P R O C E E D I N G S

ADVISORY COMMITTEE ON RULES

FOR CIVIL PROCEDURE

VOLUME I

Monday, October 25, 1943
Supreme Court of the United States Building
Washington, D. C.

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MONDAY MORNING SESSION

October 25, 1943

A meeting of the Advisory Committee on Rules for Civil Procedure, held in the West Conference Room, U. S. Supreme Court Building, Washington, D. C., convened at 10:00 a.m., Mr. William D. Mitchell, Chairman, presiding.

The following were in attendance:

Members of the Committee

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

Others

James Wm. Moore
Edward H. Hammond
Robert S. Oglebay

THE CHAIRMAN: My suggestion is that we take up this last draft of the amendments and go through it and, when we have done that, then take up the condemnation rules before us and finish up on that. If there is no objection, we will follow that order of business. The condemnation rule business has reached a point where we ought now to consider it.

Rule 4 is the first rule on which any change was ordered, and that simply struck out one word, "rules," which was a typographical error really, an inadvertence. If there is no objection, that will stand as changed.

Rule 6. You remember, an ambiguity was found by the courts as to whether the general rule granting relief from inadvertence and delay might not be applied to wipe out the special limitations on time to do things in particular rules, and we felt that our special limitations were intended to stick and that the general power of a court in its discretion to relieve a man from inadvertence was not intended to apply to certain special rules where we had fixed limitations, like six months to set aside a judgment for fraud. At our last meeting we amended Rule 6 to clear that up and specifically refer to the special rules that had special limitations and make it clear that the general power to grant relief for excusable neglect was not intended to set aside those special limitations. If there is no objection--

MR. TOLMAN (Interposing): Was there action on that,

Mr. Chairman?

THE CHAIRMAN: We voted that way, and the draft has been made that way.

MR. TOLMAN: I have a suggestion to make about it.

THE CHAIRMAN: All right, sir; what is it?

MR. TOLMAN: The result of this amendment is to take away the power invested in the court in certain of these rules, where I think discretion should remain. The first one that is affected is Rule 25.

THE CHAIRMAN: That is the substitution rule?

MR. TOLMAN: Yes, that is the substitution either on account of death or the expiration of term or removal from office, and so forth.

THE CHAIRMAN: The former statutes had a fixed limitation. If you went beyond it, you were gone.

MR. TOLMAN: I made this note about it: "This rule deals with the substitution of parties in a pending action because of the death of a party defendant or party plantiff, the incompetency of a party, the transfer of interest, and because of the death or separation from office of certain public officers. This amendment would prohibit any extension for the substitution of parties in any of those cases. Perhaps two years may be enough to permit a subetitution of parties on account of death, but it is possible that in a time of war, when men are dying far from home, an absolute limitation on

the time for the substitution of parties may work an injustice. Is it not safe to leave the matter of further extension of time in case of the death of a party to the discretion of the court, as provided in the original phraseology of (b)?"

It seemed to me that we are tightening up this rule to take away a power which is certainly to be presumed to be properly exercised, and in each one of these instances it seemed to me safe to leave the matter as it was, with the exception of one, perhaps--taking an appeal to the circuit court of appeals.

THE CHAIRMAN: That was a mere admonition, because we couldn't enlarge that, anyway.

MR. TOLMAN: Yes.

JUDGE CLARK: Mr. Chairman, may I speak on this quite briefly?

THE CHAIRMAN: Yes.

JUDGE CLARK: I think that of course you should consider each one of these separate rules. I haven't checked back immediately on the transcript, but I think the general vote was that we approved some of them. We have gone over it and included every one that we thought might come in here. Therefore, it wouldn't be at all surprising if we would want to strike some of them out. They are all here and are for your consideration. So please consider each one separately.

Coming to the first one, in the first place I think

we ought to say one way or another. Almost all these cases, if not all, would be cases where I should have expected the courts to have considered there was no discretion; that is, because it goes back to some existing statute like the appeals statute or otherwise. Therefore, if we intend to change the previous law we ought to make it clear.

Then, the next question is how far we should do it. In drawing this, in general we thought that probably we didn't want to make many changes in this kind of thing.

Now coming to the Major's suggestion, it may be an idea that there should be more than two years' time, but nevertheless the statute is provided, and while I suppose we would have without question power to change such a statute, yet I don't know. Should we take on a statutory change without being pretty sure of it? That is the problem.

DEAN MORGAN: There is a case already on that that said we couldn't, that 6(b) didn't; the Kentucky case that you cite there.

JUDGE CLARK: Yes.

DEAN MORGAN: I have a sort of recollection of one to the contrary. Anyway, I know the question was raised so as to show that 6(b) and this together made an uncertainty that ought to be cleared up.

THE CHAIRMAN: In the first place, my idea is this: that if we are going to leave the right to revise, to grant

relief, in the hands of the court, my notion of the way of doing it is not to leave it to Rule 6(b) but to have Rule 6(b) read the way it is, specifically stating that you can't enlarge the limitations in particular rules. Then if we think the limitation in the particular rule is wrong, we will amend that particular rule, and then we will have no confusion in the system. So I think it is a mistake. If we don't like Rule 25, I think we ought to change Rule 25 as to the limitations and still leave Rule 6 stating that you can't grant relief under Rule 25 except as stated in Rule 25. That is the more orderly way to go at it.

MR. TOLMAN: Mr. Chairman, if we struck out the enumeration of statutes from this particular rule, 6(b), then that conflict would disappear, and then we would take these rules up as we come to them, wouldn't we?

THE CHAIRMAN: No. The trouble is that the courts have held that the general power under Rule 6(b) overrides all the limitations in the individual rules. That is, some courts have held that. I don't think we ought to leave it that way. I think we ought to clear that up and say that Rule 6 is not intended to set aside the particular limitations in rules so-and-so, but if we don't like the limitations in rules so-and-so, we can change the subsidiary rule and still have the broad statement that Rule 6(b) is not intended to eliminate any of the restrictions in the individual rules mentioned. That is my

idea of the system.

But let's take up Rule 25. The first thing is subdivision (a), on Death. It has always been the law. The statute is a fixed limitation on the right of substitution, and without any qualification. It seems to work well enough, so why should we now go back and do what the federal statutes have never done, allow a discretion as to the time of substitution in the case of death? Isn't that the situation?

PROFESSOR SUNDERLAND: I would say so.

THE CHAIRMAN: The statute has always placed a fixed limit.

JUDGE DOBIE: There has been no complaint about the two years; that is, the substitution in that period.

THE CHAIRMAN: No. I have forgotten whether we just re-enacted the statutory provision. Is it two years in the statute in case of death?

JUDGE CLARK: Yes.

THE CHAIRMAN: And that has always been the law. Why should we broaden it beyond what it has been historically?

MR. TOLMAN: When we made this rule we specified only one rule that couldn't be extended in it, other than the death proposition. If we took out these new limitations, if we took out this limitation on Rule 25, then Rule 25 would govern unchanged. That is the way I understand it.

JUDGE CLARK: If Rule 25 governed unchanged, we would

have the ambiguity, Major. You see, we have already had the ambiguity which was raised by this case in Kentucky, Anderson v. Brady, which held that there was only the two years' limitation. I think that would be a rather rational holding, but it wasn't clear. So I don't believe that would do it. I think striking it out would just leave the ambiguity which we were trying to clear up.

MR. TOLMAN: Dean Clark, let me ask you a question. This power to extend the time comes from another rule. What is the number of the rule that gives it?

JUDGE CLARK: That is Rule 60(b), you remember.

MR. TOLMAN: Yes, that is it.

JUDGE CLARK: But the question has come as to which governs, whether it is the statute, whether it is 60(b), or whether it is 6(b). The 6(b) is a little different. It provides for general enlargement of time, provided only that it is applied for before the time has expired. The 60(b) is a pretty wide power, within certain time limits, to ask for a change because of mistake, and so on. Then, on top of that, there is the statute. The statute was a two-year limitation.

THE CHAIRMAN: That 60(b) was really a repetition of the statutory provisions. We used the California statute. It was a very narrow provision to relieve a party from a judgment taken through his mistake, inadvertence, surprise, or excusable neglect. It has very definite limitations; it is a narrow

rule. The state statutes place an absolute limit of one year on that power. If you want to set aside a judgment for extrinsic fraud or something after one year, you have to proceed to an independent suit, but the statute is limited to time absolutely to one year. We thought the formality of the judgment ought to be settled before one year, at least as against a proceeding in the same court which had rendered it to vacate it. So, if we reduce the time to six months, there has always been a fixed limit of one year for the kind of proceeding covered by 60(b) in the state codes, and the real question is Rule 6(b), which gives a very broad power of enlargement.

JUDGE CLARK: You see, Mr. Chairman, too, there would be an ambiguity between even this rule and 60(b). Rule 60(b) is one of the rules that we took out of this provision.

THE CHAIRMAN: Yes, we put 60(b) in here and said that under the broad powers in 6(b) you can't set aside that six months' limitation in 60(b)--

JUDGE CLARK (Interposing): That is one of them.

THE CHAIRMAN: --and that is what we want to do.

SENATOR PEPPER: Mr. Chairman, may I make just this inquiry just to clear my own mind up? Rule 6(b) is a sort of ambulatory provision supplementary to specific provisions in several other rules. What do we accomplish by 6(b) that wouldn't be clear and accomplished by the specific provisions? Is there something here that is essential by way of supplement?

THE CHAIRMAN: Yes, there is, because in these various individual rules that we have enumerated, which place time limits, there is no provision in each rule saying you can enlarge it for excusable neglect, and we thought, instead of putting in the rule something of that kind, we would have a general rule to grant relief for excusable neglect on time limitation. Then we discovered that that rule was being used to supersede or overpower the express limitations in certain individual rules, which was never intended, and the courts have split on this.

SENATOR PEPPER: Yes.

THE CHAIRMAN: So we are going back now and saying that this broad, general power that runs all through the rules for relief for excusable neglect shall not be construed to set aside the particular limitations in certain specified rules.

SENATOR PEPPER: And that is a better way to do than to take the trouble to spell it out in each rule?

THE CHAIRMAN: Yes. Otherwise we would have to say in each rule that this limitation can't be set aside under 6(b), under the general power.

SENATOR PEPPER: If you left 6(b) out and spelled it out in the case of each specific rule, you would avoid what always happens where, with specific rules, you have a general provision which one mind will say is in conflict with them and another will say is subordinate to them.

JUDGE CLARK: I should say, Senator, while that would be a feasible way, particularly when you were starting anew, I think it would be quite--

SENATOR PEPPER (Interposing): It would be a mistake now?

JUDGE CLARK: --bothersome to do now. There are quite a few questions. There is the question of pleading, the time of pleading. For example, where this rule is used a great deal is on extending the time for making up the record on appeal. There are a lot of those. You will notice that there is not only the affirmative grant that Mr. Mitchell speaks of, but this in a way contains a restriction on mode of operation, too. This provides that you do it differently if you apply within the time than if the time has gone by.

While if the matter were a new one we would have to study it out and see which would be the shorter way, I don't feel now, having done it this way, that it would be easy to shift around.

SENATOR PEPPER: I have always noticed that in wills, for instance, there are conflicts between specific provisions and general residuary prvisions. There is almost always a question as to which is to be given precedence. There is something in the human mind, when there is a collocation of the specific and the general, which delights in the discussion of which of them takes precedence of the other. But what Judge

Clark has said is clearly right. It is too late to raise the point now.

THE CHAIRMAN: That would bring us down to the specific consideration of whether our limitation to two years in Rule 25 as an absolute limitation is the right one. That is the old statutory provision. Major Tolman suggests that it ought to be changed, that we ought to give discretion to open up and let the man substitute years after death, without any limitation, in his discretion, instead of having a fixed limitation as has heretofore prevailed.

SENATOR PEPPER: Is the statutory provision ironclad?

THE CHAIRMAN: Ironclad?

SENATOR PEPPER: As to the two years.

THE CHAIRMAN: It is a matter of procedure, I suppose. At least we will treat it as such for the purposes of this meeting.

DEAN MORGAN: You can argue that.

SENATOR PEPPER: The Major's suggestion would be to introduce the idea that is present in statutes of limitation where one of the parties is beyond the four seas and all that sort of thing. That is the kind of exception that there would be.

JUDGE DONWORTH: I find in my notes the statement (I haven't verified it) that this two-year limitation is not only in the statute but is contained in the equity rules. If so, it

has such a historical background that it would seem to me better to stick to it.

MR. DODGE: Wasn't there a general power under the equity rules to extend the time?

JUDGE DONWORTH: There may have been; I couldn't say.

MR. DODGE: I don't remember why we changed the former rule by incorporating these additional exceptions to the judge's power.

THE CHAIRMAN: We did it because, for instance, Rule 60(b) had an absolute limitation of six months for taking the proceeding to vacate a judgment for fraud, and the statute from which that rule was taken, allowing that power, had always placed a fixed limit of one year. We reduced that limit to six months. Now the courts come along and say that, under 6(b) as we drafted it giving general power to grant relief for excusable neglect, the six months' limitation in Rule 60(b) can be set aside by a court in its discretion. We certainly didn't have that intention, so we are going back now and saying that this general power under 6(b) to give relief for excusable neglect shall not be construed to allow a court to set aside certain special limitations in the particular rules, such as 60(b) and others that we have considered.

One of them was the limitation of two years to substitute for death. If the courts carried out their present view, the present 6(b) would allow a court in its discretion to

permit a substitution after two years, provided there was excusable neglect.

MR. DODGE: I don't quite see the objection to the court's having that power, which would be rarely exercised and which might be properly exercised in some cases.

THE CHAIRMAN: You can't deal with it in generalities. We have got to take each particular rule and see whether it is the kind of limitation that we want the court to be able to set aside. Some of them we may be willing to have set aside in his discretion, and others we may not. For instance, Rule 60(b). Personally, I would be definitely opposed to allowing the court in his discretion to set aside that limitation. That is a special sort of right to go into a court and, through extrinsic fraud or something of that kind, grant a man relief from the judgment. Historically, it has always been limited to one year in the codes, and the reason for that limitation is that you never have a final judgment if you don't. That is, it is always subject to vacation on that ground. The courts have recognized that and placed that absolute limitation to it. It may be that some of them said the courts could set that aside in their discretion.

DEAN MORGAN: On 25, Mr. Mitchell, do you know what the equity practice was to allow an enlargement of the time, before these rules went into effect?

THE CHAIRMAN: I know that the statutory provisions

about substitution didn't do it.

DEAN MORGAN: Yes, I know.

THE CHAIRMAN: I have seen case after case thrown out in the Supreme Court where somebody died and no substitution had occurred within the fixed limit. Out it went, and that was the end of it. We would now be going back and upsetting the old statutory limitation and giving power to extend it, if it didn't exist before. If there had been any evil developed as a result of that, that might be one thing, but I don't know that there has been.

I think the safe course is to go through each one of these rules that he has listed and see whether we want it in the list or whether we don't. What is your pleasure about substitution on death? Do you want to leave that in the list as a limitation that can't be set aside on discretion?

MR. TOLMAN: Before you take that vote, may I call attention to the fact that there still must be excusable neglect? It is not at large. You must make a showing of excusable neglect before the court can act under 6(b).

MR. DODGE: Or on a motion filed before the time expires; one or the other.

MR. TOLMAN: This is the least important of them all, I think, but still my feeling was that the court should have that power in case of excusable neglect.

THE CHAIRMAN: How can there be excusable neglect if

your adversary is dead? You would find out in two years, wouldn't you, whether he was still active against you or whether he wasn't?

MR. TOLMAN: Yes, but perhaps an executor hasn't taken the proper steps, or an heir may not have taken the proper steps, or something else. I think two years is a generous allowance in the main, and I am not insisting on the point. It is probably better, to save time, not to discuss that any further.

THE CHAIRMAN: If there is no motion to exclude 25 from this list, we will pass on to the next rule here, 50(b).

MR. TOLMAN: Rule 50(b) deals with motions for directed verdict and motions to set aside the verdict. The effect of the amendment will be to prohibit any extension by the district judge for judgment on motion for directed verdict. There the time is ten days, not two years.

THE CHAIRMAN: That is coupled up with the motion for a new trial rule, of course, which is now limited in time.

MR. TOLMAN: Yes.

MR. DODGE: Why shouldn't the court have the power to extend that time in an extreme case? If there is death in the family or if counsel have to go away for a week, as you have drawn the rules now, a stipulation of the parties extending the time doesn't answer the purpose, although I think there ought to be a provision for a stipulation.

THE CHAIRMAN: Suppose the lawyer himself were dead and the client didn't dig up a new one in ten days.

MR. DODGE: I think the court ought to have power to extend that very short period.

THE CHAIRMAN: What is your idea?

JUDGE CLARK: Let me say, just to bring you up to date (I think all the questions should be out in the open every time they come up), that, as a matter of fact, these particular points we did discuss before. I just speak of that so that the committee will be brought up to date. Mr. Dodge, with his usual effectiveness, said then that there should be discretion, and at that time we decided that all matters connected with appeal in particular and the time for shortening and extending ought not to be changed.

Let me say first that where we started was with the three months' limitation on appeal on the time for filing notice, and I think as to that there was some real question whether we had power or not to change that requirement. I think we decided first on that that we wouldn't change it, and then we, so to speak, worked backwards. I can't remember whether there was a question as to our power as to the ten-day limit on the motion for new trial, but I think we considered that all these matters as to appeal should take the old, traditional course. So we did reach that decision as to that.

I think that Rule 50(b) and Rule 59(b) ought to be

exactly the same. That is, if you change one, you should change the other, and vice versa.

THE CHAIRMAN: Yes. As I said, they involve new trials.

JUDGE CLARK: And probably 52(b), because that is a motion that we hook up with a motion for a new trial. Rule 52(b) is the motion for additional findings.

PROFESSOR CHERRY: Mr. Chairman, if we changed 50 as proposed, this wouldn't make any difference, would it?

THE CHAIRMAN: What?

PROFESSOR CHERRY: If we change Rule 50 on directed verdict and judgment notwithstanding.

THE CHAIRMAN: Yes, there will still be the time.

PROFESSOR CHERRY: But on your appeal, you can still appeal and take advantage of the fact that you made your motion for directed verdict without making this motion afterward. Isn't that true if we contemplate a change in Rule 50?

JUDGE DONWORTH: If you did that, it would mean that after the ten days you are governed by the Slocum and Redman cases.

