHERRY: All he needs to do is to get his brethren to adhere to the Rules in that case.

JUDGE CLARK: That isn't so easy.

PROFESSOR CHERRY: I should say that is all.

JUDGE CLARK: Then they say, "If that isn't final--"

THE CHAIRMAN (Interposing): It isn't a question of whether it is final. It is final, but it ought not to have been entered. That is the point. It is final judgment on its face, that is true, but he was erroneous in having entered any judgment.

JUDGE CLARK: If you can call it final, then my colleagues are going to say right away, "Of course we have jurisdiction, and what we ought to do is to consider the appeal when the parties have argued it all and put in their briefs, and so on."

THE CHAIRMAN: If nobody has made the point that the judgment ought never to have been entered because a partial judgment may not be entered under the Rules unless all counterclaims are disposed of, you are bound to remand and vacate the judgment and say, "Hold back this separate judgment until you have disposed of the counterclaim. Nobody raises the point."

JUDGE CLARK: Sometimes they raise it, and sometimes they don't.

THE CHAIRMAN: If they raise it, you ought to vacate

the judgment and say it was entered in violation of the Rules.

JUDGE CLARK: If they don't raise it, do you think we have jurisdiction?

THE CHAIRMAN: Of course you have jurisdiction. It is the final judgment. The fault with the judgment is not that it isn't final, but that it ought not to have been entered.

JUDGE CLARK: I want to say that if that is the theory on which we will consider all these cases, there isn't any question about it. In every case that comes up, we will say that is the short way out, because that is the trend of my colleagues. They think maybe it would have been just as well if the trial court had held this up, but none the less the parties are all here and now we can short-cut by deciding this case, which in turn invites more people to bring it up.

THE CHAIRMAN: You are talking now about a case in which the respondent doesn't complain that the judgment was prematurely entered?

JUDGE CLARK: Yes.

THE CHAIRMAN: If the parties are satisfied that the judgment was not entered prematurely and want it decided on the merits, and it is a final judgment, why on earth shouldn't you decide that they wanted it that way?

MR. LEMANN: As Justice Douglas said, that is the spirit of the Rules. Why do you complain now in your capacity as a judge that these issues are brought before you for decision

when they ought not to be?

JUDGE CLARK: I don't quite see how you work out that it is final when there isn't any authority under the Rules to grant it.

THE CHAIRMAN: There are a whole lot of judgments that are erroneous--it was erroneous to enter them, and they were erroneous as to content and result--but they nevertheless determine the issues, and they are final in the sense that, if allowed to stand, that is the end of it.

JUDGE DONWORTH: Mr. Chairman, with reference to the point that bothered me, I don't think I want to insist upon the point because I think this means what I think it ought to mean, namely, in the Ettelson case, the insurance case where--

THE CHAIRMAN (Interposing): Is this something new?

JUDGE DONWORTH: This is what I have been trying to say for two days.

MR. LEMANN: You were told you were premature.

THE CHAIRMAN: I don't mean to suppress you, Judge, but we have just been discussing this proposal. I simply asked, does this relate to it or is it a new problem?

JUDGE DONWORTH: I don't know. Go ahead.

THE CHAIRMAN: If it is something new, I suggest we vote on what we have been talking about, and if it is not, let's hear it.

JUDGE DONWORTH: Go ahead.

THE CHAIRMAN: I leave it to you to decide whether it relates to the matter or is improper.

JUDGE DONWORTH: It relates to this subdivision of the rule; I know that.

THE CHAIRMAN: Is there any further discussion of this question? The proposal is on what page, Charlie?

JUDGE CLARK: Let me say again, I admit the proposal isn't complete at all.

THE CHAIRMAN: What page is it on?

JUDGE CLARK: Pages 150 and 151.

THE CHAIRMAN: Let me read it.

DEAN MORGAN: Before you read it--Charlie, won't you consent to strike out "it shall be presumed that"?

SENATOR PEPPER: Good. I was going to do that.

DEAN MORGAN: "adjudication so made is provisional".

JUDGE CLARK: All right.

DEAN MORGAN: Because you don't know what it means when it says "it is presumed that", and neither does anybody else.

THE CHAIRMAN: We are not going to adopt it anyway, are we, so why chew it up? (Laughter)

JUDGE CLARK: I am sorry, because I guess I failed to show what is a real problem in the courts. I must say I still don't think there is any basis for the definition of final judgment that has been made here. I don't see how we can

do it. The judgment of the Circuit Court of Appeals depends on its being final judgment. This rule provides for entry of final judgment under certain circumstances. That involves settling an entire occurrence. If a matter is not an entire transaction or occurrence, there is no basis for final judgment, and it isn't final.

MR. LEMANN: Then the appellee should file a motion to dismiss the appeal on the ground that the judgment before was not a final judgment and not appealable. If he doesn't elect to do that, then, as the Chairman says, the case is submitted by agreement of parties to your decision.

THE CHAIRMAN: My angle is different. I think it is a final judgment, but it was prematurely entered. If one of the parties objected on that ground, the appeal is not dismissed, because that would let the judgment stand, but it ought to be sustained on the ground that there was no authority to enter it until the counterclaims were disposed of.

MR. LEMANN: If the appeal is dismissed, the judgment stands only as an interlocutory judgment, just as if the appeal hadn't been taken, which is the way the Reporter thinks it should be. Don't you?

THE CHAIRMAN: I should like to clear the decks for Judge Donworth, and I shall submit this to a vote. On page 150 the proposal is to amend 54(b) in the manner shown at the bottom of page 150 and at the top of page 151 of the Reporter's

notes, which provides that when he enters a partial judgment or decides a particular claim, he may "in writing expressly direct the entry of a separate judgment ...." And, "In the absence of such express direction, and whenever other claims remain for adjudication, it shall be presumed that the adjudication so made is provisional only and subject to modification or change before final judgment is entered."

SENATOR PEPPER: Mr. Chairman, may I ask the Reporter whether, in adapting the language of (b) to this amendment or this amendment to the language of (b), there hasn't been some gap in the thought that the printed language in the rule provides, that "When more than one claim for relief is presented", and so forth, "the court .... may enter a judgment disposing of such claim." With providing that there is to be any adjudication on the claim or the entry of the judgment, the amendment says that the court "may in writing expressly direct the entry of a separate judgment" .... and "In the absence of such express direction, and whenever other claims remain for adjudication, it shall be presumed that the adjudication so made is provisional...." It implies that there has been an adjudication as to which the presumption is that it is provisional unless he specifies in writing that it is final. Do you see what I mean? What is the adjudication with respect to which the presumption is that it is provisional only, when the rule provides for the entry in writing of a separate judgment, which obvious-

ly isn't provisional? Does he first make an adjudication with respect to which the presumption arises that it is provisional, and then simultaneously direct the entry of a judgment which settles that it is final? Do you see what I mean by the difficulty?

JUDGE CLARK: It may be that you are finding some difficulty in the final use of the word "adjudication".

SENATOR PEPPER: I don't know what the adjudication is that you refer to, because there has been no provision for adjudication before except the provision for the entry of a judgment which in terms is declared to be final.

JUDGE CLARK: Well, I suppose it means it shall be presumed that any determination--

SENATOR PEPPER (Interposing): But there is no provision that he shall determine. You see in the printed rule "When more than one claim for relief is presented ...., the court .... may enter a judgment disposing of such claim." Then you want to go on and say that unless, in entering judgment, he directs in writing thus and so, that it is a final disposition, it is provisional and subject to amendment.

MR. TOLMAN: Therefore, not appealable.

SENATOR PEPPER: Therefore, not appealable, but as it stands now, there is no provision for an unappealable adjudication, but only for one which is expressly declared to be final.

MR. DODGE: The adjudication means the direction so

given, doesn't it?

SENATOR PEPPER: There is no provision for giving the direction, excepting in the language which makes it clear that the presumption that it is provisional can arise.