PROFESSOR CHERRY: Governed by the rule that we are proposing now, which would mean that the appeal would raise that.

THE CHAIRMAN: The present situation is this: Rule 50(b), which we are talking about, dealing with motions for

judgment notwithstanding the verdict couples up with the motions for a new trial, and, as Charlie has said, we have to consider Rule 59, which deals specifically with motions for new trial, and they ought to be consistent. Rule 59(b) says:

"A motion for a new trial shall be served not later than 10 days after the entry of the judgment, except that a motion for a new trial on the ground of newly discovered evidence may be made after the expiration of such period and before the expiration of the time for appeal, with leave of court obtained on notice and hearing and on a showing of due diligence."

There is a definite limitation on the right to move for a new trial. It has to be done within 10 days, except on newly discovered evidence it may be made later.

The question is whether we ought to allow Rule 6(b) to grant discretion to the courts to allow a motion for a new trial, on any ground that may be made, after 10 days. I don't see why we shouldn't. I don't see why the discretion should be present under excusable neglect, 6(b). I don't see why we should include either 50(b) or 59(b) in this list of rules where we won't allow an enlargement. It is a pretty stiff rule to say that a man has to make a motion for a new trial or a motion for directed verdict in 10 days, or he loses his rights, even if his lawyer is dead.

DEAN MORGAN: A motion for directed verdict or for

judgment notwithstanding after the motion for directed verdict is made at the trial is purely a formal one, anyhow. He doesn't have to do anything but move for decision, practically, on his motion for directed verdict. So I don't see that he needs more than 10 days there. If you extend the time for making motions for a new trial and put it in the discretion of the trial judge, you should put some limit on it. It will mean you might just as well not have any time, because it will practically always be extended whenever the lawyer asks for it. If you want to cut out delays, it seems to me this is one way to cut them out.

JUDGE CLARK: May I say that I agree 100 per cent with Dean Morgan. You want to have in mind that it is well settled that all these motions extend the time for taking any of the steps for appeal, and it seems to me that the Judicial Conference has been considering one of the weaknesses of the federal system now, the long delay that is permissible for taking appeals. I don't believe there is any reason in the world why there should be the three months' rule. The Judicial Conference has been discussing a 30-day rule, which I should think was all that was ever needed, but we haven't got that, and you can see how easy it is for the unsuccessful party to hold the successful party away from the fruits of his victory. All he needs to do is to get an extension of time, if the power exists, and I think all of you know how easy a judge is after

he has made a decision. He is easier then on the other side than before he has made his decision. He will say, "Well, you can go ahead. I will help you out." He grants the time, and that holds up the time for any further proceedings of any kind.

THE CHAIRMAN: I think there is something to be added to enforce that view, and that is that a motion for new trial is in the discretion of the lower court, anyway. It is a matter of discretion with the trial court, and there is no appeal from an order refusing or denying it, anyway. So you don't lose any of your rights on appeal by not making the motion for new trial, but if you make it, the moment it is filed the finality of the judgment is suspended and the time for appeal doesn't run. So all a fellow has to do is to make a motion, if he can get the court to allow him to make a motion 30 days after the judgment has been rendered, and then he has suspended the running of the time for appeal. Maybe that is right.

MR. TOLMAN: This 10-day limitation, you think, is superseded by that 30-day?

THE CHAIRMAN: Thirty-day? What do you mean by 30-day?

MR. TOLMAN: You used that as an illustration only?

THE CHAIRMAN: I didn't refer to any 30-day. I just used it as an illustration that your 10 days might elapse, and then you might come in at the end of 30 days or 60 days or 90 days, just before the time for appeal expired--

MR. TOLMAN (Interposing): Yes.

THE CHAIRMAN: --and ask leave to file a motion for a new trial. Then, if the court grants leave to file it, says it is excusable neglect, all the 60 or 80 days that have run against the time for appeal are wiped out, and your time hasn't begun to run at all until the motion for new trial is ruled on.

JUDGE CLARK: Major, I said that there was a suggestion of making the appeal time 30 days. Of course, that has been considered by the Judicial Conference, and so on, but it isn't the law now. I think it ought to be 30 days, with no extension of time for new trial. I don't see why that should extend. That is the historic rule; the Supreme Court settled it. But since it is more or less a suggestion to the trial court, I think it would have been better if all that sort of proceeding was without reference to the time for appeal, because, as the Chairman says, it doesn't affect the rights on appeal at all. At any rate, that other rule is well settled. It does hold up the time for the running of the appeal, the finality of the judgment, and so on.

MR. TOLMAN: Of course, the views and the experience of the appellate judge as to the trouble in extending the time for appeals are very important to be considered, but I had supposed merely that if a lawyer dropped dead in his tracks on the ninth day, before he had made his motion for new trial, if somebody came in and told the court, he would say, "You can

make it later. I think, to balance those two (I have no particular feeling about it), I wouldn't tie up the 10-day rule and make it immutable.

JUDGE CLARK: Would that be true on the three months' time for appeal, if a lawyer dropped dead on the 89th day?

MR. TOLMAN: Do we have that here? We had this 10 days' provision for making the motion. I don't think the other is in this rule. It is excluded, Judge Clark. That is the original thing that was in this rule, that you mustn't extend the time for an appeal. That, I think, should stay there.

JUDGE CLARK: Yes, but this does it, you see, very clearly, very directly. This rule does that same thing very materially.

MR. TOLMAN: That is an assumption that he would let him have his way about it, whether it is really excusable neglect or not. I think we can trust the judges not to play hob with your calendar.

JUDGE CLARK: I don't believe the trial judge ever refuses the time when it is asked for at once. He always grants once. He may grant more, but I think the first time the lawyer comes around he is sure to get it.

THE CHAIRMAN: We haven't had any complaints about the limitations on motions for new trial, motions for amended findings, and motion to direct the judgment notwithstanding the verdict. Nobody has squealed about these limitations, have

they?

JUDGE CLARK: It is rather historic in federal practice. These are the old ones. We haven't changed those.

PROFESSOR SUNDERLAND: These limitations haven't been in force under the rules as drawn now.

THE CHAIRMAN: Under 6(b)?

PROFESSOR SUNDERLAND: Under 6(b) they have been elastic.

THE CHAIRMAN: What is the decision as to whether 6(b) supersedes all the limitations under the particular rule? I thought there was a conflict of decisions in that.

JUDGE CLARK: There is. If you will look at the note on Rule 6, there is a reference to authority, the Ainsworth case.

THE CHAIRMAN: That is C.C.A. 3rd. "It was held that by virtue of Rule 6(b) the district court, upon a motion made after the expiration of the forty-day period stated in Rule 73(g) but before the termination..... But the contrary holding was made in Mutual Benefit," a case in the 6th Circuit.

JUDGE CLARK: That, however, was as to a particular rule where time is very freely granted. I don't understand there has been any suggestion that Rule 50(b) allow more time.

THE CHAIRMAN: Are you ready to vote? I think we should couple up in our vote all three of those rules. One is 50(b), which has to do with motions for directed verdict coupled

motions for a new trial; one is 52(b), which relates to a motion to amend the findings of the trial court and alter the judgment accordingly; and the other is 59(b), which is a motion for new trial. They either all ought to be in or all ought to be out.

MR. TOLMAN: I think so. I think they should all stand or fall together.

THE CHAIRMAN: Are you ready to vote on that?

JUDGE DONWORTH: There is one observation I should like to make. I call attention to the difference in the wording of Rule 50(b), which is to obviate the Slocum and Redman decisions, and the general provision about a motion for new trial in Rule 59(b). You notice in Rule 50(b), to obviate Slocum and Redman, the motion must be made within ten days after reception of the verdict, whereas in the general new trial section, Rule 59, it is within ten days after judgment. It wouldn't necessarily follow that the two ten-day limitations should go the same way. We might conclude that if a man wants to take advantage of obviating the Slocum and Redman decisions and, having made a motion for directed verdict, wants to get the benefit of that within the ten days, that is a different proposition from the ordinary case where the man is simply defeated and wants to move for new trial and wants to extend his time for an appeal by a motion for new trial.

THE CHAIRMAN: You see, the rule on motion for di-

rected verdict, however, allows a man to couple with it an alternative motion for new trial. You have to wipe out that privilege in order to draw any discrimination between a motion for--

JUDGE DONWORTH (Interposing): Perhaps so, but the time limit is different. You see, in one case it is receiption of the verdict, and in the other it is entry of the judgment. I don't know how I am going to vote on the proposition, but they would not necessarily go together.

THE CHAIRMAN: Our problem would be, first, as to whether Rules 50(b), 52(b), and 59(b)--

MR. DODGE (Interposing): We had excluded only Rule 59 before, Mr. Chairman, and had left the power of the court in as to all these other rules. I understand that there has been no complaint about that, and it hasn't caused any difficulty. Delay is an important thing, but it isn't the most important thing. The most important thing is the protection of the rights of the clients, and protection particularly in circumstances where there is a real ground for inaction, real excuse for inaction, on the part of the lawyer. Where that condition exists, I fail to see why the judge should not have power, upon a motion made before the time has expired or for excusable neglect, to extend the time. I don't anticipate that that is going to be any real cause for delay in the administration of justice, and it may protect substantial rights.

JUDGE CLARK: I don't want to be insistent on this, but I think that Mr. Dodge makes a little assumption there that the present rule does permit of discretion. There is nothing to show that the present rule does. It has not been so construed, and I don't believe it does. There was a slight ambiguity which has not arisen as to these rules, but it has arisen mostly as to the forty-day for filing the record rule, and I think that we are changing now the practice, rather than otherwise. I don't think we can make the assumption which has been stated. Of course, again I say, this is one way of depriving the successful person from the fruits of what he has won.

MR. DODGE: I don't see that, and I am not at all concerned about any matter there except the protection of the substantial rights of litigants.

MR. TOLMAN: Mr. Chairman, may I make a motion for the record, to see if we can't get a vote on it? I move to strike out of this amendment in line 11 of Rule 6, the words and figures--

THE CHAIRMAN (Interposing): You mean as the rule was originally drawn?

MR. TOLMAN: No; I mean this proposed amendment that is before us.

MR. HAMMOND: Line 10, as amended.

MR. TOLMAN: The original rule had in it only one

other rule in which the power to extend time should not apply, and that was the last one. Now there have been inserted several of these rules. I am convinced by the discussion that some of them should be inserted, but I think these three ten-day rules, 50(b), 52(b), and 59(b), to which the Chairman has just referred, those words and figures, should be stricken out, so that a motion for new trial, a motion to amend the findings, and a motion to reserve decision on motion for new trial may not be foreclosed by this rule but may stand with the limitations that are in them, subject to the right of the court to extend the time for excusable neglect.

JUDGE DONWORTH: I would ask Major Tolman to repeat the words and figures that would go out under your motion. Will you please repeat that? I didn't get it.

MR. TOLMAN: Yes. They are 50(b), 52(b), and 59(b), (c), and (d).

THE CHAIRMAN: We haven't talked about (c) and (d).

MR. TOLMAN: In line 11.

THE CHAIRMAN: I know it is there, but I am trying to find out whether (c) and (d) would go along with (b).

DEAN MORGAN: But (c) has a particular provision, "which period may be extended for an additional period not exceeding 20 days". There is a very specific limitation there upon the right to extend the time.

THE CHAIRMAN: There is a motion for a new trial

based on affidavits, which means newly discovered evidence, and a party comes in and within ten days after serving of his motion, the opposing party has ten days to produce opposing affidavits, which may be extended for an additional period not exceeding twenty days, either by the court for due cause shown or by the parties. Suppose this is newly discovered evidence. Suppose that the time is extended to not exceeding twenty days and then the party who has won the verdict, after twenty days, new evidence having come to light, wants to put affidavits in which would beat the plaintiff's motion for new trial on the ground of newly discovered evidence. The court may consider that his failure to dig up that additional stuff and put in those affidavits within twenty days (that is, the party who is resisting the motion for new trial on the grounds of newly discovered evidence) is the result of excusable neglect, and if we don't give the court power to allow him to do it after the twenty days for excusable neglect, we might be barring him from digging up affidavits and additional facts which would have a very material bearing on the question.

DEAN MORGAN: Yes, but it seems to me if you are going to make 6(b) applicable to (c), there is no sense in saying, "which period may be extended for an additional period not exceeding 20 days".

THE CHAIRMAN: For good cause shown.

DEAN MORGAN: Yes, for good cause shown. You can

extend any length of time for good cause shown. What is the use of having two orders? If you are going to do this, it seems to me you would want to amend (c) by striking out all that question of extension of time.

THE CHAIRMAN: On the grounds already covered by 6(b).

DEAN MORGAN: Already covered by 6(b).

MR. DODGE: That is true.

DEAN MORGAN: I think it is perfectly obvious that when we did this we didn't expect 6(b) to cover this thing.

THE CHAIRMAN: No.

MR. DODGE: As a matter of fact, the only affiant may be in Europe somewhere--

DEAN MORGAN (Interposing): Sure.

MR. DODGE: --and the affidavit can't be obtained inside of twenty days. The court ought to have the power to deal with that situation.

JUDGE CLARK: That is really what this does, it seems to me.

DEAN MORGAN: It is the old Sacco Vanzetti case all over again.

JUDGE CLARK: There are very few cases that are appealed, in the first place. Of those that are appealed, less than a third have any merit in them, and what you are doing is to give a great weapon (this is a very considerable weapon) to the party to delay the other man from judgment. It seems to

me that these are a little remote fears. The motion for new trial and these other things are, in the main, formalities, and if the losing party wants to make them, it is quite all right. It is the history of federal procedure, as the cases show, to make him do it rather promptly. These are rules of long standing and haven't been changed, and we are now changing them.

MR. DODGE: We have to assume that there is often merit in the contention of the opposing party, and we mustn't deprive him of his rights because certain other people may be delayed two or three weeks in getting a judgment entered.

PROFESSOR SUNDERLAND: It seems to me that the most characteristic thing about our whole system of rules is the vast amount of discretion we have given to the trial court, and I don't think we ought to show a lack of confidence in the court in this particular matter when we give such wide discretion in scores of other matters throughout the rules.

MR. DODGE: Yes.

JUDGE CLARK: Of course, 6(b) provides for extension within the time almost automatically, ex parte, without notice to the other side. You get your first ten days, at least, without any question. Suggestion has been made that you must show excusable neglect. That is not the rule. That is only a part of the rule. After the period has expired, then you can get more time by showing excusable neglect.

MR. DODGE: I think Major Tolman's motion perhaps

should be amended by including the striking out of those words suggested by Mr. Morgan as being words that ought to go out if your motion is carred; that is, beginning with "which period may be extended for an additional period not exceeding 20 days".

MR. TOLMAN: Would you read that?

JUDGE DOBIE: Senator Pepper's suggestion would come in there, that that, being a time limitation, would perhaps prevail over the general rule, if we left the language in that other rule as is.

THE CHAIRMAN: It seems to me the Reporter's argument is that the effect of the motion for new trial is to suspend the running of the time for appeal, that if you carried it to its logical conclusion and went back far enough, you would find that the act of the court in allowing the party additional time to answer eventually affects the time for appeal, that it delays the appeal just that much, and that any intervening extensions would delay the trial and postpone the hearing, and it would have the effect, of course, eventually of delaying the final judgment on appeal. So I am not very much impressed with that.

DEAN MORGAN: The fellow who is on the slow side knows that, without any question.

MR. DODGE: These things aren't always done by a fellow who is on the slow side trying to delay, not at all in my experience.

DEAN MORGAN: Oh, no.

MR. DODGE: They are generally quite apt to be based on a substantial consideration affecting real rights.

THE CHAIRMAN: Are you ready for the question?

JUDGE DOBIE: What is the question?

THE CHAIRMAN: The motion is to strike from Rule 6(b) in the Reporter's last draft (if you are using the draft with the lines shown on it, I refer to lines 10 and 11) "50(b), 52(b), 59(b), (c), (d)," so that we leave the court power, in the exercise of his discretion, on a showing of excusable neglect to grant a longer time than Rules 50(b), 52(b), and 59(b), (c), and (d) now fix.

In addition to that, the motion carries the idea that, if we are going to leave Rule 6(b) so that the court will have discretion to enlarge the times specified in those three rules, we do not need in Rule 59(c) the clause: "which period may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation."

Do we understand it? It is a little confused. I may not have stated it very clearly.

MR. TOLMAN: I think it is satisfactorily stated.

THE CHAIRMAN: As Rule 6(b) is now before us, it makes it clear that under Rule 6(b), discretion for excusable neglect, and so on, the court may not enlarge the times

particularly limited in Rules 50(b), 52(b), and 59(b), (c), and (d), because we expressly stated that those rules were excluded from the operation of Rule 6(b). Now we propose to strike out from Rule 6(b) any reference to those rules as being rules which the court can modify for excusable neglect.

MR. DODGE: That is, we leave in all those where there is a substantial period, such as six months or two years.

THE CHAIRMAN: We are not dealing generally with it. We have already decided that we will leave reference to Rule 25 in there.

MR. DODGE: Yes; that is two years.

THE CHAIRMAN: That is the two-year limitation for substitution. Now we have passed on to these particular rules. What we will do with the others remains to be seen.

MR. DODGE: The Major's motion leaves in 60(b), where there are six months.

THE CHAIRMAN: I am going to vote to leave Rule 60(b) in here because of the historical basis for that rule, but that is not before us now.

MR. DODGE: No.

THE CHAIRMAN: It is the limitations of time for motions for directed verdict, for new trial, for amended findings, and so on.

All in favor of the motion to strike out the reference to those three rules in Rule 6(b) say "aye." Raise your hands,

please. That is six. All opposed? Four. The motion is carried.

Now we come to Rule 60(b). Shall we strike out the reference to that or shall we make it clear that the limitation of six months in Rule 60(b) cannot be set aside by a court under 6(b)?

MR. TOLMAN: If it is left in, it does not.

THE CHAIRMAN: If it is left in, it deprives the court under Rule 6(b) of the power to extend that six months' limitation for a proceeding to vacate a judgment, under that system, of extrinsic fraud and that sort of thing.

MR. TOLMAN: So far as I am concerned, I didn't mean to include that in my motion. I think it should be left in.

THE CHAIRMAN: Is there any motion to strike out 60(b)?