MR. DODGE: It directs the entry of a judgment, but the direction is provisional only, isn't that it?

SENATOR PEPPER: No. It says that "In the absence of such express direction...."

MR. LEMANN: What would be the adjudication we would have had? There would be no adjudication.

SENATOR PEPPER: That is it; that is the point.

MR. LEMANN: That is just another objection.

SENATOR PEPPER: Let's put the question, and then let the Reporter see whether there is anything in the suggested criticism which may lead him to modify the language.

JUDGE CLARK: I think the language can be improved. It is that the requirement of the final judgment shall not be written without an express written direction.

SENATOR PEPPER: And if no such written direction be given, then it is provisional and subject to alteration. That is all right.

JUDGE CLARK: That is what I was intending to say.

SENATOR PEPPER: Yes.

THE CHAIRMAN: Are you ready for the question now? All in favor of the amendment raise their hands.

PROFESSOR SUNDERLAND: As stated by the Senator?

THE CHAIRMAN: Yes.

... Three hands were raised ...

THE CHAIRMAN: Opposed.

... Four hands were raised ...

THE CHAIRMAN: Judge Donworth, have you anything on 54?

JUDGE DONWORTH: Yes, but the debate that has taken place rather convinces me that we cannot improve the language. The case that I referred to is one that has been before the Supreme Court, where an insurance company, claiming that a policy is void because issued fraudulently or by misrepresentation, brings a suit against the insured or his representatives to cancel the policy. Thereupon, the beneficiaries of the policy counterclaim in the same suit and demand judgment for the amount of the insurance, the money being the equivalent of what they would have gotten by an independent suit of their own if the plaintiff had not anticipated them by this suit for cancellation. I cannot conceive that under those circumstances, any judge would proceed under this rule otherwise than in this manner: He would try the equitable suit. He has already made an order in this case, which has been before the Supreme Court, stating that he will try the equitable suit first, and under the well-established principle of equity from time immemorial, when equity takes jurisdiction of a subject matter, it will

dispose of the whole case. Therefore, I cannot conceive that when the trial judge finally hears the equity suit, he will make any such foolish order as that it is without prejudice to the suit by the defendant against the plaintiff for the amount of the insurance, although that is called a counterclaim under our nomenclature. It is so necessarily involved in the claim itself that, in my judgment, he cannot dispose of the equity suit--if he grants the relief for the company, he cannot do that without enjoining the defendant from the further prosecution of the counterclaim. It is true that if he decides the equitable suit in favor of the defendant, then the defendant's counterclaim is open and will take its natural course. It seems to me the situation there is so obviously one-way that it needs no further elucidation.

JUDGE CLARK: Mr. Chairman, I should like to say something more about this. I think that this is one of the major problems under the Rules. After study, I listed what I thought were three or four of the most important questions. I have no doubt but that this is one. This is one of the blindest of provisions to work out; it is one of the most difficult, too. It is one that is causing as much difficulty as any that I know of. My efforts here, I admit, were weak, but it really doesn't seem to me that it is quite right to leave out any suggestions that will help. I think on the whole that the Committee wasn't greatly interested in that problem. Maybe the appellate courts

have to stew in their own juice. Still, I do think in view of the conflict of opinion, it would be well at least to consider the matter and try to see if something couldn't be done.

I might call attention to the fact that Mr. Moore has discussed this at very great length, and his discussions show a good deal of the problem involved. I don't know what the final solution is. I haven't any.

THE CHAIRMAN: Isn't the matter that you have reference to what we just voted on?

JUDGE CLARK: It is. You voted it down by a one-vote margin, with a large number of the Committee not voting at all. I think the correction is rather important, and I really think it ought to be given more consideration by the Committee--not necessarily my suggestion.

MR. DODGE: Could you deal with it in some way in that last sentence of that section, (b), where you are talking about staying?

JUDGE DONWORTH: Did we adopt Mr. Morgan's motion to amend the suggestion?