JUDGE DONWORTH: Rule 60(b) is the rule that the Chief Justice wrote his letter about, is it not, about the action of the circuit court of appeals which declined to consider a judgment where the district court had vacated the judgment and then put in a new judgment later so as to enlarge the time for appeal? As I recall the circumstances, a judgment was entered without the knowledge of the defeated party.

THE CHAIRMAN: His point, Judge Donworth, was this: That case arose in the District of Columbia, and the time for appeal in the District of Columbia was fixed by rule at twenty

days. The man didn't know that the judgment had been entered, and he allowed the twenty days to go by. The only protection in the rules about giving him notice of entering judgment was a postal card that the clerk was supposed to send him. The clerk failed to send it, and the man didn't trot up to the court house within the twenty days to see if judgment had been entered, so he didn't know it had been entered. The judge's criticism was not 60(b) at all. It was that there is no provision in the rule requiring notice of entry of the judgment in addition to the starting of the time for the making of the appeal.

I wrote the Chief Justice a letter and explained to him that the provisions in the federal law for fixing the time for appeal were that it always ran from the date of judgment, and not from the date of notice of the judgment, and that we rather feared that we didn't have any right to change the statutory time for appeal by saying that it should run from notice instead of from date of actual entry. But his letter had no relation to 60(b) at all.

JUDGE DONWORTH: Are you sure about that? I concur in all that the Chairman has just said, but there is another consideration besides, having to do with the action of the district court which tried to give a man a chance for his "white alley." He said, "I will set aside this judgment, and I will enter a new judgment in the precise terms of the former

judgment, so that he may appeal from this new judgment." He vacated the original judgment and, a month or two later, made a formal judgment to the same effect. I think that Rule 60(b) did cut a figure there, because they held that the district court had no power to vacate the judgment and put in a new judgment.

THE CHAIRMAN: That was done within the six months' period, you know.

JUDGE DONWORTH: Yes.

THE CHAIRMAN: The point is that the entry of the judgment in that case wasn't obtained by fraud or as a result of excusable neglect. The neglect was in not finding out afterwards that it had been entered. So Rule 60(b) had really no application to it.

JUDGE CLARK: That is what the court held. The circuit court held that it did not come under 60(b) because it was not the action of the parties. There was no excusable neglect, and so on, of the parties.

THE CHAIRMAN: As far as the entry was concerned.

JUDGE DONWORTH: Yes, that is what I am leading up to. Rule 60(b) has the word "his", "taken against him through his mistake, inadvertence, surprise". This may not be the right time to suggest the point, but I think if the "his" were out, that man would have to show semper vitalis.

THE CHAIRMAN: How was the judgment taken in that

case? As a result of excusable neglect?

JUDGE DONWORTH: "proceeding taken against him through his mitake, inadvertence". Certainly it was inadvertence on the part of this man that this judgment was entered. However, that is delaying. I won't press that matter at this time, Mr. Chairman.

JUDGE CLARK: On the question of time, Mr. Chairman, I might refresh your mind. At least one case has held that the time limit of 60(b) is overridden by 6(b). There are five cases that have held that it is not. Most cases have held that it is not overridden, that six months govern, but one case has held the other way.

MR. TOLMAN: You think 59(b) should be in the enumeration?

THE CHAIRMAN: 60(b).

JUDGE CLARK: 60(b). I do think so as to 59(b).

THE CHAIRMAN: We have voted on that.

JUDGE CLARK: That is done for this meeting at least, I suppose.

THE CHAIRMAN: The question before us is whether we will leave in Rule 6(b) a reference to Rule 60(b) as being one of the limitations that can't be set aside under Rule 6(b).

SENATOR PEPPER: There has been no motion.

THE CHAIRMAN: There has been no motion to strike it out, so we will leave it in, unless somebody wants to make it.

The next ruled referred to here is 73(g).

MR. DODGE: Mr. Chairman, there was a suggestion made by the Insurance Committee of the American Bar Association that seemed to me a good one, with regard to stipulation of the parties extending the time for filing an answer or something like that, subject to the power of the court to prevent undue delay. It seems to me that the court ought not to be bothered every time. If, for a perfectly justifiable reason, a little more time is really needed to prepare an answer, the parties ought to be able to do that by stipulation.

JUDGE CLARK: Mr. Chairman, we referred to that again in the supplemental material recently sent out, and the case, of course, was the 3rd Circuit case, Orange Theatre Corporation v. Rayherstz Amusement Company, 135 F. 2d 185, where it was held that the stipulation did not govern, that the stipulation had to be approved by the court. A lot of lawyers are upset by that, and the Insurance Counsel [illegible], as Mr. Dodge says, do think that the stipulation should govern.

THE CHAIRMAN: Does that have anything to do with 73(g)?

JUDGE CLARK: No, but I suppose it does come in 6(b) or at least this rule we are considering. I mean generally. I think it might well be thought to come there.

THE CHAIRMAN: Maybe it is pertinent to 6(b).

JUDGE CLARK: The general subject, yes.

THE CHAIRMAN: We are now dealing with the question of these particular rules, and I think we will avoid confusion if we go through to the end on that.

JUDGE CLARK: I think Mr. Dodge thought you were going to the next rule.

THE CHAIRMAN: No, no. I am still under 6(b), but I am referring to the reference in it to Rule 73(g), as to whether that should stay in or be stricken. Rule 73(g) is the rule about docketing and record on appeal, and we have expressly provided in there the limitations and how they shall be granted. The question is whether we want to abolish those and let the district courts set them all aside for excusable neglect. Rule 73(g) says:

"The record on appeal" .... "shall be filed with the apellate court and the action there docketed within 40 days from the date of the notice of appeal; except that, when more than one appeal is taken from the same judgment to the same appellate court, the district court may prescribe the time for filing and docketing, which in no event shall be less than 40 days from the date of the first notice of appeal. In all cases the district court in its discretion and with or without motion or notice may extend the time for filing the record on appeal and docketing the action, if its order for extension is made before the expiration of the period for filing and docketing as originally prescribed or as extended by a previous order; but

the district court shall not extend the time to a day more than 90 days from the date of the first notice of appeal."

That bars the district court from allowing more than ninety days from the date of the first notice of appeal in which the docket was directed, and after the time has expired and the docketing is too late, he can't then extend it.

JUDGE CLARK: The district court cannot.

THE CHAIRMAN: The circuit court of appeals can.

JUDGE CLARK: The circuit court of appeals does it right along.

THE CHAIRMAN: Yes; that is all right.

JUDGE CLARK: May I make a suggestion on this? This is perhaps the place where the question arose. There was a difference of opinion on this very point as to whether 6(b) changed this provision or not, although the provision is pretty explicit. Therefore, I should say in the first place we ought to clear the thing up one way or another. Secondly, I express the hope that you don't extend the time here. I think this is a very salutary provision, and I think that the circuit courts regularly do have provisions governing the extension of time.

May I just say how we work it? We have a circuit court rule which provides in effect that when an extension of time to docket after the time has expired is considered, the moving party shall show us either that he has moved the district court if it is within the time and what happened, or that he

has not and the reason therefor; and, second--and perhaps this is most important--that there are reasonable grounds for pressing the appeal, and he has to show his hand there. We are able, on that second ground in particular, to get rid of a great many rather foolish appeals that are not really being pressed very much. We have it in our control, in other words. If you keep it too long in the district court, of course the district court can be taking charge of the thing, but as it stands, we really control it, and if they don't show any reasonable grounds, we dismiss it at once.

SENATOR PEPPER: You really are in the position that you would be if it were a case of certiorari, not appeal.

JUDGE CLARK: That is it, yes; just exactly.

THE CHAIRMAN: Isn't it enough that we give pretty broad power to the district court by this rule, and we have still left to the circuit court of appeals the right to grant additional time if the merits deserve it? So, what is the harm in leaving these limitations fixed as far as the district courts are concerned?

SENATOR PEPPER: There is no motion to change.

THE CHAIRMAN: I don't hear any.

MR. TOLMAN: I didn't intend to make any.

THE CHAIRMAN: Then that finishes the specific subject. Is this now a place where you want to put something in Rule 6(b) about stipulations?

MR. DODGE: I think so. The Committee of the American Bar Association, the Federal Courts Committee of the New York County Lawyers Association, the Committee on Practice and Procedure of the International Association of Insurance Counsel have all taken that point, that it ought not to be necessary to rush to the court to get permission when counsel agree that the time for filing an answer may be extended.

THE CHAIRMAN: What, in particular, do they want? Do they want broad power to stipulate to extend everything or only certain particular steps?

MR. DODGE: I note that the suggestion of the Insurance Committee of the American Bar Association was that the parties should have power by stipulation to extend the time. They are referring only to that case where it was held that they had no power to extend the time for filing an answer and that the party was therefore defaulted, although the parties had stipulated that an answer might be filed ten days later, or something like that. I should think that they were talking primarily of that.

JUDGE DOBIE: I should just like to advance the observation that down in my part of the world there is entirely too strong a tendency, I think, among the lawyers who are used to the very loose practice in the state courts, and they have the idea that they can do practically anything by stipulation. I remember the first time I went on the federal bench they were

passed up continually. They just said, "We both agreed to this, Your Honor. It is perfectly formal." I said, "It is not formal at all," and I denied the continuance. Certainly, from our part of the world, I would in general object to anything to give the lawyers the idea that they are running the court, and not the judge.

MR. DODGE: You would rather have them go hunt up the district judge and run to him to extend the time of filing because of absence of the counsel from the city for ten days.

JUDGE CLARK: Here is a case where we have left the discretion with the trial judge. Perhaps I am all wrong about this, but I am a little worried myself that we seem to be tending to say that any way we can give the lawyers more time is desirable. When one way of giving them more time is to extend the discretion of the judge, we support it; and when a way of giving them more time is to take discretion away from the judge, we support it. I don't believe that is a very good tendency now when the pressure really is on the courts to try to speed things up. The statute creating the Administrative Director of the Courts and the circuit councils, and so on, refers two or three times to taking ways and means of expediting business. The circuit judges, for example, sitting in council are supposed to take some steps to expedite business. There isn't very much we can do. We poke around and try to keep it in the atmosphere, so to speak.

But now, of course, this is to take away all discretion from the judges and to provide that when a stipulation is made by the parties, the judge has no power at all. As it stands now, the provision is simply that the stipulation must be approved by the court, and, of course, almost always it is. It is unfortunate, perhaps, that in this case it wasn't approved, because I don't think the question would have arisen. But there happens to be this one case that various people think has been harsh. I am not so sure it was so harsh, after all. At any rate, we have in this one case taken away all the power of control over the situation from the court, and I doubt if that is very desirable.

THE CHAIRMAN: Let's confine it--pardon me, Senator.

SENATOR PEPPER: I was just going to make a comment. When Sir Norman Birkett was over here he told of an instance where, when he was at the bar in London, he had undertaken with his adversary, to stipulate for a ninety-day extension. Lord Justice Macnaughton said, "Dear me! Ninety days is a long time. Who knows that any of His Majesty's judges will be alive at the end of that time?"

To which Birkett's adversary replied, "My Lord, is not that almost too much to hope for?" (Laughter)

THE CHAIRMAN: Of course, providing that time for answer may be extended by stipulation is one thing; providing that generally the parties can extend anything by stipulation

is quite another. I understand that Mr. Dodge's suggestion relates only to the time for answer.

DEAN MORGAN: Then you don't want it in 6(b), do you?

THE CHAIRMAN: No. Where is it?

DEAN MORGAN: The time for answer.

THE CHAIRMAN: It should be in Rule 12, in a clause there that the time for answer may be extended by stipulation, if you want it.

DEAN MORGAN: Yes.

THE CHAIRMAN: You don't mean to have a general authority to extend everything by stipulation, do you?

MR. DODGE: Oh, no.

THE CHAIRMAN: What do you say to that, Charlie, to extend the time for answer, without running to the judge, by stipulation?

JUDGE CLARK: I should think it still ought to be subject to the approval of the judge. There isn't any particular running to the judge about that.

THE CHAIRMAN: You have to go to him to get him to make an order on the stipulation.

SENATOR PEPPER: There is this to be said in favor of it, as limited to the case of the time for filing an answer: At that stage of the game the judge doesn't know anything about the case, and it is almost inevitable, if the reason for extension is sufficient to lead the plaintiff to agree to it, that

the court will approve the stipulation. It is otherwise as to things during the course of the trial or after the trial. The judge knows what they are talking about then, and he can determine whether the stipulation is reasonable or not, but as to the time for filing an answer, the judge hasn't the material (unless he is going into a sort of pre-trial conference) to make up his mind whether he ought to approve the stipulation or not. Therefore, I should think that it ought to stand on the stipulation of the parties, as Mr. Dodge has suggested.

MR. DODGE: The judge would always allow it.

SENATOR PEPPER: He couldn't help allowing it.

MR. DODGE: Of course he couldn't. "You move that the time for filing an answer be extended to two days. Does the other side consent?" "Yes." "Granted." Why go to the necessity of marking that on a motion list and hanging around in court, at the expense of your client, for some time. It is a mere formality.

JUDGE DOBIE: Would you put any restriction on it?

MR. DODGE: No.

JUDGE DOBIE: Any length of time you want?

DEAN MORGAN: If the trial judge refused to honor the stipulation?

MR. DODGE: It was never presented to him.

JUDGE DOBIE: Suppose it is six months, Mr. Dodge. Would you allow that?

MR. DODGE: I would just as leave have a limitation, if you think it would do any good, but you are not at all likely to have any such stipulation from counsel.

PROFESSOR SUNDERLAND: A six months' limitation would suggest a very long period of continuance.

JUDGE DONWORTH: Then the question would be: Can that be extended?

JUDGE CLARK: Let me say a little more, although I guess maybe I have ideas a little different. Of course, in the first place it should certainly be limited to 12(a). I should think the general power would be very dangerous, and it would be something of a help to limit it to 12(a). I must say that even as to that I really hate to see an invitation to the lawyers to extend the time. It seems to me unnecessary. It seems to me that is contrary to the present spirit. Of course, with a good many of these rules it is not so much whether you can get the extension. If you go after it, you can get it nowadays, but that is a little different from making it always appear as the rule.

I had some occasion to study this matter a while back. Where you have a twenty-day limit for filing the answer, the average time is three months. When you have it fairly easily done, by agreement or otherwise, a lawyer can't very well refuse a request, and when is he going to start refusing? This, of course, provides for stipulation after stipulation, and I

think the whole practice of making this a matter that a lawyer has either to be a hard-boiled egg whom nobody likes in order to get his case ahead or to allow it to go by agreement is rather unfortunate.

THE CHAIRMAN: On your last suggestion about stipulation of the continuation, you might provide that the time for answer may be once extended by stipulation without action of the court, but that any further extension--

DEAN MORGAN (Interposing): Are you going to limit it to the answer?

THE CHAIRMAN: No. Charlie says 12(b).

JUDGE CLARK: 12(a).

THE CHAIRMAN: 12(a). But, going down through this rule, there are all these motions that are permitted within certain times, and the question arises whether they should be extended by stipulation.

JUDGE DOBIE: Having said one thing about my part of the country, it is only fair, I think, to say one other thing, Mr. Dodge, and it is in your favor. It is the fact that, of course, in Philadelphia, Boston, and New York the federal judge is always there, but in the Western District of Virginia the court meets in seven places, and it is sometimes rather difficult to get to the judge.

MR. DODGE: Certainly.

JUDGE CLARK: I have noticed that they always do that

by the United States mails, which is almost always open. They are always done by mail.

THE CHAIRMAN: Suppose a fellow gets caught on the nineteenth day; his stenographer hasn't got his answer typed, and the judge is sitting over in the Far Western District of Minnesota, for instance. Your extension is no good unless you get to the judge that night. Then you are in default. Your only next step then is to move the court for relief, which he will grant as a matter of course because you couldn't get to him. So you are bothering the court with a motion to be relieved under circumstances of that kind, which he would certainly grant.

JUDGE DONWORTH: I don't think that there is any abuse of the judicial process of accommodating each other. When the defendant wants more time, if the attorney for the plaintiff in the case grants it, I don't see any abuse of discretion there involving criticism of the court in all that, such as results if an appeal is delayed. That is different. I think the difficulty about the suggestion is how you are going to word Mr. Dodge's motion. It should not preclude the right to make motions. The spirit of what these insurance lawyers suggest is that whatever the defendant has to do in the start of the case up to the filing of the answer may be extended by stipulation rather than bother the judge about it. I think you can depend upon the adverse party to protect his own

interests, but I don't see just how you can word the motion to meet the mischief.

MR. DODGE: I think if you amend section (a) of Rule 12, it necessarily follows that the later provisions in Rule 12 are affected thereby. Of course, they relate to the time when the pleading is required. If the stipulation is extended for twenty days more, those provisions are affected. I don't see any objection to putting in a limitation, if that is thought desirable, that the time for filing the answer may be once extended by stipulation.

JUDGE DONWORTH: Would you formulate a motion, Mr. Dodge?

MR. HAMMOND: May I say a word about this?

THE CHAIRMAN: Yes.

MR. HAMMOND: Here is the way the thing impresses me. If under the present rule you can get that extension as a matter of course, why do we change the rule? If you do change the rule and say anything about extensions by stipulation, that is just going to lead the parties to do it that way all the time. You are going to get a lot more. We have some statistics in the Tax Division which show that in tax cases, as a result, they think, of this rule which permits only the judge to extend the time, the time for answer has been cut down a great deal.

DEAN MORGAN: I should like to know how they ever got a default judgment in that case, unless the plaintiff went back

on his stipulation.

PROFESSOR MOORE: That is exactly what happened. He did go back on it.

DEAN MORGAN: Went back on the stipulation? You mean he stipulated--

THE CHAIRMAN (Interposing): The stipulation was void.

DEAN MORGAN: Didn't they disbar him then?

SENATOR PEPPER: No. This was the 2nd Circuit: (Laughter)

DEAN MORGAN: No; it was the 3rd Circuit.

MR. DODGE: In that case, however, the discussion took another turn, and this point was only briefly reverted to.

MR. HAMMOND: Another thing is that the court really isn't bothered if the court has agreed to the stipulation for the extension of time for answer, subject to the approval of the court (which is what we do in regard to our briefs in the circuit courts of appeal), because the clerk takes care of it and the judge automatically grants it. The clerk even prepares the order.

THE CHAIRMAN: Suppose the judge isn't around or accessible at the last minute, what happens?

MR. HAMMOND: Then you would have the provision in our rule that you could go to the judge after the time has expired and have it extended then.