THE CHAIRMAN: Yes, we did. It was submitted with his amendment.

MR. LEMANN: You want to get a clearer guide to the appellate courts and you want a clearer statement as to what the trial judge may properly do in disposing of an issue.

JUDGE CLARK: Yes.

MR. LEMANN: I wonder how you can put it more clearly. That is my thought. You do want an opportunity to dispose of some issue finally without waiting to dispose of all of them, as I understand it. You don't want to give that up, or do you?

JUDGE CLARK: On the whole it is desirable, but I am not sure that an argument can be made against that rule, and it would be better to prevent any final entry.

MR. LEMANN: I think that is the first thing you would have to line up on. Really, that is the kernel of the problem. You have to pay some price for these difficulties you have in your courts, if you want to permit the piecemeal disposition of a case in the lower court. If you find that the price you pay is too high, I think you have to resolve that issue, perhaps, unless you can find some way to compose it that is better than we have here (I haven't thought of any that is better than you have here), if you want to preserve the right to the trial court to dispose of one thing at a time. You have stated it pretty clearly, it seems to me, that if it can be disposed of separately without affecting any other issues, it may be done. Can you improve on that, if you want to permit that? You didn't improve on it by this suggestion. I voted against it because I didn't think it made any change in what you had, but possibly just further confused the situation by intimating that you made a change when you didn't.

THE CHAIRMAN: It didn't control the judge in any way.

It just simply called his attention to it so that he had to make an express order one way or the other.

JUDGE CLARK: He doesn't even have to do that now. I think he makes it by default in most of the cases.

THE CHAIRMAN: Would you like to have the whole rule about separating trial of various claims and some action revised so as to provide that no final action shall be entered in any of them until they are all disposed of, so that you will never have more than one appeal from the same case? Is that the idea?

DEAN MORGAN: I don't think you can do that with our joinder provisions. I think if you had this expressed, rather than permissive, you could use The American Law Institute rule that only if all the issues are determined arising out of the same transaction, may separate judgment be entered. You might make your language that way.

MR. LEMANN: By way of emphasis.

DEAN MORGAN: By way of emphasis.

PROFESSOR CHERRY: If you had all that in, Eddie, and the judge went ahead and did it, and then the Second Circuit Court of Appeals went ahead and said, "Notwithstanding that, we have it here, and we are going to decide it," wouldn't we still be in the same boat? We don't deal with the problem satisfactorily, do we, Charlie, if we put all the warnings in the world to the District Judge. If he goes ahead and does it,

your court is going to go ahead and say, "Well, we have it here, and we are going to decide it."

SENATOR PEPPER: That is the reason I voted against it.

PROFESSOR CHERRY: That is the reason I voted against the change. It seems to me we are trying to do the impossible by that.

MR. LEMANN: You can't have your cake and eat it, too.

DEAN MORGAN: You could put in an express prohibition saying that any judgment entered in violation of this shall not be a final judgment.

THE CHAIRMAN: Why not just withhold it and say that no judgment shall be entered until all the issues are disposed of? You have a serious question, then, under the appeals statute.

MR. LEMANN: You will only be saying over again what you have already said. It is already there, isn't it?

PROFESSOR CHERRY: If either of those courts is going to stand on the rule, either the trial court of the appellate court, we wouldn't have any trouble under the Rules. Apparently, neither one is doing it. Are we going to get anywhere if we are going to say some more words that they are to do what they say they don't want to do?

DEAN MORGAN: You can do it by saying that any judgment or purported judgment entered contrary to this shall not be a final judgment. That will knock it out from being appealable.