DEAN MORGAN: If the other party doesn't go back on

his stipulation, how the devil is it ever going to get before the court? That is what I can't see. You certainly aren't going to be able to rule on the theory that all the lawyers are just like this fellow was in the 3rd Circuit. He ought to be disbarred for going back on his stipulation.

MR. DODGE: I am not sure that he did go back on it. It was only incidentally involved in that case, and the merits, apparently, were before the court in some way.

MR. HAMMOND: If you put anything in there about stipulations, you are going to have extending of time all the time. If you don't mention the subject and you can get what you want without amending it--and you really can--why amend it?

THE CHAIRMAN: Of course, the point is this: The insertion here of a provision to extend the time for answer by stipulation carries the necessary implication, of course, that you can't extend anything else by stipulation. You are dealing with the case only in its very preliminary stages, where the defense may not have had time to get counsel and get started and learn about the case. It is quite different from putting in a clause, for instance, that after the case has gotten well going and everybody has had time to prepare and know what he is doing, then the parties can extend steps by stipulation. It is far from that.

The only practical reason for putting the provision in is the difficulty of access to the judge sometimes. In a

good many outlying districts that is so. If you could always be sure that the judge was right at your elbow, that all you had to do was send a messenger up to the court with a stipulation and a formal order saying "Time extended accordingly," hand it to the clerk, and he would walk into the judge's chambers and get it, there wouldn't be any need for alteration. That doesn't bother the judge very much. The only point about getting it in is the occasional difficulty in getting an order in advance of the expiration of the time, because the stipulation is no good under these rules without an order. If you rely on a stipulation, your times goes by, and the other side raises the point, then the only way you can get an extension is by making a motion for extension on the ground of excusable neglect. That bothers the judge more than the other thing.

MR. DODGE: You put it on the motion list and wait a long time and involve your client in wholly unnecessary expense.

JUDGE DONWORTH: There is no motion pending, is there?

THE CHAIRMAN: No, there isn't.

MR. DODGE: I move that we add appropriate language at the end of Rule 12, a provision that the parties may extend the time for filing the answer by stipulation on one occasion.

THE CHAIRMAN: Without action of the court?

MR. DODGE: Yes.

THE CHAIRMAN: Then what do you think about the job

of preparing the motions in subdivision (b) of that rule? Do you think they should have time to extend those?

DEAN MORGAN: He can always put those in his answer, if he wants to. He doesn't have to use a motion.

THE CHAIRMAN: That is right. I guess you are right.

MR. HAMMOND: How about a motion for summary judgment, if we adopt the rule?

THE CHAIRMAN: There isn't any time limit on that. You can do it any time after certain things have happened, right up to the trial. There is a limitation on how soon you can do it, but not on how late you can do it.

SENATOR PEPPER: May I inquire for what default it was that judgment was given in this Orange Theatre case?

JUDGE CLARK: Judgment was not given, as a matter of fact. This is what happened: There wasn't any going back on the stipulation, really. The parties filed two stipulations for further time, and then the defendant moved--

SENATOR PEPPER (Interposing): Time for what, Mr. Reporter?

JUDGE CLARK: For making the objection, which came in as a motion to dismiss.

SENATOR PEPPER: So it wasn't the case of an answer.

JUDGE CLARK: The stipulation was within the stipulation of time within which the said defendants may answer or otherwise move with respect to the complaint. The defendants

then eventually, within the extended period, filed a motion to dismiss the complaint on the basis of the venue being improperly laid. The matter was argued on the ground that, by filing the stipulations, the parties had waived the objection to venue, and that was the holding below. It came to the upper court, and the opinion was by Judge Goodrich, who says, "This issue assumed that the stipulations were effective upon the parties and the court. We believe this assumption was erroneous, that the stipulation was not binding, hence there had been no waiver. We have then this situation: The stipulations extending the time were ineffective and the defendants are in the position of having failed to plead or otherwise to defend within the twenty days allotted under Rule 12(a). Permission to plead after the allotted time is a matter for the discretion of the trial judge, but we have no doubt that upon remand the trial judge will take into account the fact that the stipulations which we now hold invalid to create an extension were, nevertheless, relied upon by the parties. The order of the district court is reversed and the case remanded for further proceedings not inconsistent with this opinion."

What they did was to take away the effect of a claimed waiver of venue. That is the real effect of the decision. They sent it back for further proceedings.

DEAN MORGAN: Does he waive his right to raise the point of venue if he doesn't answer within a particular time?

JUDGE CLARK: I shouldn't suppose so. I should suppose that under our rules we made it pretty clear that you can hold your objections while you file an answer on the merits. Therefore, if you have a stipulation, you should not be held to have waived, but the trial judge held that because the old federal cases were fairly strict on it. What the circuit court of appeals does here is to get away from a strict and probably no longer existing rule of waiver by going into a little excursion on stipulations, which has caused all this trouble. I think Mr. Hammond is right. The case for question rarely comes up, and we now invite everybody to come in and have a good time.

THE CHAIRMAN: The motion before the house is a motion to add to Rule 12(a), as to the time for pleading, a provision that various times to plead specified in that rule may be extended by stipulation without approval of the court. That is the gist of it.

SENATOR PEPPER: May extend the time for what?

THE CHAIRMAN: Any of the times to plead specified in Rule 12(a) may be extended by the parties once by stipulation without approval of the court.

SENATOR PEPPER: I am confused about this. As I understand it, there is no specific time limit for the filing of the answer.

JUDGE CLARK: Yes, there is supposed to be, twenty days.

DEAN MORGAN: Within a reasonable time after service.

SENATOR PEPPER: After service.

DEAN MORGAN: Or before service. There is no specific time for filing.

SENATOR PEPPER: That is what is bothering me.

DEAN MORGAN: For filing.

THE CHAIRMAN: You are talking about serving.

JUDGE CLARK: We get away from service here. All papers are supposed to be filed within a reasonable time, but all our proceedings date from service.

DEAN MORGAN: That is what we are talking about.

SENATOR PEPPER: I was just going to ask, if there has been no filing, and then there is a stipulation, what is it that the stipulation provides for? An extension of the time for serving after filing?

JUDGE CLARK: No; just for serving.

SENATOR PEPPER: Just serving, irrespective of whether you file or not?

JUDGE CLARK: Yes.

THE CHAIRMAN: The rule says, "A defendant shall serve his answer within 20 days after the service of the summons and complaint".

SENATOR PEPPER: And it is the service that is the subject of the stipulation?

THE CHAIRMAN: No. It is the service of his answer--

SENATOR PEPPER (Interposing): Yes.

THE CHAIRMAN: --and the time that you are extending is the twenty days after service of the complaint.

DEAN MORGAN: What I would like to know is why you need a stipulation, anyhow. Suppose a man comes to me late with his answer, or suppose he calls me up before and says, "I am not going to be able to get my answer in on time. Have I got to go to the court?" I say, "Certainly not." Then he comes around with the answer late, and I admit service on it. Who is going to stop it?

THE CHAIRMAN: The only person who can take advantage of it is the fellow who is extending the time.

DEAN MORGAN: The plaintiff. He has to go back on his stipulation. I don't see any sense in it.

MR. DODGE: The court took notice of it and denied--

DEAN MORGAN (Interposing): No. The court in the 3rd Circuit took notice that the formal stipulation didn't have the effect of waiving the venue proposition. That is all the court took notice of there.

THE CHAIRMAN: Well, Eddie, there are three or four groups of lawyers who are complaining about it, and the fact is that, as the rule is worded now, you have to go to the court to get an effective extension, and the lawyers are afraid not to do it. They construe the rules, properly enough, to provide that if you want to get an extension you have to go to the

court for it and present either a proof of need for it or a stipulation and get the order. They don't want to be bothered with going to the court, and they are afraid not to go to him, even if they have a stipulation, as the rules are worded.

JUDGE DONWORTH: This doubt about the serving and filing could be obviated by making the amendment read like this:

"The time for a defendant to answer or otherwise move under Rule 12 may be extended by a written stipulation of the parties once for not exceeding twenty days to answer or otherwise move."

SENATOR PEPPER: I would be in favor of the answer part of it for the reason I gave awhile ago.

MR. DODGE: I think the rest follows, doesn't it? (b) says "A motion making any of these defenses shall be made before pleading if a further pleading is permitted."

THE CHAIRMAN: Yes, because if you extend the time for answer, you automatically extend the time for motion.

SENATOR PEPPER: Yes, but if the plaintiff is willing to agree that the time for answer should be extended at a stage when the court knows nothing about the case and can't intelligently pass upon a motion to approve or disapprove the stipulation, I don't see any harm in clearing up the doubt and making the stipulation effective, because one of the things that will be in the mind of defendant's counsel is that when he agrees that the time for filing or serving the answer is

extended, that necessarily and automatically extends the time for motions that may be made before the filing of the pleading.

THE CHAIRMAN: I am not so sure about that, because I think a good many lawyers are cautious enough when they extend the time for answer or otherwise plead or move, because they are likely to be tripped up on the ground that they have extended only the answer.

SENATOR PEPPER: Maybe Judge Donworth is right about that.

JUDGE DONWORTH: I would ask Mr. Dodge to accept this amendment in lieu of what he has proposed, that we add to Rule 6(b)--

THE CHAIRMAN (Interposing): 12(b). We thought the provision about answering was the place to put it, you know. We are talking about 12(b). His motion related to 12(b).

JUDGE DONWORTH: I am not so clear on that point but, waiving that, (I thought we were dealing with enlargement here in Rule 6 and that that would be the proper place) in either place to add this:

"The time for a defendant to answer or otherwise move under Rule 12 may be extended by written stipulation of the parties once for not exceeding twenty days."

JUDGE DOBIE: Without the approval of the court?

JUDGE DONWORTH: I don't think you have to say that.

THE CHAIRMAN: You are sort of emphasizing, if you

put that in, the fact that the next time you try it you have to get the judge's approval. Why do you want the parties limited to twenty days' extension, if you are going to allow them to stipulate only once?

JUDGE DONWORTH: There was a suggestion that it might be abused and go on. I am perfectly willing to trust the lawyers in the case.

THE CHAIRMAN: You would be willing to have an amendment proposed that the time for answering or otherwise moving under Rule 12 may be once extended by stipulation of the parties without approval of the court.

JUDGE DONWORTH: I would make it written stipulation of the parties without approval of the court.

THE CHAIRMAN: Yes. Are you ready to vote on that?

PROFESSOR MOORE: Mr. Chairman, shouldn't it cover the plaintiff's right to have the time stipulated and require a reply where that is necessary?

THE CHAIRMAN: Plead, instead of answer.

PROFESSOR MOORE: Yes.

THE CHAIRMAN: It ought to be "plead" instead of "answer," because there is ten days' time to reply here.

JUDGE CLARK: It should be "party" instead of "defendant," I think. Judge Donworth's motion referred specifically to "defendant to answer". I suppose we should make it "party to plead or otherwise".

THE CHAIRMAN: Yes; "party to plead" instead of "defendant to answer". Any further discussion? The question is on the amendment.

JUDGE DONWORTH: You leave out the twenty days?

THE CHAIRMAN: Yes.

DEAN MORGAN: How is it going to read, then?

JUDGE DOBIE: "The time for a party to plead--"

THE CHAIRMAN: "--may be once extended upon stipulation of the parties without approval of the court."

PROFESSOR SUNDERLAND: Plead or move.

THE CHAIRMAN: "plead or otherwise move under Rule 12--"

JUDGE DONWORTH: "may be extended by a written stipulation of the parties once without approval of the court."

SENATOR PEPPER: Seconded.

THE CHAIRMAN: All in favor of the motion say "aye"; opposed, "no."

DEAN MORGAN: No.

THE CHAIRMAN: The "ayes" seems to have it.

We jumped ahead of Rule 6. We are going back. By the way, you haven't decided whether that ought to go in Rule 6(b) or in Rule 12. Where do you want it?

SENATOR PEPPER: Isn't it germane to 12 rather than to 6(b)?

THE CHAIRMAN: I rather think so.

MR. DODGE: This relates only to court action.

THE CHAIRMAN: It relates only to steps specified in Rule 12, and you had better hook it up there so they won't have to go to another rule to see whether the limitations in Rule 12 are applicable. Wouldn't you agree to that, Judge Donworth?

JUDGE DONWORTH: I do, sir.

PROFESSOR SUNDERLAND: I should like to raise a question, Mr. Chairman, on the wording of 6(b) as to the distinction between (1) and (2) as we have it drawn in that rule.

"the court for cause shown may, at any time in its discretion (1) with or without motion or notice, order the period enlarged if application therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion permit the act to be done after the expiration of the specified period".

It seems to me what we intended there was to make a distinction between cases where the application was made before the time ran out and cases where the application was made after the time ran out. We haven't said that.

In the second we have said, "upon motion permit the act to be done after the expiration of the specified period". It seems to me that ought to read, (1) as it reads now, (2) upon motion permit the act to be done if the application therefor is made after the expiration of the specified period".

PROFESSOR CHERRY: The rest of the sentence clears that up: "where the failure to act was the result of excusable

neglect". There has been a failure to act already.

PROFESSOR SUNDERLAND: Yes, but what is the distinction between (1) and (2)? (1) is where the application is made before the time runs out.

PROFESSOR CHERRY: Yes.

PROFESSOR SUNDERLAND: (2) is where the application is made after the time runs out.

PROFESSOR CHERRY: My point is that it is thereby a necessary implication.

PROFESSOR SUNDERLAND: It seems to me ambiguous there, and to make it perfectly clear we should make the antecedent clear.

THE CHAIRMAN: What you meant by (2) is that after the motion was made after the expiration of the specified period, permit the act to be done where the failure to act was the result of excusable neglect. That is your point, isn't it?

PROFESSOR SUNDERLAND: But the way it reads is that the act be done after the expiration of the time. That isn't what we mean. We mean the application is to be made after the time has expired.

THE CHAIRMAN: That is the way I stated it. Your proposal would be met if we changed (2) to read this way: "upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the

result of excusable neglect".

PROFESSOR SUNDERLAND: That is right. That will cover it.

THE CHAIRMAN: Do you think that should be changed or do you think it is necessary?

JUDGE DOBIE: Just shift that "after the expiration of the specified period" up to the next line.

THE CHAIRMAN: "upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect".

PROFESSOR SUNDERLAND: That is all right. Then the phrase modifies the right word. Otherwise it modifies the wrong word.

JUDGE DONWORTH: I like this because it leaves out the word "his" excusable neglect.

THE CHAIRMAN: Do you want to make that alteration in the phraseology of (2) of Rule 6(b), to clarify it?

SENATOR PEPPER: I will second the motion which I understand has been made to that effect.

THE CHAIRMAN: All in favor say "aye." It seems to be agreed to.

Anything else on Rule 6?

Rule 7. We understand why that was altered at the last meeting. To clarify it, we simply struck out the phrase "if the answer contains", and said "there shall be a reply to a

counterclaim", et cetera. There is no reason to reconsider that, is there?

Now we come to Rule 12. As I understand the situation and what we did at the last meeting, among other things we drafted (a) for the purpose of improvement in form and clarification. We also provided motions to dismiss because the complaint didn't state a cause of action and for judgment on the pleadings, so labeled, might be treated at the option of the parties as a motion for summary judgment and affidavits introduced, notwithstanding the original form of the motion, which might have been directed only to the basis of the pleading. We agreed to that.

Then another step we took, as I recollect it, as we originally drew them up we had the motions to be made divided into two groups, and we passed an amendment to allow them to be put in only one group.

The Reporter has a new proposal that he wants to bring up, which, as I read it, has this effect: Except for the motion to strike--what is the other?

JUDGE CLARK: The motion to make more certain is (e), and the motion to strike is (f).

THE CHAIRMAN: Except for a motion to make more definite and certain and except for a motion to strike, (e) and (f), he provides that every other motion specified under Rule 12, including a motion to set aside the service of process

and whatnot, shall be made as a motion for summary judgment. In other words, he transfers the motion for summary judgment rule, such motions as a motion to set aside the service of process, objections to the venue, jurisdiction, and whatnot. That is his final proposal here. It is his own suggestion, because we didn't do that at the last meeting.

Do you want to present your ideas?

JUDGE CLARK: Yes, if I may, just a little. First, let me add a little to Mr. Mitchell's statement.

As to (a), I think you did not pass upon the form but referred it back to me and Professor Moore generally to see if we couldn't write something to shorten it. We tried that out, but I think since that is formal only, unless you wish, we had better not go into it now. The other is more important. I think and hope we have improved it. Professor Moore again made a change that I think will help shorten it. Unless you think otherwise, suppose we pass (a) for the present, because the changes are formal and are intended to be made only to make it shorter and simpler.

As to (b), I think that the Chairman has fairly well stated about what we have tried to do. Let me put it this way: Last time you acknowledged the general similarity of 12 and 56; that is, of the answering motion under 12 and the summary judgment motion under 56. I rather think that you ndid a great deal in the way of clarity. I think the changes then made were

really very helpful. They were along the lines of what I think a good share of the courts were doing, particularly the circuit courts, perhaps not all the district courts. The district courts were raising more question. The circuit courts particularly would look at the case on all the matter of record, affidavits and everything else.

It seems to me that what you have done has one defect still, and that is that it did make a good deal of form. In a way, you were not saying very directly just what you were doing. You were saying in effect to the parties, "We will keep the forms of the pleading, but if either of you wishes not to keep them, we won't do it." In other words, you would preserve a kind of formal separation between 12 and 56, and it was only formal, I think, really, because any person could throw it over.

It seemed to us that the desirable thing was to try to work the two together and make them loosely integrated so that the lawyers would see that there wasn't intended to be any overlapping or, if there was an overlapping, it was an intentional one. That was to try to fit the two together. So that is what we tried to do.

First, we sent around, fairly early in the summer, some suggestions for doing that, and then Mr. Mitchell raised certain questions as to whether we hadn't confused or perhaps changed the law as to what could be done with objections in

abatement, and perhaps we hadn't changed the form of trial, and so on. Then we went over it again, and you will find here a memorandum as to the forms of trial of various objections. It appears there that there isn't a very definite form, that the matter has been heard on testimony and in various formal ways. Where the objections appeared on the appearance of the pleadings, it has been done by motion. It appeared to us that it might be clearer if we put all that directly in Rule 56, because that is the way I believe the committee now wants to treat it. That is to be treated by way of affidavit wherever possible, or held by trial where that was the form.

So the final suggestion we made should be before you. It appears under date of October 21. There are two letters signed by me. The first and the more bulky is the material on the cases. The other one is underneath. They are both there.

If you will look for a moment at the redraft suggested under date of October 21, what I think it does, as the Chairman suggested, is to take what might be termed the guts of the motions that may be made and state them under Rule 56. Rule 12(b) provides for their making, but provides for their making by saying that the party may move for summary judgment as provided in Rule 56. Rule 56 then, particularly in (b), collects them all.

THE CHAIRMAN: May I ask this question? Passing by

the question of policy, I discussed with you by correspondence exactly what your proposal meant. One of the points I made about it, as you had made the redraft as I originally saw it (not in this document; I haven't studied this), was that you provided for a single motion called a summary judgment motion that would include not only a motion for judgment on the merits, on the ground that there was no genuine issue of material fact, but would include such things as motions to set aside the service of process and objections to the venue, and so on. I made the point that, as you had worded the rule, you could make only one summary judgment motion. For instance, if you objected to the service of process and were forced to make a motion for summary judgment to set aside the service of the process, under the rule as drafted you had to couple at the same time, if you ever were going to do it, a motion for judgment on the merits, on the ground that there wasn't any genuine issue of fact, with the result that if you wanted to attack the service of process, if you did it you would have to do it by a motion for a summary judgment. If you had any claim that you were entitled to judgment on the merits, regardless of the service of process you had to prepare for that and put in all your affidavits on the merits and what the real facts were, and so on, all in one motion, when the preparation of your case on the merits might be completely futile because the process hadn't been served or the venue was improperly laid.

It was the same idea that you had in your original pleading rules, which you didn't accept originally, that all your case, all your defenses, process, venue, service of process, merits, and everything else had to be put in the answer; and the majority of us objected to that because we didn't think the defendant ought to be required to prepare his answer to the case on the merits and expose it all in an answer, alongside with a motion to set aside the service of the process or objection to venue or something of that kind.

As I construed it (I am not sure that you agreed with me that I construed it properly), I thought it was so worded that when you got under your new system, instead of making those preliminary motions specified in Rule 12, you had to couple them all up, except for the motion for definite statement and the motion to strike, (e) and (f). You had to put them all in one motion for summary judgment, and you had to make just one motion and couldn't make another. You had to include in the single motion for summary judgment such things as objection to service, objection to venue, and so on, along with your contention that there was no issue of fact and that you ought to have judgment on the merits.

Whether I was right or wrong in construing the rule, what I would like to ask, as you have it revised and brought in under date of October 21, is, have you still got a rule there so worded that you have got to make a motion for summary

judgment, once for all, and you have got to include in that one motion not only such things as insufficient service and venue, and so on, but also your motion for judgment on the merits because it is a sham case. How is that done here now?

JUDGE CLARK: This time we put in specifically that you can move later. Let me refer to it. Refer to Rule 56(b), line 17.

THE CHAIRMAN: As originally drawn?

JUDGE CLARK: Oh, no; under date of October 21.

THE CHAIRMAN: Let's start with Rule 12. You have to hit both of them.

JUDGE CLARK: I was just going to answer your question. I don't care, any way you want to do it.

THE CHAIRMAN: I will read this now. Rule 12(b): "HOW PRESENTED. Every defense or objection, in law or fact, to a claim", and so on, "shall be asserted in the responsive pleading thereto if one is required, except (1) that prior thereto the party may in one motion move under subdivisions (e) and (f) of this rule and for summary judgment as provided in Rule 56, and (2) that subsequent to the responsive pleading the party may move for summary judgment as provided in Rule 56."

JUDGE CLARK: You will notice that (2) is likewise covered in 56, "that subsequent to the responsive pleading the party may move for summary judgment", and so on.

May I explain just a little more? I think in reading

you stopped a moment where it says "in one motion", and perhaps you were a little hesitant about that. The idea of one motion is repeated in 56(b). But let me call your attention to the fact that the committee did vote that. That was the idea that we had before; that was a part of what we did at that time. We voted that there should be only one motion or it should be all-inclusive.

THE CHAIRMAN: That didn't include the motion for summary judgment. We didn't require that it be hooked up with the other.

JUDGE CLARK: What we did vote was that there should be one motion under 12 and that that one motion under 12 might, at the option of a party, be turned into a summary judgment.

THE CHAIRMAN: That is, if it were a motion for dismissal on the ground that the complaint didn't state a true claim or a motion for summary judgment, it could be converted into a summary judgment motion and treated as such; but we didn't do anything about a motion to set aside service of the process, or about venue or jurisdiction.

JUDGE CLARK: If you will look at the original draft of what was reported back to you, you will find what the Chairman has just stated in (b); and then if you will look over at the original material, Rule 12, page 4, "Consolidation of Defenses," (g), you will see that a party may join all other motions.

"If a party makes a motion under this rule and does not include therein all defenses and objections then available to him which this rule permits to be raised by motion, he shall not thereafter make a motion based on any of the defenses or objections so omitted."

Maybe I am wrong, but I took it as the sense of those two together, which were voted by the committee, (b) and (g), that there should be only one motion at this stage and that it should be all-inclusive. If that is true, that is what I have done. I have provided that at a later stage you can again move for summary judgment.

I might say that Mr. Moore and I have also provided that if there is a defect and it can be cured by amendment, it shall be so cured.

Perhaps I can state a little more generally what I thought was the way of doing this: to provide that you could make one omnibus motion, make all these objections and support them by affidavit or otherwise, that the court might order their being settled in the ordinary method by which they had been settled before or, if there were a defect which could be cured, that the court must give opportunity to their being cured.

That covers in general the provision corresponding to Rule 12(b), but then we provide in addition that thereafter, after the pleadings are closed, you may make your motion for

summary judgment, provided it is on matters which are not waived. I can go over that in more detail, but I think that in general is what it provides.

THE CHAIRMAN: The general effect of it is this: Our rule for summary judgment as heretofore drawn dealt only with merits. That is to say, you made a motion for judgment and the party making it was entitled to judgment which would amount to a bar on the grounds that there was no material question or issue of fact, and the party moving was entitled to a judgment as a matter of law. That motion, as we had it under Rule 56, had nothing to do with setting aside service or questions of venue or matters of abatement which were going to result in a judgment to end the litigation. Those things were left to Rule 12.

In your proposal you are embodying in the summary judgment rule not only matters resulting in judgment of bar on the merits, but motions are to be treated and considered as summary judgment motions dealing only with the matter of abatement and, a step further, maybe even a motion to set aside service of the process, which I thought didn't even abate the action but just simply left the action pending and gave a man a chance to make another service.

The question we have to decide is whether we want to report and carry over into the summary judgment rule all those different things, some of which are merit, some of which are

abatement. I didn't think that a motion to set aside a service was necessarily a motion in abatement. It might be. If your motion to set aside the service was on the ground that you were a foreign corporation, as Mr. Moore pointed out, and couldn't be served at all in the district, the effect of setting aside the service would be to abate the action and require another action in the proper jurisdiction. But still there are some motions to set aside the service which don't go that far, which don't abate the action. A defendant might be sued there, might even be found there, but still there might be some defect, such as the summons being left at his home with a person not of suitable age and discretion or something of that kind.

If there were any issue of fact, changes of fact, that hadn't gone to trial, I always supposed if you moved to set aside the service of process, the court could try that issue on affidavit, whether there was a conflict or not; but as Rule 56 was proposed to be amended, you had exactly the same procedure with respect to matters affecting the merits as you had on a motion to set aside the service. You couldn't decide the conflicting question of facts on the merits if there was a conflicting fact, obviously, but they applied the same rules to these imported motions, some of which I thought had been customary in the federal courts, to hear and decide on conflicting affidavits.

I got a little bit confused about that. I am

explaining how the original suggestion came to me. What they have done with it now in Rules 12 and 56, as we have it on October 21, I wouldn't say without checking it over.

JUDGE CLARK: If I may go on a little further, first I think it may be simpler to say what we have done. I have already made a suggestion as to what we have done as to the one on consolidated motions. It seems to me, again, that what we are doing is to put in simpler form really what the committee's machinery was before. That is what we have tried to do.

Now, on the form of trial, and so on, if you will look at 56(c).

MR. GAMBLE: Is that the October 21 draft?

JUDGE CLARK: The October 21 draft. Down at lines 27 and 28 we shift around that formal provision as to issue of material fact, and we state in line 28 that "the moving party is entitled to a judgment as a matter of law for the reasons that (1) the present action must abate". Let me say that whatever the difference of terminology, I suppose that must be the ultimate decision; after you have let it stand for a while, if nothing is done it can't be a decision that the action is ended on the merits. "that (1) the present action must abate or (2) on the merits, there is, except as to the amount of damages, no genuine issue as to any material fact: provided that if the objection is such as may be obviated by amendment or otherwise, the court shall not enter

judgment without affording the party reasonable opportunity to obviate the objection."

Down in (d), lines 47 to 49, "If matter of abatement is in issue the court may order such hearing, as is proper under the circumstances of the case, in advance of the trial on the merits in accordance with Rule 12(d)."

There we have attempted to say how the court shall try the matter.

Going on a bit, if you will look at the other memorandum submitted here, you will see that it cannot be said that these matters can be tried on affidavits in the federal courts, because where issues of fact have been raised there are a good many cases that have allowed them to be tried by testimony.

THE CHAIRMAN: You mean, for instance, where there is a motion to set aside the service of process, it takes the consent of both parties to try the issue of fact on affidavits? Is that the rule in the federal court?

JUDGE CLARK: I really think that is the rule, but I don't know that you can say that. There has been very little stated in terms of absolute writing one way or another. That has been what has been done more than otherwise, and what has been done is that there has been a trial on it on testimony. I wonder if that could be excluded if a party objects to it.

DEAN MORGAN: There is no question, is there, Mr. Mitchell, at common law if the defect didn't appear on the

face of the record, that the only way to take advantage of it was by a plea? It was in the jurisdiction of the court, and the party had to appear personally, couldn't appear by attorney; and jurisdiction over the person was a different matter, I suppose, because, of course, in the English common law the sheriff was unimpeachable, so you couldn't have the kind of case that we frequently have, moving to set aside the service on the ground that the return was unproved. I know the Illinois common law practice was that if it appeared on the face of the record, you could take advantage by a motion, but if it raised a question of fact, you had to plead in abatement.

PROFESSOR SUNDERLAND: But the federal court sitting in Illinois refused to follow that and held that you could raise the point on a motion with affidavits.

DEAN MORGAN: But the question was always raised there whether they would or would not follow the state practice.

PROFESSOR SUNDERLAND: They refused.

DEAN MORGAN: Very frequently they did follow the state practice, and sometimes they didn't.

THE CHAIRMAN: Did the state practice require, on conflicting questions of fact about service, that the witnesses be examined, subject to cross examining?

DEAN MORGAN: If the parties asked for it, yes. They do that in Massachusetts now.

MR. DODGE: Certainly. They always try issues of fact

in the ordinary way. One thing that struck me here is that ordinarily the commonest case in one of jurisdiction over the person is the foreign corporation alleged to be doing business in the state. There is always a sharp issue of fact, in my experience, in those cases, and why should it be required that in the first instance you have to raise that point by a motion for summary judgment, which obviously you are not entitled to because there is a plain issue of fact there always raised, hitherto in my experience, by an action in abatement or a motion to dismiss. It is always subject to trial in the usual way. I don't see any sense in providing that you have got to raise that question, that you have got to plead to the merits, file your complete answer, and then after that, file a motion for summary judgment, which you know you are not entitled to.

PROFESSOR MOORE: May I say a word to that, Mr. Mitchell?

JUDGE CLARK: That isn't the suggestion, as a matter of fact. I should like to make it very clear at once that that is not our suggestion.

MR. DODGE: You say, "subsequent to the responsive pleading the party may move for summary judgment". That is, you have to file your full answer, although you feel very confident that your client is not doing business in the state and that the case is going to be dismissed. Then you have to move for summary judgment, although you know there is a plain issue

of fact.

DEAN MORGAN: Oh, no. You can raise it in (b).

PROFESSOR CHERRY: You could do it before that, too.

DEAN MORGAN: You can raise a motion and have it tried out.

MR. DODGE: The party may move under subdivisions (e) and (f) for summary judgment as provided in Rule 56 and "that subsequent to the responsive pleading the party may move for summary judgment".

DEAN MORGAN: Two motions.

MR. DODGE: I fell on the last clause, and not the first. Apparently you can move for summary judgment. Although you know you are not entitled to it, you have to raise the point in that form.

JUDGE DONWORTH: It seems to me that the question of how you are going to try the sufficiency of service of process is brought in here (I don't mean intentionally) with the effect of lumbering up and confusing a matter that doesn't need any elucidation. We have been getting along from time immemorial by a motion to quash the service. How it should be tried, whether on affidavits or otherwise, takes care of itself. We shouldn't lumber up these rules by trying to make plain a thing that has taken care of itself. The effect of bringing that question of trial in here seems to be that, if there is going to be a trial, it should be a motion for summary judgment.

That is an entirely different thing. I understood that the Reporter's original idea was that an objection to a complaint was something that should not be allowed to be made purely on the allegations of the complaint but that the parties should be allowed to bring in affidavits. So the suggestion is that it should, at the option of somebody, be converted into a motion for summary judgment.

Be that as it may, it seems to me that the thing for us to do is to decide the point raised by the Chairman in the beginning of this particular discussion, namely, whether an objection to the venue or to the service of process and similar motions should necessarily be confused with a motion for summary judgment. I see no connection between them. I think the question of finding out whether a man is in court or not is preliminary, and he should not be required to lumber up the record with a lot of affidavits on the merits merely because he wants to say, "I am not in court," and the question of how his not being in court would be tried can be left where it has been left for 150 years.

JUDGE CLARK: Might I just say two or three things? First, I hope that before you get too firm an idea, you will look over our proposal and give us a little consideration; think about it a little and not decide it too quickly out of hand, because it seems to me that there is a point here. We may not have hit it in the best way possible. There are various

ways that this could be done, and we have tried several. The main point, as we saw it last time, with almost a majority, not quite a majority, of the committee working on it last time, is that, as it has stood in the past and as it stands even more perhaps in our suggested changes, the summary judgment rule and Rule 12(b) just overlap, and it is very confusing unless there is some explanation of it.

The suggestion is made that there wasn't any need of putting any of this material as to jurisdiction, and so on, in the summary judgment motion. As a matter of fact, that confusion was there, and judges, rather properly, I think (because I did it myself), when they didn't seem to be able to do all they wanted to under Rule 12, have simply turned over to Rule 56.

THE CHAIRMAN: Charlie, may I interrupt you there? You say that there was an overlapping of Rule 12 and Rule 56. Oughtn't we, to be accurate about that, to say that the overlapping of Rules 12 and 56 related only to two features of Rule 12? One was the motion to dismiss because the complaint didn't state a cause of action, which overlapped the summary judgment rule because the summary judgment rule says you can move for summary judgment. The other overlapping was similarly related to a motion for judgment on the pleading.

Is it fair to say that the summary judgment rule that we have ever overlapped at all on things like motion to set aside the service of the summons and matters in abatement? I

don't think it did.

JUDGE CLARK: I disagree with you.

THE CHAIRMAN: Do you think that Rule 56 as we have it in the book, authorizing a motion for summary judgment on the ground that the service is improper, overlaps?

JUDGE CLARK: Yes.

THE CHAIRMAN: I don't agree with you at all.

JUDGE CLARK: In fact, that is what I held. Of course, I held that before the question came here. I held that on the issue as to whether you could have affidavits or not on any of these motions, and on that issue, as a matter of fact, I never saw why you could make any distinction between any of them. If you were going to exclude affidavits on some, you had to exclude them on all. I held that the matter was clear under 56, that the whole thing should come up under 56, and they would be accepted under 56.

THE CHAIRMAN: Under the decision you speak of, what was the issue? Was it the service of process, a question of venue, or was the real question involved as to whether or not the plaintiff in truth and in fact had a meritorious claim? What was it?

JUDGE CLARK: The thing that I remember particularly was the $3000 amount.

THE CHAIRMAN: Jurisdiction.

MR. DODGE: Doesn't the defendant, when moving for

summary judgment, have to assert that he believes that there is no issue of fact to be tried?

JUDGE CLARK: In May the issue came up as to how far we could accept affidavits on these preliminary questions, and there was originally, you know, the problem as to how far affidavits could be used.

MR. DODGE: He has to assert that fact, and yet he knows almost always that it is not true. There is an issue of fact as to whether the corporation is subject to suit in the state.

SENATOR PEPPER: What happens, Mr. Chairman, as a matter of procedure, in such a case as Mr. Dodge puts, where a foreign corporation is alleged to be doing business in the state and wants to dispute that factually? What happens if the corporation successfully maintains its side of the issue and it is determined that it is not doing business within the state?

THE CHAIRMAN: The court sets aside the service of the process and in doing so, he holds it is set aside not because the method wasn't all right, because the marshal didn't do his business, but because the corporation is not subject to service in that state and hasn't got anybody in the state authorized to receive service. That means that the case has to be dropped, because he has held there is nobody there whom you can serve. The action is no longer pending in the court.

SENATOR PEPPER: The reason I asked the question was to raise this one. Is the action of the court in such a case the kind of judgment that is contemplated by the motion for summary judgment? We usually think of that as a motion on the merits. Is an order setting aside the service a judgment within the commonly accepted meaning of summary judgment?

THE CHAIRMAN: You are just following the line of suggestion that I made in my letter to Charlie here, and I contended that certainly, as far as our summary judgment rule was concerned, it clearly doesn't cover a situation of that kind. It was intended to dispose of the judgment of the case in any jurisdiction on the merits. He took issue with me about that and referred to the New York Code of Civil Practice. I think the New York Code of Civil Practice summary judgment rule, which is Rule 113 there, is precisely the same as ours. It deals with the merits. Charlie referred me to some other rules of the Civil Practice Rules in New York which provide for a motion not labeled a motion for summary judgment at all, but a motion dealing with some of these preliminary things, and he argued that that was in legal effect a motion for summary judgment, and the New York Civil Practice Act permitted a motion for summary judgment on these preliminary questions.

My answer to that was that they didn't call it that, but that the bar generally considered a motion for summary judgment, historically and certainly as we have it in our rule,

as relating to matters on the merits, judgment in bar, and so on.