THE CHAIRMAN: If your court, Charlie, would come out flat-footed in one of these cases and call attention to the express provision of Rule 54(b) and call attention to the fact that there is no authority whatever to enter a separate judgment on a particular matter until all claims and counterclaims arising out of the same transaction or occurrence have been adjudicated, wouldn't you just make perfectly clear what is already clear in the rule? Wouldn't that curb your District Judges? Wouldn't that withhold the entry of these judgments until that full adjudication had been made? Your trouble, as I understand it (I may be off the track), is that they go ahead and disregard the rule and enter judgments on some claims when other claims and counterclaims arising out of the transaction have not been determined. If they did that and respondent made the point in the appellate court that it wasn't a final judgment and couldn't be appealed, but that it was entered without authority under the rule, your court, as I suggested to you in that letter, would simply vacate the judgment and send it back and say, "Here, there is no authority for entering this judgment. We vacate it and direct you not to enter one until you have disposed of the other issues."

Of course, in a case where the respondent doesn't make that point and is content to have the issue decided in the Court of Appeals and not remanded that way, there is an error committed by the trial court in prematurely entering the

judgment, but the appellant or nobody else raises the point. Unless you want to take notice of that plain error in violation of the rule by the trial court without having it assigned, there is nothing for you to do but go on and decide on the merits, and in that way you are loaded with a succession of separate appeals, maybe, in the same case.

Isn't that about your trouble, as you put it up to us?

JUDGE CLARK: I suppose that is it. I might say that I don't think that what we do has very much effect. We have dismissed a good many cases on motion, I suppose, and I can think of a lot that we have actually dismissed on this very ground. Every little while, we take one and then the rest of them keep coming on. I think that what we are doing hasn't great consistency. We are struggling somewhat for consistency and also to get the court's business done.

SENATOR PEPPER: What is the relation between the matter to which you are now addressing yourself and Judge Donworth's point about the insurance case? Is that involved here. Where there is a proceeding to cancel the policy, and in that proceeding the beneficiary of the policy by way of counterclaim attempts to collect the face of the policy, Judge Donworth puts the case where the court proceeds to adjudicate the question of the validity of the policy and determines, let's assume, that it was obtained by fraud. His point is that you can't, upon the basis of that determination, make a provision

that the finding is provisional merely or without prejudice, because to do so would make it possible in the other branch of the case--the trial of the counterclaim--to bring about a recovery on the very policy which the court has held to be bad. That was your case, wasn't it?

JUDGE DONWORTH: If you will permit me, Senator, I think that that particular trouble is fairly well handled in this proposed amendment. Turning to page 150 and taking the suggestion, "When more than one claim for relief is presented in an action, the court at any stage, upon a determination of the issues material to a particular claim and all counterclaims arising out of the transaction or occurrence...." I think that couples the suit to cancel the policy with the claim on the policy. So I think that particular thing is meant.

I think there is a verbal difficulty at the top of page 151. The word "adjudication" following the word "adjudication" in the first line is inappropriate. The action that the court takes, as mentioned in the first part of this long sentence, is a determination, not an adjudication; and I think that the language would be helped if, in the second line of page 151, it said, "shall be presumed that the determination so made is provisional only...." and exclude the idea of its being an adjudication.

SENATOR PEPPER: That resolution was voted down.

JUDGE DONWORTH: I know.

SENATOR PEPPER: The Reporter is urging that it be, in effect, reconsidered. Aren't you, Charlie?

JUDGE CLARK: I am suggesting that something be done.

DEAN MORGAN: You want something more effective than that, I should suppose.

MR. LEMANN: Judge Donworth, wouldn't your case be just as well taken care of by what is in the rule now? What does this new language add? The language you just read is in the rule now, in 54.

JUDGE DONWORTH: I am not advocating the amendment; I am simply saying it doesn't clear my idea.

DEAN MORGAN: His case hasn't more than one claim, anyhow.

MR. LEMANN: Your case is already sufficiently covered under the rule.

JUDGE DONWORTH: I think so, upon reflection.