SENATOR PEPPER: On the other hand, the Reporter is pressing the point, as I understand it, that there is some kind of traditional distinction between a judgment on the merits and an order entered after it has been established, from whatever procedure is adopted, that the defendant can't be brought into the court for the purposes of that case.

THE CHAIRMAN: That is right.

SENATOR PEPPER: Isn't there a lot to be said in favor of dissipating that fairly chimerical distinction between the two kinds of judicial determination? It is all the same thing. It ends in favor of the defendant.

MR. DODGE: It isn't the same thing.

DEAN MORGAN: Judgment in abatement.

MR. DODGE: Summary judgment is rather a new thing in this country, and the bar at large, I think, fairly understands it to be applicable to cases where an issue of fact is apparently made by the pleadings, but there isn't really any issue of fact to be tried. I fail to see why a plea to the jurisdiction over the person or something of that kind has any relation to what the bar understands by the motion for summary judgment.

DEAN MORGAN: Couldn't you make a motion for summary judgment after a plea in abatement?

MR. DODGE: There is no issue of fact, although

apparently one is set up, yes.

DEAN MORGAN: Then why not make it before?

THE CHAIRMAN: I think that the Reporter is quite right about this. Historically, summary judgment, as we have it in our rule, dealt with the merits. There is no insuperable objection to embodying under the head of summary judgment rule a lot of other things that we are not accustomed to have there. It can be done, but the question is that we have educated the federal bar by our rules to deal with that motion on the merits, and now we have put a lot of stuff in there that hasn't anything to do with the merits, and we are going to cause a lot of confusion in their minds. If it is going to be done, it has to be done a lot more explicitly and with a lot more explanation, it seems to me, than we have got.

JUDGE CLARK: Could I say something on that, please? In the first place, our summary judgment rule is very different from anything elsewhere in the country. We have already expanded the term "summary judgment" beyond anything known. It doesn't seem to me that you can say very much as to the feeling of the bar as to the words "summary judgment." Summary judgment started in England about seventy-five years ago on only promissory notes, and in this country today (I haven't looked it up lately) I don't think there are more than twelve states at the most that have it. They have it in variegated ways. Where we have it, it is usually on definite provisions,

such as promissory notes. Those have been somewhat expanded, but none of them is as yet very broad. In New York the original rule, Rule 113, was only for plaintiffs. It was a plaintiff's remedy. Rule 107 covered all these matters for the defendant, covered it from the beginning and covered it just as Rule 113 did for the plaintiff. It specified just as 113 did. Rule 113 specified that you got summary judgment on certain kinds of things, notes, and so on, and those have been added to somewhat; Rule 107, which was the motion for the defendant, specified that you got it on these jurisdictional matters and these matters in abatement, statute of limitations, statute of frauds, and so on. That was the pattern of those few states which had summary judgment, until we came to it.

We considered at first whether we would follow the pattern of specifying the kind of thing you get summary judgment on--

THE CHAIRMAN (Interposing): Or merits, Charlie.

JUDGE CLARK: --or of making it general.

MR. DODGE: As it was in many states, I don't see how your Rule 56 went beyond the prevailing notion as to what a summary judgment procedure is. It is just the same as we have in Massachusetts.

JUDGE CLARK: I say that I don't think we can find any definite feeling of the bar as to what summary judgment is. Summary judgment has to be what it is defined in the rules to

be. A judgment is a judgment; it is appealable and final, and so on.

The real difficulty we find here is that we have things that, in any event, look so much alike, and what is causing the difficulty in the cases is that we have 12, which seems to do one thing, and 56, which does it much more simply. All we thought we would do would be to take a simple provision and make it all-inclusive. That is about all we tried to do.

Of course, I suppose there is no impelling reason that you shouldn't repeat all that we have in Rule 12, but it is a confusing thing to have it in two separate sections, unless you make it clear to the bar why you have the two. It leads them immediately to think that there is some restriction on one of the sections that there isn't on the other. Outside of the cumbersome way of having two sections do the work of one, I think that is perhaps the most doubtful thing about it, because it leads you to imagine that there must be restrictions on one rule that there are not on the other, or you wouldn't have two rules.

SENATOR PEPPER: Is there a corollary to the proposition stated in Rule 12(b), as you have redrafted it, that, if you have some ground which you might have included in your motion and did not, you thereby waive that?

JUDGE CLARK: The waiver goes no further than is stated in Rule 12(h), the provision as to waiver, and we have

never made waiver go any further than that you waive only the defects of form. Some people have thought we should go further than that, but we have never provided it. You never waive at any time any objection of jurisdiction on the merits.

SENATOR PEPPER: Yes.

JUDGE CLARK: You can raise that even at trial.

SENATOR PEPPER: The reason I asked that question, Mr. Chairman, is that this joinder is merely permissive, isn't it, and prior thereto the party may--

DEAN MORGAN (Interposing): Otherwise he puts it in his answer.

SENATOR PEPPER: Yes. He may in one motion move under subdivisions (e) and (f) and for summary judgment, but I suppose he may, as Mr. Dodge suggests, move without asking for summary judgment, may he not?

I thought it ought to be clarified. That is the reason I asked whether it is a corollary to the proposition that if he wants to make the point at all, he has to make it in a motion for summary judgment. It certainly doesn't say so explicitly here. It says he may join a motion for summary judgment and a motion under (e) and (f).

THE CHAIRMAN: As I read it, one fair construction of it is that if you move under subdivisions (e) and (f) for more definite statement or to strike, you have to incorporate in that motion a motion for summary judgment, and you may in one

motion move under (e) and (f) and for summary judgment.

SENATOR PEPPER: That is certainly permissive, isn't it?

THE CHAIRMAN: Then it says, "that subsequent to the responsive pleading the party may move for summary judgment as provided in Rule 56." That gives him another right to make another motion for summary judgment, as I read it.

SENATOR PEPPER: That is right, but suppose that under this rule a defendant made a motion under subdivisions (e) and (f). I will assume, without looking at it, that one of them has to do with--

DEAN MORGAN (Interposing): Bills of particulars, and so forth.

SENATOR PEPPER: Yes. And suppose he loses on that. There is nothing to prevent him, after filing the responsive pleading, from moving for a summary judgment on the merits, is there?

JUDGE CLARK: That is correct.

PROFESSOR MOORE: It is provided that he can in 56(b).

JUDGE DONWORTH: Under the proposal, can a defendant move to set aside the service of process if, later on, he thinks he is going to have ground for moving for summary judgment? Isn't he compelled, when he moves to vacate the service of process, to file his multitudinous affidavits on the merits, or waive?

PROFESSOR MOORE: No, sir.

THE CHAIRMAN: Where is the provision that makes that clear?

PROFESSOR MOORE: Over in 56(b), Mr. Chairman.

THE CHAIRMAN: What line is it?

JUDGE CLARK: It is lines 17 to 21.

PROFESSOR MOORE: Do you have the October 21 redraft? Starting at line 10, it states specifically what matters in abatement he may make (if you will look to line 17) before service of responsive pleading.

SENATOR PEPPER: That is what I was trying to get at. It seemed to me that maybe Mr. Dodge's objection was met by the fact that a motion in the nature of a plea in abatement could be made before the service of the responsive pleading and without filing a motion for summary judgment.

PROFESSOR MOORE: We call that a motion for summary judgment in abatement, but it is clear that the defendant can do under 56(b) exactly what he can do now, except that a motion for summary judgment and abatement--

SENATOR PEPPER (Interposing): So it really comes down to a question of terminology, doesn't it?

JUDGE CLARK: That point is terminology, of course, and to a certain extent a good deal of this is terminology, it is true. I should say that there are perhaps two things of substance outside of an attempt by the terminology to make it

shorter and clearer. That is what this is in the main, anyway. It is an attempt to make it shorter and clearer and to prevent apparently conflicting things, and so on.

But there is this which I think we have done: You see, under Rule 12, as we drafted by committee vote, there is some machinery whereby the thing starts out as a demurrer and turns into a summary judgment. That may still be terminology, but what we are trying to do is to say, in effect, that it is a summary judgment from the beginning. Don't fool yourselves. In fact, there was a little discussion that the committee had as to whether the court or the parties turned it into a summary judgment, and it was quite clear, I think, that the parties were the ones who had to do it. We did away with that, which seems to me, if I may put it so, just hocus-pocus. It starts out as one thing and turns out as another.

THE CHAIRMAN: That may be true as far as the motion under 12(b)(6) for failure of the complaint to state a claim, the motion on the pleadings, but aren't you stating it too broadly when you say it applies to such things as the motion to set aside service?

DEAN MORGAN: May I ask this, Mr. Mitchell? Isn't it true that under the rule as redrafted, the answer may set up the objection, anyhow?

JUDGE CLARK: Yes.

DEAN MORGAN: Mr. Dodge was saying that, if there were

an objection in abatement which would call for actual trial, the way to do it was by a plea in abatement. That is what the first part of 12(b) provides. It may be put in the answer. Then you have the option of putting it in another way, if you want it.

JUDGE DONWORTH: Dean Morgan, if you do put in the answer, then surely you are bound to set up your entire defense. You are bound to say, "I am not in court, and paragraph (2)--"

DEAN MORGAN (Interposing): They have to do both, yes, by a motion or by a plea in abatement, because we have only one answer, and all the code states have only one answer, but the code states and we in this rule allow you to join in your answer both dilatory pleas and pleas to the merits.

JUDGE DONWORTH: Most states do permit a motion to set aside the service before you answer at all.

DEAN MORGAN: The motion to set aside the service now would be a motion for summary judgment.

MR. DODGE: I thought that we decided at the last meeting that the defendant should not be required to go to the labor of filing a long answer on the merits if there was a preliminary question to be disposed of first.

DEAN MORGAN: That is right.

MR. DODGE: I understand, also, that there is no provision whatever in the summary judgment rule for trial by jury or trial any way on the facts. Last week there was a

question tried in Washington for four days on the issue whether the International Paper Company was doing business in Boston and subject to suit there. They must have tried that issue in the superior court for three or four days. That is not a matter for summary judgment. It is a matter for a real hearing on a preliminary issue which may dispose of the whole case. I should object to any rule that required that you should bring that matter up only by answering elaborately to the whole merits or by a motion for summary judgment, which seems not to be applicable to the situation.

THE CHAIRMAN: Suppose, in the case you mentioned, Robert, there was a question involved as to whether the defendant corporation was subject to doing business in the state. I should assume that you must say that in an advance hearing of the motion for summary judgment, it necessarily has to be tried. But suppose the defendant who makes that motion for summary judgment is confident that, if the whole subject is gone into by affidavit, it would appear to the court that there really isn't any issue of fact, that the plaintiff hasn't shown that he can produce any evidence that they are doing business in the state. Therefore, even in that kind of case, it isn't a foregone conclusion that you have to go to trial on the issue, because it may well develop that your affidavits may show the facts and nature of what the company is doing and isn't doing, and it may finally wind up on the affidavits

as really not being in dispute.

So it seems to me that there is no more reason to assume, when you make a motion for summary judgment directed at the right of the person doing business, that there is going to be a conflict in the affidavits than there is if you are making a motion for summary judgment on the merits. It may develop that there is, in which case you have a trial, but if the exact nature of what the defendant is doing is spread upon the record in affidavits and the other party isn't able to produce a witness who can suggest that anything else is the fact, then you have no genuine issue of fact. So I am not sure that you are always defeated on a motion for summary judgment if your motion is directed to the doing of business.

MR. DODGE: Not always, but almost always, because it is, I think, very rarely that the truth can be arrived at without cross examination of the corporate officers and a great deal of detailed consideration. The books are full of cases on that very point, and practically every one of them, I think, was decided upon questions of fact and if they are really conducting business in the state. I have difficulty in thinking that in any ordinary case that can be disposed of by affidavits of witnesses who aren't cross-examined.

THE CHAIRMAN: I had this subject up before the 3rd Judicial Conference. They invited me over to Pocono Mountains in September to talk with the Judicial Conference on proposed

amendments to the rules. Of course, I had only this preliminary draft and told them that. I called their attention to the various questions that were pending, and one of them was the thing that we are discussing. I pointed out to them that the rulesas now drawn provide for these preliminary motions on service of process and sufficiency of the process and the venue, and so on, and I also pointed out to them that this motion to dismiss the complaint under 12(b)(6) on the ground that it didn't state a good claim and the motion for judgment on the pleadings were in a class by themselves, and that some of the courts, when they had a motion to dismiss the complaint because it didn't state a good claim, had broadened it out and treated it as a motion for summary judgment on the ground that on the undisputed facts they didn't in fact have a claim.

I called attention to a decision in the 2nd Circuit which said that under circumstances of that kind, although the motion was labeled a motion to dismiss because the complaint didn't state a claim--the parties had put in affidavits, and the court, Judge Hand, very properly said that under those circumstances, however you label it, it can be treated as a motion for summary judgment. I said that was the right way to do it, and I criticized some decisions by the 3rd Circuit Court of Appeals which, instead of doing that, had invented a new kind of motion called a "speaking" motion, that wasn't dealt with in the rules and left the lawyers in the air.

I said, "Why invent a new kind of motion called a speaking motion and graft it on the rules, with no limitations as to what it is, when you already have a summary judgment motion and you can do what the 2nd Circuit does, just say that your motion for dismissal because the complaint doesn't state a good claim has been converted really into a motion for summary judgment."

I related to them that, in order to cure up that different method of treatment by the two circuits, the 3rd and the 2nd, we had explicitly provided in an amendment that a motion to dismiss because the complaint doesn't state a good claim and a motion for judgment on the pleadings might, at the option of either party, be converted into a motion for summary judgment and be treated as such, thus obliterating the 3rd Circuit's scheme of inventing a new kind of speaking motion.

Then I made a further suggestion of my own at that time. I said, "Maybe we didn't go far enough. Maybe the right thing to do is to abolish those two motions under 12--the motion to dismiss because the complaint doesn't state a claim and the motion for judgment on the pleading--and have those things dealt with right in the first place as a motion for summary judgment, which may be confined to the pleadings alone or supplemented by affidavits and proofs." I suggested that maybe we ought to go that far and strike out those two motions in 12 and transfer them to motions for summary judgment.

Then I brought up this proposal of the Reporter, and I tried to explain it to them fairly. I didn't criticize it at all over there. I said, "Now, here is another proposal that is made, by which not only the motion to dismiss because the complaint doesn't state a good claim and the motion for judgment on the pleading should be abolished and treated as a motion for summary judgment under 56, but all the other things in 12, except the motion to strike and to make more definite and certain, should be embodied in 12, including service of process, venue, and all those things. That proposal has been made."

They took a vote over there on my suggestion, which I tried to support, that the motion for dismissal because the complaint doesn't state a cause of action and the motion for judgment on the pleadings should be transferred. They voted me down unanimously on that, and I noticed that Justice Roberts, who is the Circuit Justice there, stood up with the rest.

So they not only didn't welcome this proposal to transfer all these preliminary motions over to summary judgment, but they even vetoed the suggestion, which I had hoped would be made, that we transfer those two, the motion to dismiss because the complaint doesn't state a claim and the motion for judgment on the pleading.

As they left it over there, they thought we had gone far enough when we said you could convert a motion to dismiss

because the complaint doesn't state a claim and a motion for judgment on the pleading into a motion for summary judgment, as we have done. That was their reaction. I was taken aback, because I thought they would listen receptively at least to my suggestion that those two motions be transferred.

MR. DODGE: What was the tribunal?

THE CHAIRMAN: It was the Judicial Conference of the 3rd Circuit Judges. Every district and circuit judge was there, and 100 to 150 members of the Pennsylvania, Maryland, and New Jersey bar were there.

MR. DODGE: I am glad they took that position. I agree with that position entirely.

THE CHAIRMAN: I merely say that because of the reaction that the average member of the bar, without much thought, gets to this idea of broadening out the summary judgment rule to include such preliminary matters as the service of the process and all that. They want a chance to bring that up and get it out of the way on motion before they are bothered with summary judgments or anything else, as they look at it.

I think there is a great deal to be said theoretically about the Reporter's position. I think the difficulty in my mind about it is that we may cause confusion and confound it. If we do it, I think we have to do it a lot more explicitly than the present draft provides for.

DEAN MORGAN: I think we will have to go to lunch,

but after lunch I should like to have it made clear on this motion for summary judgment for lack of jurisdiction, lack of jurisdiction over the person, and all that sort of thing, what will happen in case there is a dispute in the evidence on it. That is, there are affidavits and counter-affidavits, and the court says something has to be tried. As I understand it, under our present motion, certainly in a lot of the federal cases, we can try that out right now on the affidavits on the motion. We don't have to do as the Massachusetts practice is, actually give them a trial by jury, and so forth, on that sort of thing.

THE CHAIRMAN: I thought that my experience in the federal courts was that the issue of service of process and whether the defendant was subject to service in the state, doing business, was a matter that it was customary to try on conflicting affidavits, without cross examination. When I commenced to read some of the cases, I rather got the angle that it was customary to do it, but with the acquiescence of both sides, that if one man insisted on having a conflicting question of fact to be decided tried on cross examination, and so on, he had a right to it. At least that was the suggestion.

JUDGE CLARK: There are cases that hold that specifically.

MR. DODGE: I never knew one of those cases that was decided on affidavits.

DEAN MORGAN: I have seen lots of them.

THE CHAIRMAN: I have argued scores of them, but nobody has raised the question. They went ahead.

JUDGE CLARK: You read this memorandum, and you will find some cases.

DEAN MORGAN: I saw them there.

THE CHAIRMAN: We will have to adjourn for lunch.

... The committee adjourned at 1:05 p.m. ...

MONDAY AFTERNOON SESSION

October 25, 1943

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

THE CHAIRMAN: The meeting will come to order. Mr. Reporter, have you something further to say about your proposals on Rules 12 and 56?

JUDGE CLARK: I should like to speak a little about what I understand to be the existing law as to the method of trial of matters in abatement. If you have before you the memorandum of October 21, 1943, you will see that various methods of trial have actually been had. This is the memorandum which says in the letter, "Regarding Mr. Moore's proposed redarft of Rules 12 and 56, Mr. Mitchell has asked for a check of the authorities on two questions: (1) whether insufficiency, or defect in service, of process may be raised by a plea in abatement; and (2) whether it has been the practice to determine such objections solely on affidavits or upon testimony and trial."

I was going to call attention to some of the cases.

On page 4 there is a case from the Court of Appeals of the District of Columbia. "Defendant filed motion to quash service, supported by affidavit, on ground that service of summons was procured to be served upon him within the district by trick, device and fraud." Counter affidavits were filed,

and the motion was overruled. Whereupon the defendant filed a plea in abatement. "The appellate court held that in the District of Columbia the practice was established that where questions of service may be determined as a matter of law, they should be raised by motion to quash; but where the facts are disputed (as on affidavits and counter affidavits) and the defendant did not waive right to jury trial (motion to quash not being such waiver), and the parties had not entered into any stipulation that the court determine the issues, the motion must be overruled. The defendant is then entitled to raise the point by plea in abatement on which he can have jury trial and the trial court was in error in striking such plea."

That was a C.C.A. decision.

On page 9 is a single-judge decision from the Circuit Court in Illinois, which I think must be the case that you were referring to, Edson. That is Benton v. McIntosh, where they say the decision should be by the court on hearing of affidavits instead of trial by jury, and that they will not follow the state practice.

On the other hand, turning over to page 13, you will see a couple of cases from the Southern District of New York.

THE CHAIRMAN: What did the court hold in that case? You simply state, "That decision does hold that the federal court may ignore state practice in such a matter, and that a motion to quash .... has been the usual practice".

JUDGE CLARK: Where same may be decided on affidavit.

THE CHAIRMAN: Yes.

JUDGE CLARK: On page 13, at the top of the page, is an Oklahoma case where oral testimony was presented, but the cases that I was going to refer to here are the two cases at the middle of the page.

The National Typographic Company case. "On motion to set aside service of process, the court refused to decide the motion upon affidavits as to one defendant, saying: 'As to Starring, the question of residence is in dispute, and the motion should not be granted where there has been no opportunity to cross-examine him as to the statements in his affidavit.'"

The next case, 1906, from the Southern District of New York. "Motion to quash service on ground that defendant was not an inhabitant of the district." The court there said: "But it would be unfair to the complainant to accept as conclusive the sworn ex parte statement of the defendant as to his intent, untested by cross examination.... This court has frequently, where proved facts seemed inconsistent with such a statement, declined to determine the question on ex parte affidavits, leaving it to be decided under plea, or upon issue raised by the answer," and so on.

I give those as samples. I don't know that you could say that there is anything plainly authoritative. That District of Columbia case is fairly direct. We thought that, on the

basis of what there was here, you could not lay down a rule that a trial on the merits was out of order or couldn't be had.

THE CHAIRMAN: No, we don't. The court can always call witnesses, in its discretion.

JUDGE DONWORTH: We have a rule right on that, you know, that when a motion involves matter not of record, the court may order an oral hearing. We have a rule to that effect.

JUDGE CLARK: There are various other ways that the thing has been handled. On page 15 you will see a case in the middle of the page that refers to a special master for hearing of the point.

THE CHAIRMAN: This question would become material only in the event that you transposed the summary judgment rule to the motion to set aside service of summons, in which case you would have to settle this question of law and make some statement in the summary judgment rule as to whether you couldn't have hearing on affidavits; but if you don't transpose it, then you don't need to deal with it. I suggest that before we take up the details in that way, we decide the broad question.

DEAN MORGAN: First, Mr. Mitchell, I should like to know what the decision is, whether you are going to determine a disputed question of jurisdiction by affidavits or whether you are going to treat the summary judgment in abatement in exactly the same way as you treat the summary judgment on the merits. If the summary judgment in abatement is treated as

the summary judgment on the merits is treated, then if there is a question of fact, you don't get the summary judgment. If it is treated the way it might have been treated in the motions that you have under 12 and the way I must confess I assumed it would be treated there, by a preliminary hearing on affidavits or on testimony without a jury, then that is quite a different matter, because our summary judgment, so far, contemplates that there is no question of fact bona fide in issue.

JUDGE CLARK: Of course, I don't know what you want to do, but in our draft we very consciously avoided making any change there. If you look at our draft, you will see that it is done on the basis of following whatever practice there was. From what I see of the cases, I rather think that a man could claim a trial by jury, and I think it would be pretty difficult to shut him out, but I don't want to get into that here. So what we have said here is that the court may order such hearing as is proper under the circumstances of the case on pleas in abatement.

THE CHAIRMAN: You think a man is entitled to a jury trial as to whether the marshal left the summons at his house of usual abode?

DEAN MORGAN: I suppose so.

JUDGE CLARK: I should wonder. Of course, there is a difference between the kinds of questions. I should say he was certainly entitled to a jury trial on whether he resided in the

district and on whether he was served by fraud. That was the very case where the District of Columbia Court of Appeals said he was entitled to a jury trial, on the issue of fraud.

DEAN MORGAN: The other goes to how you are going to attack an officer's or sheriff's return. That is really what that other goes to.

SENATOR PEPPER: May I inquire, Mr. Chairman, what difference it would make, except as a matter of terminology, if this proposed draft read as follows:

"Except that prior thereto the party may in one motion move under subdivisions (e) and (f) of this rule, without prejudice to his right to move for summary judgment under Rule 56, either before or after the filing of the responsive pleading."

As I understand it, that would make no difference, except it would not extend the term "summary judgment" to the motions affecting (e) and (f) and would limit summary judgment to whatever it now means under 56.

JUDGE CLARK: Senator, there is just one rather slight difference, whether you think it so or not.

SENATOR PEPPER: I am just asking to have you clear up my thinking about it.

JUDGE CLARK: There is one difference, and it is one of the details which may or may not be necessary. Last time, we thought it was a good idea to have only one motion at a time

and 12(b) and (g) together, of the rule, provide that you have only one motion, that you raise all your objections at that one time. So, under that rule, you would bring in your objections in one motion, and what you have now suggested is that you first make your motion directed to process, and then you could later on make your motion directed to the merits. That is just the way it is in the present draft, but not as we voted. We voted to cut down and to say that you should have only one motion at a time, and there is that difference. I think that is the only difference.

SENATOR PEPPER: I see. What I was thinking of was the apparently definite objection to treating a motion to quash for lack of adequate service or a motion to dismiss because the defendant is not found within the district so as to extend to those motions the name of a summary judgment motion. It seems to me that we have to decide that the advantages of the single motion are great enough to overweigh the terminological objection or that we have got to give effect to the latter and contemplate two motions.

It seems to me there is a confrontation of two different rules of convenience, that we can't split ; we have either got to do as you have done, apply the term "motion for summary judgment" to all these motions, or we have got to make a differentiation between those ordinarily known as cases where you move for summary judgment and the others that have been

here discussed. Which force, of those two conflicting forces, should overrule the other?

JUDGE CLARK: Well, of course there is still a third way, if you do as we did in the original draft, that is, in this that we sent out in June. There we cut it down to one motion and provided that two things differently named should be joined together.

SENATOR PEPPER: Yes.

JUDGE CLARK: One is a motion as to process, and the other is a summary judgment. You can do it that way and still have the only-one-motion stage.

I might say parenthetically that I thought we were pretty well agreed that the one-motion stage was desirable. Just to recall it to your mind, as you may remember, when this whole matter came up originally Monte Lemann was very strong for the two-motion stage, and he is the man who, last May, made the motion that there be only one, that is, that the defendant couldn't have two preliminary bites before he went to trial. I rather thought it was quite a desirable thing to cut down the series of objections the defendant may make and have him bring them up together or get ready to go on trial.

SENATOR PEPPER: I remember that debate and the vote, but it is probably an infirmity of my memory that I didn't realize that we had considered or discussed the extension of the term "summary judgment" to cover these, which in common law

pleading were called dilatory pleas.

THE CHAIRMAN: We didn't.

JUDGE CLARK: We didn't so vote at that time, and there is no question. I will say I thought I was doing it with a little justification and partly on your motion at that time, which brought forth, as I remember, exactly a split vote of the committee, which was finally decided then by the Chairman. I thought I was doing just what you had in mind. I may have gone beyond it, but that is what I thought I was doing. Your motion in general, I though, was to integrate 12 and 56, and I don't know, I can't recall at the moment, which you had swallowing up the other, but the idea was that 56 should be the overriding one, I think.

THE CHAIRMAN: Was that split vote on the question of whether there should be two groups of motions or one?

JUDGE CLARK: No. I think there wasn't any question about that.

THE CHAIRMAN: What was the split vote that I decided?

JUDGE CLARK: As I remember, that finally came up, and the definite split was on the motion for judgment [illegible] that you brought up.

MR. HAMMOND: The motion for judgment, to eliminate the motion for judgment on the pleading in Rule 12, because it is taken care of under Rule 56.

THE CHAIRMAN: That motion wasn't directed at the

motion to dismiss for failure of the complaint to state a claim. Was this confined to judgment on the pleadings rule?

MR. HAMMOND: Yes.

THE CHAIRMAN: We weren't very logical about that, because if we were going to strike out the motion on the pleadings rule, we ought to have stricken out the one for motion to dismiss because the complaint doesn't state a claim. I think those two motions are of the same kind.

JUDGE CLARK: Mr. Hammond brought that out. We had had a discussion and several votes on it, and then Mr. Hammond brought it up at a later time. Not all the votes were equally tied. Perhaps the one that was equally tied sticks in my mind more, but I think that vote that was precipitated by Mr. Hammond's suggestion was the one that was tied.

THE CHAIRMAN: Is that the draft of October 21?

MR. GAMBLE: There is no provision for raising the question of the sufficiency of the service by motion at all. The rules provide that those questions, "every defense or objection," should be raised by the responsive pleading, except the motion for more definite statement and the motion to strike, included in subparagraphs (e) and (f).

DEAN MORGAN: And summary judgment.

MR. GAMBLE: And summary judgment.

DEAN MORGAN: The summary judgment rule, 56, provides for that; lack of jurisdiction over the subject matter.

THE CHAIRMAN: He transposes to summary judgment the motion to set aside the service. It becomes then a summary judgment motion under Rule 56. So it is preserved, but it is under the head of the summary judgment motion instead of under Rule 12.

MR. GAMBLE: It isn't included in Rule 12 as it is now drafted.

JUDGE CLARK: What was your question, Mr. Gamble? I didn't get it the first time.

MR. GAMBLE: I say, under this rule as it is drafted there is no provision for raising the question of the sufficiency of service by motion.

JUDGE CLARK: Yes. We wouldn't agree to that. We would agree that it is provided for by 56(b).

THE CHAIRMAN: He transfers it to (b). You are right; it is not done now under Rule 12, but it is still done. It is done under Rule 56 where it lists the motions that may be made as a motion for summary judgment.

MR. GAMBLE: I see it now.

JUDGE CLARK: May I add one thing more about the question of what is waived and what is not? That has been referred to. That is covered in 56, but you will find, also, that it is explicitly taken care of in Rule 12(h). Rule 12(h) says, as it always has said, as a matter of fact, that the objections of no jurisdiction over the subject matter and of no legal claim

are never waived and can be brought up at any time, can be brought up at the trial.

MR. DODGE: Is there any provision now anywhere for a preliminary hearing on what would have been called, in the old days, a demurrer?

JUDGE CLARK: The preliminary hearing provision remains in substantially as it is now. That is Rule 12(d), isn't it?

PROFESSOR MOORE: Rule 12(d), Preliminary Hearings.

JUDGE CLARK: Yes. The only difference that has been made in 12(d) at all is to provide very clearly as to matter in abatement also.

MR. DODGE: Rule 12(b)? Where does it say anything about the failure of the complaint to state a cause of action?

JUDGE CLARK: Under the redraft, under the draft that was sent out in June, that provision for failure to state a cause of action is there, only in a limited way, because while you may raise the claim of failure to state a cause of action, yet the other party can get away from the statement by filing affidavits. Either party turns it into a summary judgment. On the redraft we thought we would just leave it out and say that in any event it is a summary judgment, and you can decide on all the papers before the court (which may include an affidavit but do not need to) whether there is any claim for relief.

MR. DODGE: It isn't referred to in Rule 56 as one of the grounds of a motion for summary judgment.

JUDGE CLARK: Of course, you can always raise the question whether there is a showing of any claim for relief, and it is not now a matter of pleading it; it is a matter of showing it by affidavit or otherwise.

MR. DODGE: After you have filed your full answer?

JUDGE CLARK: Yes; any time.

PROFESSOR MOORE: Or even before, too.

MR. DODGE: Why isn't it listed, then, in Rule 56 as one of the grounds of a motion for summary judgment?

PROFESSOR MOORE: The first sentence provides that you move for summary judgment on matter in bar or abatement or on both such matters. A motion for summary judgment on the ground that the complaint fails to state a cause of action would be, I take it, summary judgment in bar. The plaintiff could defeat that by showing by affidavit that he did have a good cause of action but had failed to state it.

MR. DODGE: Which he could show ordinarily by filing right off a motion to amend, if it were a formal defect in the answer or declaration.

PROFESSOR MOORE: Yes.

JUDGE DONWORTH: As I understand it, the underlying theory of the present proposal is that it is really immaterial whether a cause of action, if I may use that expression, is

stated or not; it is utterly immaterial. You have to move for summary judgment, at which hearing the plaintiff may supplement his defective allegations by affidavits, and he doesn't have to amend. The court hears the thing on the merits, taking the affidavits into consideration the same as it would the pleadings.

THE CHAIRMAN: And you may go to trial and judgment without ever having a claim stated in the complaint.

JUDGE DONWORTH: That is my understanding.

MR. DODGE: But that is just accomplishing, in another name and under different forms, what he could have accomplished by a simple motion to amend his complaint, if it was obviously defective.

THE CHAIRMAN: Only, as Judge Donworth points out, if you show you really have a good claim by affidavits, even though you haven't stated it, there is nothing in the rules that says you must amend your complaint so as to state what has been discovered.

JUDGE DONWORTH: I am not making any particular point on that. I am just bringing it out.

MR. JUDGE: That is, you abolish completely the old demurrer or motion to dismiss, as it is known in the federal practice, and invite affidavits by calling it a motion for summary judgment.

DEAN MORGAN: Provided that "the court shall not enter judgment without affording the party reasonable opportunity to

obviate the objection."

MR. DODGE: By amendment.

DEAN MORGAN: By amendment or any other way.

MR. DODGE: Which is the natural way to do it, rather than by an affidavit.

DEAN MORGAN: So it says, "if the objection is such as may be obviated by amendment or otherwise, the court shall not enter judgment without affording the party reasonable opportunity to obviate the objection."

THE CHAIRMAN: That was the redraft we voted.

PROFESSOR CHERRY: They wouldn't enter summary judgment, but they would deny summary judgment. Judge Donworth's point is that there is no statement of a cause of action where the curing has been by affidavit. Isn't that the point?

JUDGE DONWORTH: Correct.

THE CHAIRMAN: That provision giving leave to amend was stuck in under our redraft of Rule 12(b), which allows the motion for failure to state a claim.

JUDGE CLARK: We stuck it then in our draft, also.

THE CHAIRMAN: Yes.

MR. DODGE: We left the familiar motion to dismiss or demurrer in effect before, and merely provided that at the election of either party it might be treated as a motion for summary judgment, which I never saw very much ground for, as an amendment of the complaint would take care of anything that

could be covered by an affidavit.

JUDGE CLARK: You may remember that we do the same thing at trial. After all, these preliminary papers really correspond to a trial. What they do is to make it unnecessary to call in the witnesses unless the parties really force it to trial. You have the substance of what they are going to say by affidavits. Our Rule 15(b) is after trial. You decide the case according to the issues. You may remember that there it is provided that "Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues." The formal amendment there is made rather as a matter of form. If you want to keep everything shipshape, the judge can make sure that the amendment is made, but if he doesn't do it, the matter is tried just the same.

MR. DODGE: The ordinary demurrer in my experience has not been based upon defects of form readily curable in a declaration, but has raised the question of substance, whether the plaintiff has any cause of action. A fellow sues, for example, for some right which he claims under a statute, and there is no doubt who he is or what the statute says. The only question is whether that particular plaintiff is within the class protected by the statute. That is a perfectly simple

issue which the party ought to be able to raise, I should think, in the familiar way, by a motion to dismiss. We are not dealing with demurrers, in the main, which merely go to technical defects of form, but with demurrers which go to the substance of the cause of action.

PROFESSOR MOORE: I believe you can do that now under 56(b).

MR. DODGE: You can move for summary judgment, and then that at once suggests to parties the affidavits. Then the record will be cumbered up with affidavits which probably are immaterial and which take much more time and involve more expense than the perfectly simple demurrer or motion to dismiss.

THE CHAIRMAN: Over in the 3rd Circuit when I read that change that we had adopted, somebody spoke up and asked, "Why shouldn't the judge be the one to decide whether it is converted into a motion for summary judgment or not?"

MR. DODGE: I thought that was what we voted.

THE CHAIRMAN: I found that note that I made on my draft over there, that one of the judges piped up and asked, "Why shouldn't the judge be the one to decide or at least have a right to decide?"

MR. DODGE: Wasn't that the vote that we passed, instead of this vote that either party may at its election?

JUDGE CLARK: No.

MR. DODGE: My recollection is different.

JUDGE CLARK: There was some discussion, and some members of the committee apparently assumed that that was what we were talking about, but I don't think there was any question what the vote itself was. Some members of the committee, in restating the proposition, put it in terms of the court, but the vote itself was in terms of the parties.

MR. DODGE: Suppose the defendant demurs to the complaint, or does the equivalent, and the plaintiff elects to treat it as a motion for summary judgment. How does he show that election? Does he file a document in court stating, "I elect to regard this as a motion for summary judgment"?

THE CHAIRMAN: He puts in affidavits, and that proves what he called it in the first place.

MR. DODGE: Instead of amending his complaint, he puts in an affidavit?

THE CHAIRMAN: Yes; because the rule itself is restricted to the face of the complaint, and when he puts in affidavits he is electing to go outside the complaint, and that is a motion for summary judgment.

MR. DODGE: In the ordinary case where the defense goes to the merits, affidavits won't cure it, and I don't quite see the usefulness of that in the great majority of motions or demurrers of that sort.

THE CHAIRMAN: You mean you don't see the usefulness of our provision that the court might treat it as a motion for

summary judgment?

MR. DODGE: I would let the court treat it. In a rare case, the court might for some reason prefer an affidavit to a motion to amend, although I have difficulty in conceiving of that kind of case.