SENATOR PEPPER: I suppose the courts have considered (I haven't observed the discussions) the collision that there is between equity jurisdiction, where the validity of the policy on a charge of fraudulent representation is determined by the findings of the chancellor, and the case where the validity of the policy is determined by a jury in a suit by the beneficiary, the facts being the same. It seems as if it was one of the inevitable consequences of amalgamating law and equity that the right to determine finally the validity of the

policy by a single judge goes out the window, because the beneficiary has a right to trial by jury, and if you are going to leave it the other way, it is just a race between the insurance company to get a bill filed and the beneficiary to issue a writ of summons. The beneficiary wants a jury trial; the insurance company wants trial before a judge. If you are going really to eliminate the distinction between law and equity, I should think it would be the claim of the insurance company that will have to suffer, and the case would be triable by a jury only.

I don't know how that is dealt with, Mr. Reporter. Has that question been faced in such a case as Judge Donworth puts?

JUDGE DONWORTH: It is pending in the Supreme Court now as a result of their allowing an appeal.

SENATOR PEPPER: Is that question involved? Have they discussed the question of the relative rights of the parties, one to have a trial by a single judge and the other to trial by a jury?

JUDGE DONWORTH: I think it is necessarily involved, because when the judge granted an order to the effect that the equitable issue resulting from the complaint be tried first, the Supreme Court held that that was equivalent to granting an injunction against the jury trial and, therefore, held that it was appealable, although interlocutory. So that case is now pending somewhere on appeal.

SENATOR PEPPER: I see.

DEAN MORGAN: It is back to the Circuit Court of Appeals now, isn't it?

JUDGE CLARK: It is back there, and they are filing new pleadings. Let me say that on the whole, I didn't suppose this was as difficult as perhaps it may turn out to be, and I suppose it is in line with what I understood Judge Donworth to say. Of course, if you have heard one set of issues in the case and that decides the whole question, it ought to decide it, so to speak.

DEAN MORGAN: There isn't more than one claim in this case that Judge Donworth put.

JUDGE CLARK: No. I don't think that his case comes into collision with our discussion here because I don't think there is more than one claim. It is all one intertwined matter, once you have some decision which ends it, and you would have if your finding should be cancellation, say.

DEAN MORGAN: But in your New Yorker case there were three different claims. They may all have grown out of the same transaction that the plaintiff was making, and two of them were decided. In Judge Donworth's case he has only one claim and a counterclaim, so there is no question about it except about entering judgment on a counterclaim when you don't have the claim.

THE CHAIRMAN: In that situation where the equity

suit to cancel the policy was started first, and the policy-holder came in with a so-called counterclaim for recovery on the policy, a jury case, I don't understand how it happened that any trial judge would exercise his discretion (he has it under these Rules) in favor of trying the equity claim first. Why wouldn't he have said to this man, "I think you ought to have the jury trial you are entitled to on your counterclaim. If I try the equity case first, I am deciding the issue of the validity of the policy without a jury. So, if I have any discretion about it, I am going to try the counterclaim first"? How did it happen? On what ground did he stick the other suit up?

JUDGE DONWORTH: I haven't read the opinion, but I presume it was on the authority of the Liberty Oil case, which was the law, you know, before our Rules were applied. Under the Liberty Oil case, the equity issues were tried first.

THE CHAIRMAN: Was it because the equity case was brought first? Was that the reason?

JUDGE DONWORTH: I think not.

DEAN MORGAN: Mr. Mitchell, what difference would it make? Suppose you try the jury case first and the judge doesn't agree with it, there is no res judicata until a judgement is entered. So he can try the equity case and throw it out just as he could before. The Supreme Court, before these Rules, held that equitable defenses were triable by the judge, that if

it was an equitable defense, it was triable by the judge and he could determine. That would be the original case in Judge Donworth's example. The defense would be an equitable defense to the plaintiff's counterclaim. At the same time, that was a good action in equity by itself, and under the Federal system, under New York practice, the jury would have to try it. If it is an equitable counterclaim, the court tries it. You just can't decide this thing simply because the jury has gone on and given a particular finding when it comes to the equity cases. As long as it is not res judicata, the judge can make his own finding. Practically, what happens, of course, in most cases is that the judge accepts the finding of the jury. Otherwise, he tries the case first as Judge Donworth says, and says, "I am not going to bother with a jury. I am going to save all the expense of a jury trial."

THE CHAIRMAN: What do you want to do with this?

JUDGE CLARK: May I make this one suggestion, and that is all. Of course, I can't ask you gentlemen to do the impossible. That may be what I am thinking of. I shall make one suggestion only, and then we can let it go. Do you think it would be desirable and might it not help if in 54(b), which we are considering, we stated the negative? We haven't done any more than say that you may grant a judgment if all the occurrences are taken care of. Might it not be helpful to say that the court shall not enter judgment where all the issues

material to a particular claim and all counterclaims arising out of the transaction have not been determined? I wonder if it wouldn't be helpful to have the express prohibition made. Now it is only rather vaguely implicit. If you think there is anything to that, I will write out something and bring it in in the morning. If you say, "No," I will quit.

SENATOR PEPPER: That is much better than the other way.

JUDGE CLARK: Do you think you would like to see it?

SENATOR PEPPER: Speaking for myself, I should like to see it. I was worried about the other thing and voted as I did for the reasons given by Professor Cherry. If you are going to make a flat provision of the sort you now suggest, which would be a conditional restriction on entering any judgment excepting when everything has been disposed of, I should think that was well worth reconsidering.

THE CHAIRMAN: If you stuck in before the words "may enter", the words "but not otherwise", you would accomplish it, wouldn't you?

JUDGE CLARK: Of course, that is the intent of it, but might it not be better, if you are going to do it, to write a separate sentence saying, "but not otherwise" separately?

DEAN MORGAN: I think the only way you can incorporate it is by saying, "Any purported judgment entered contrary to this shall not be a final judgment." Then you have it not

appealable. That is what you want to accomplish, to keep it away from the appellate courts, as far as I can see.

MR. DODGE: This separate judgment is wholly a new thing. You give the court affirmatively the power, or it wouldn't have any.

PROFESSOR SUNDERLAND: Would our stating in a rule that it was not appealable make it not appealable?

THE CHAIRMAN: No. The fault with the Reporter's proposal, which you voted down, was that it didn't provide a remedy. It simply tried to direct the court's attention to a provision where he could do the same thing over again. The feeling of many of us is that if you are going to do anything about it, you ought to provide, without reference to other counterclaims involved in the same controversy, that it shall be provisional only as to modification or change before final judgment is entered. If we said that, it would say appeal. Our own Rules say it is subject to variation in its provisions, but as to the amendment the Reporter had here, I voted against it and some others said they did because it simply was just trying to jostle the judge's elbow and didn't quite force the result. In view of the fact that the rule already expressly stated that he shouldn't enter separate judgment unless all these other matters had been disposed of arising out of the same transaction, I didn't think another jog in the elbow was going to do any good.

SENATOR PEPPER: Will the Reporter do as suggested now, so that we can take it up tomorrow?

THE CHAIRMAN: Suppose you bring something in, Charlie. You haven't any chance of passing it unless you clamp down and not merely jostle the judge, but expressly provide that a judgment entered in violation of this rule is a provisional judgment, subject to modification at any time before the final wind-up.

JUDGE CLARK: All right. I will make one more try, and then if you don't like it, we will go back and stew.

JUDGE DONWORTH: One difficulty with that suggestion is that as now drawn, it gives the judge the right to make the final judgment that he wants to, and I think that ought to remain there.

JUDGE CLARK: The final judgment if he wants to, when he has the situation.

JUDGE DONWORTH: Yes.

JUDGE CLARK: All I am saying now is that we should tie him up by saying that he shall not do it when he hasn't got the situation.

THE CHAIRMAN: Evidently, we can't compel him to obey the rule, because he has refused to obey it in the past, but we can say that if he issued judgment not authorized by the rule, it shall be provisional only, subject to alteration before final disposition of all the other claims. Then when the case

reaches the Court of Appeals, they say, "It isn't final judgment and is not appealable."

... The meeting adjourned at 6:40 p. m. ...