THE CHAIRMAN: But, don't you see, Robert, even if you amend, there still is the question of whether you have got a good cause of action in fact, on the undisputed facts. If you just stick the amendment in, then he has to follow that up. If the motion for dismissal on the ground that the complaint doesn't state a claim has been defeated by an amendment, then he turns around and has to bring a second motion for summary judgment on the ground that, although you stated one, you haven't one on the facts.

MR. DODGE: That is a different question.

THE CHAIRMAN: Don't you think there is something in the idea that, if you make a motion to dismiss because the complaint doesn't state a good claim, but it appears that he can state it all right by amending his complaint, but the question arises whether it isn't a sham claim, the court, without requiring a new and independent motion for summary judgment, should have the right to say, "Well, let's go to the guts of this thing instead of the mere form."

That is what so many of the courts have been doing. The 2nd Circuit has done it repeatedly. On a motion to dismiss

because the complaint doesn't state a good claim, if the courts ask, "What is the real, underlying fact about this thing?" and find that they get to slinging affidavits around, the courts treat them then as motions for summary judgment, and they go right to the guts of the thing, and it expedites the final disposition. That has been done repeatedly in the 3rd Circuit. That is why we are recognizing that practice, which certainly has frequently appeared to be desirable.

Our committee adopted a provision to do just what the 2nd Circuit said you could do under those circumstances if the situation makes it desirable: Go whole hog and convert to a motion for summary judgment, not merely on what the complaint states, and find out whether there is any real issue of fact. There are so many cases that have arisen that way that it seems to be a useful function to take care of.

MR. DODGE: That goes beyond the mere demurrer into the old question of summary judgment in its familiar form.

THE CHAIRMAN: Yes.

MR. DODGE: I know that in my experience demurrers have raised questions which were not susceptible of remedy by amendment. They have gone to the substance of the case. I should have said that it is often said that one shouldn't demur for mere matters of form because that merely educates the other side, whether that is a laudable reason or not. Most demurrers which are actually filed in my experience go to the

merits, and the defect or the difficulty can't be cured by amendment.

THE CHAIRMAN: If that is the case, it wouldn't do either party any good to file affidavits, would it? Then you have the court deciding the motion for summary judgment, as he has a right to do on the face of the pleadings. He doesn't have to have affidavits. If neither party puts them in, you can have a motion for summary judgment decided right on the face of the complaint.

MR. DODGE: My difficulty is in going away from a matter that is so familiar to all lawyers. I suppose the demurrer or the motion to dismiss exists in every state in the Union, doesn't it? Now we propose to abolish that very familiar way of testing a basic legal question by calling them all motions for summary judgment, suggesting affidavits and confusing the bar.

THE CHAIRMAN: You are arguing not only against the recent proposals that the Reporter makes, but you are asking us to go back and reconsider what we did last spring and wipe out this provision that a motion to dismiss for failure to state a claim might be converted into summary judgment.

MR. DODGE: I had thought, as I said, that we voted that an order of the court might so convert it, but that the option of either party might confuse matters by making an election.

JUDGE CLARK: If I could speak on that, forgetting what we voted on, I should like to suggest this: It seems to me that so often, as is only natural, Mr. Dodge refers to practice which is very simple and which works out very well and which lawyers can count on. I don't believe that any good lawyer would be caught with a poor complaint which would show up on a demurrer, except on some point of substance. I am perfectly willing to agree to that. A good lawyer is never caught by a demurrer unless he wants to be. I mean, often that is an easy way of raising the question, and if the lawyers get together and do it, that is fine.

But the thing that we run into right along and the reason that we act as we do--and I know we would hate dreadfully to be tied up that way--is, as Learned Hand put it in a letter, that if some poor lawyer comes up and is trying to plead and hasn't done it very well, but he has shown in one way or another that he has some point or that he has none at all, either way, it is very helpful to us. If it goes off on a question of bad pleading, the trial judge has likely decided peremptorily against him, and it is a little difficult when it comes to us to tell why. It may be that the trial judge just got worn out, if the fellow has been so dumb about it, or it may be that the trial judge hasn't had the patience he should have, or it may be that it just came up on a crowded motion docket. I think the latter is very likely in New York.

But for some reason, here is a poor pleading, a peremptory decision against him, and now we are sitting on that case. What are we going to do about it? In the record there are various affidavits of one kind or another, and there isn't any question of the difference to us. I mean, you get a greater feeling of assurance as to what you are doing when it is a difference between the bare allegations or it is a difference between what the parties have tried to set forth in narrative fashion. Often then you can affirm, because you are quite sure that he hasn't any point. I mean you have gone to the merits rather than otherwise.

As to what the bar is thinking now, of course I don't know, but, as the Chairman says, there are the circuit court decisions. I have collected some thirteen from various circuits. We do it right along. We look at all we can see there, and if we decide that it has some question, we send it back, but if he shows his hand further than his mere allegations, there is all the difference in the world, it seems to us, between acting somewhat on what the case is about and acting on very pale and weak allegations.

Just one thing more, and that is as to who should turn this thing into a summary judgment, if it is to be turned. There, again, I don't know how the problem could be settled. Most of these things the trial judge has decided very quickly at the motion calendar. Suppose the trial judge has not marked

this "summary judgment." Can we act on it on appeal? I don't know that it makes any difference. If any judge at any time, looking into the case, can turn it into a summary judgment, it is a mere matter of judgment, and that means that, whatever affidavits are there, we are going to treat it as a summary judgment. We are going to look at everything we can that is going to help us to the result. If, however, it means that the trial judge has got to go through some formality and say, "Mark it down that I have done so-and so," they would be ashamed because they don't do it, you see.

THE CHAIRMAN: That is a good point. You are responsible for that because you suggested this election by the parties and the court. My idea (if we are back now to the question whether we should undo what we did last spring, which seems to be what we are talking about, instead of whether we should do more) is that it could be worded in a better way by saying nothing about anybody's election. Just say, "If there is material presented beyond the face of the pleadings, the motion may be treated as a motion for summary judgment." That doesn't confine it to the district court and doesn't deprive the circuit court from so dealing with it.

JUDGE CLARK: Any way, so long as the hands are not tied.

JUDGE DONWORTH: At the last meeting I voted against the proposed change, but I acquiesce in the vote taken at that

time. That vote was restricted mainly to subdivision (6) of Rule 12(b), "failure to state a claim upon which relief can be granted."

THE CHAIRMAN: Wouldn't it also include a motion for judgment on the pleading?

JUDGE DONWORTH: That may be.

THE CHAIRMAN: Yes.

JUDGE DONWORTH: Passing that, I strongly believe that we should retain what is now in Rule 12(b) as to the first five subdivisions that, not quoting the words but the idea, the defendant may object because of lack of jurisdiction over the subject matter, lack of jurisdiction over the person, improper venue, insufficiency of service of process.

Our Reporter, for whom I have the most profound respect, if I correctly interpret the vote has not accepted that vote, but he is amalgamating some of these first five into a motion for summary judgment.

THE CHAIRMAN: You are not quite right. He has made a draft according to our vote, and then he has also suggested another draft. He has obeyed our orders but has come in with a suggestion and asked for reconsideration.

JUDGE DONWORTH: I am very much opposed to that new idea. I think that these first five must be heard independently before we find out whether the man is going to lumber up the record with a terrible lot of affidavits and such like.

One suggestion that has been made by our Reporter submits some authorities about the way that the defective service of process is tried. There is a decision from the District of Columbia cited, where they held there must be a jury trial, if demanded, but the majority of the cases cited in the federal courts simply say that the defendant cannot get away with his motion when he doesn't submit his witnesses for cross examination.

We have covered that by Rule 43(e), "Evidence on Motions." "When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or depositions."

So the man and his witnesses can be summoned in and cross-examined. I think that takes away the idea that these matters of preliminary objection are in the same category with a judgment summarily on the merits. I don't think the two ought to be amalgamated at all. I think it is confusing both to the bar and to the courts.

THE CHAIRMAN: There are a good many motions that are referred to in that last rule you read that are neither in abatement or in bar, which are often decided on the basis of conflicting evidence. All that that rule did was to give the court discretion, if it chose, to say, "I would like to see the

witnesses and have them cross-examined." It seems to me that that is a little different thing from saying that the court has a right to hear all questions on conflicting affidavits even if one of the parties objects to it.

However, it seems to me that we have been reneging a little about what we did last June and have been talking about going still further and putting all the motions now specified in Rule 12, except (e) and (f) (which are the motions to strike and to make more definite) over in the summary judgment rule and labeling them all "summary judgment motions." Can't we vote first on the question as to whether we want to take all these preliminary motions and convert them into summary judgment motions under the summary judgment rule, excepting (e) and (f)?

DEAN MORGAN: I so move, Mr. Chairman.

THE CHAIRMAN: You move we do it?

DEAN MORGAN: I move that we accept Rules 12 and 56 as reported by the Reporter in his draft of the 21st of October, 1943.

THE CHAIRMAN: Do you want any further discussion about it?

JUDGE DONWORTH: As I said, I favor retaining 12(b) as is so far as concerns the five preliminary matters which do not go to the merits.

DEAN MORGAN: I should like to say, Mr. Chairman, that the only objection that I have heard against this is that

the lawyers are going to be confused and that they don't like to learn something new. It seems to me that there is no chance of their really being confused if they read the rule. When they come to a question like Mr. Dodge's on these motions in abatement and find that there is a question of fact to be tried out, they have the provision right at the end of the section that the court shall make suitable provisions for that. If in the district the practice is to hear it on affidavits, it can be heard on affidavits; if the practice in the jurisdiction is to call a jury or to call witnesses and try it by the court, it can be done that way.

It seems to me that this combination of rules provides a perfectly sensible and practical way of handling this matter, and if we weren't all tied up with history, I don't think we would have any objection to it. The whole objection seems to me to come down to an objection to change; that is all. Heaven knows, if we had listened to those objections to begin with, we would never have had these federal rules.

JUDGE DONWORTH: My objection is not based upon change but upon the fact that, in order to make a simple preliminary motion which does not involve the merits, he is obliged at his peril to bring in the difficult question of the merits, which may involve him in controversy.

DEAN MORGAN: He is not obliged to.

JUDGE CLARK: No, Judge Donworth, he is not obliged

to. Sorry.

THE CHAIRMAN: Then, if he isn't obliged to, he can make a motion for summary judgment on these preliminary grounds, and if he gets licked onthat, he makes a motion for summary judgment on the merits.

DEAN MORGAN: After he puts in his answer.

THE CHAIRMAN: Why does he have to wait? Under our present rules, the defendant can make a motion for summary judgment the day that the summons is served on him.

DEAN MORGAN: Yes, he can now.

THE CHAIRMAN: But this rule says no, that he has to wait until his answer is in.

DEAN MORGAN: He can do it under this not only on the merits but in abatement. Why shouldn't he?

THE CHAIRMAN: It seems to me, when you get down to brass tacks, you are leaving the thing pretty much where it is, because if you can make a preliminary motion and call it a motion for summary judgment to set aside service of process and then make another motion later for summary judgment having to do with the judgment in bar, you have just what you have today; you have a preliminary motion to strike the preliminary questions and a later motion on the merits. The only difference you have accomplished is that of labeling it now a motion for summary judgment instead of a motion to set aside the service.

If that is all you do by it, you still have the separate successive motions, and aren't you getting into trouble because you are transforming what the lawyers have understood as a motion to set aside the service into a summary judgment proceeding, which may cause some confusion? If you still have successive motions to make, I don't see what you gain by merely labeling a motion to set aside service of process as a motion for summary judgment.

JUDGE CLARK: May I speak a little on that? I don't want to talk too much but, after all, I suppose I am in this.

I think there has been a good deal of fear that we are doing more than we are. In one sense it is perfectly proper to say that the real difference between the draft voted, which we set forth in the June draft here, and the draft we are suggesting is one of form and of statement, and there is very little difference, if any, on the merits as such. What we have done, really, is to try to take what seemed to us the rather cumbersome form as a result of our meeting in May and to put it into what seemed to us the plain English of the thing. I am afraid we haven't succeeded very well, maybe, because you have had difficulty with our change, but I am not entirely sure that that may be the fault of our change. Perhaps it may be that it is still new, and you are not quite accustomed to it.

On Judge Donworth's suggestion, we haven't made that change. As a result of the May meeting and of the original

draft we made in June, you had then only one motion. The defendant was supposed to make all his objections at one time. That is what we are still keeping. You had a motion which was a sort of chameleon. It started out as one thing, and it ended in substance as another. What I think we have done really is to try to say, "Well, let's from the beginning call it the other."

Therefore, I wonder if you haven't felt we were doing altogether too much, more than we were. What we are really trying to do is to make a much shorter and simpler statement of what we did in May.

THE CHAIRMAN: Let me ask you this: Under Rule 56(b) as you redrafted it on October 21, I am left in doubt as to whether, having once made, before answer, a motion for summary judgment dealing with matters in bar and been defeated, you can then make another motion for summary judgment on the matter in bar after the answer. It says:

"As provided in Rule 12(b) only one motion for summary judgment, whether raising matter of bar, or of abatement, or of both, can be made before service of a responsive pleading; thereafter a motion may be made for summary judgment on matter of bar, or of abatement on grounds (1)-(2), or on both such matters."

As a matter of clarity, I am left in grave doubt as to what you can do there. You can make only one motion for

summary judgment before responsive pleading is served, whether it be raising matters of bar or of abatement or of both. If you don't make a motion in bar, I assume that under this rule you could make another motion for summary judgment after pleading in bar. I suppose your idea is that this permits you to make both before the answer if you want to, but if you don't make it in bar before, you do it afterwards. Is that the exact result of it?

JUDGE CLARK: That is true and that, I think, is the existing rule, and it is something that we didn't tackle changing. That goes back to our theories of waiver, which I think are the general rules in this country. That is that matter which shows you have no right of action, no claim, can be brought up at any time.

There are two matters, of jurisdiction and subject matter. The fundamental right to recover can always be brought up. That is stated definitely in our Rule 12(h). It has always been stated, and we had it there. Some people have said we ought to go further and say there was a waiver. There may be some argument to be made on that. The only thing is that I think it has been difficult to work out, because you are not going to get a court to give a judgment where there is no right of action. So I don't believe that any rule other than this would work.

Anyway, we have taken as the rule the fairly general

rule under the codes and the fairly general rule everywhere. That being the general rule, then you can always bring it up to trial, and hence it will be a natural corollary that you can always bring it up by summary judgment.

You might go one step further then and ask, "Well, why couldn't you make a series of summary judgments before the answer?" Of course, perhaps you could, but there we tried to say that if you have one preliminary hearing before the answer, that is enough. It is just a little attempt there to cut that down.

As I said, that is what we voted in May, that, shortly stated, there be only one preliminary hearing before you went to answer.

THE CHAIRMAN: Let me see if I haven't a suggestion that may solve our present difficulties. Who was the man whom they called "The Great Compromiser," Senator?

SENATOR PEPPER: Henry Clay.

THE CHAIRMAN: All right, my name is Henry. What we are getting out here is a tentative draft for consideration by the bench and bar and, personally, I should rather regret to see us take one of these drafts,whichever we take, and suppress the other. My suggestion is that we have a division of opinion on this committee. We haven't even voted to see how we stand, but my suggestion is to take Rules 12 and 56 as we voted on them last June and see that that draft is clear and does do

what we want to do. Then we will let Charlie take the new rules here and, in the light of the discussion here today, polish them up. Then we will publish both rules in our tentative draft and say, "Gentlemen of the Bench and Bar and the Supreme Court: The committee is divided on this thing."

We must write a careful, clear note describing what the effect of each rule is, and why, and shoot it out to the bar, and then come back in the later winter or spring and see what arguments and reasons the bench and bar are going to give us pro and con on one or the other. I think then I should be in a good deal better position to make a decision on it as a member of this committee. Even then we might have to put both drafts up to the Supreme Court at that stage.

I think we could talk and argue about this thing all day, and some of us have definite views one way or another, but let's do that; let's put both drafts out.

JUDGE DONWORTH: You wouldn't have any vote of the members of the committee as between the two?

THE CHAIRMAN: If you want to, all right. You can state in your report how the committee stands, what the vote is. My suggestion is that we simply say the committee is divided and that we should like the suggestions of the bench and bar as to their choice between these two ways of treating it.

SENATOR PEPPER: Mr. Chairman, just to see whether I

have correctly caught the Reporter's thought, may I state what I understand to be the cumulative effect of 12 and 56 as he proposes to amend them? I am disregarding questions of terminology, whether we call them summary judgment or what.

"Every objection to a claim," and so forth, "may be asserted by a motion for judgment on matter in abatement or in bar. A motion based on matter in abatement must be made before a responsive pleading is filed. A motion based on matter in bar may be made either before or after a responsive pleading. All matter of abatement must be included in a single motion, and both matter in abatement and in bar may be so included. Matter in abatement includes the following," and then comes the category that you have in Rule 56, " and matter in bar includes the objection that the pleading of the adverse party discloses no ground for relief."

THE CHAIRMAN: That is your redraft?

SENATOR PEPPER: That is my conception of the cumulative effect of the revision proposed by the Reporter.

JUDGE CLARK: I think that pretty well covers it.

THE CHAIRMAN: I think it is very clear. I think the Reporter might well consider it.

SENATOR PEPPER: It just spells the thing out.

PROFESSOR SUNDERLAND: Does your suggestion take care of uncertainty and striking out?

SENATOR PEPPER: I wasn't attempting to do any

drafting. I was just attempting, so far as the limits of our controversy here is concerned--

PROFESSOR SUNDERLAND (Interposing): But those matters wouldn't be abatement or bar.

SENATOR PEPPER: (e) and (f) would stand as they are. They wouldn't be affected by this.

JUDGE CLARK: I should like to add this, Senator: I have been trying, I thought, to represent (if I may say so) our party, and I thought what we were trying to do was to state the view that, as I recall, you had, Dean Morgan had, Professor Cherry had, and there may have been others, but I remember those three in particular. Of course, I am worried about this a good deal. I should be only too happy if one of you would take up the torch. Now perhaps Dean Morgan might try his hand at it. I mean, I don't want to insist on any one thing. I have tried to shift. The general idea was to put these two things together, and that was what you had in mind, I think.

SENATOR PEPPER: Yes. Please understand that I wasn't attempting offhand to do any drafting or to improve on what you had done. I was simply trying to give my mental impression of the net result of what you have done and to do it without regard to the disputed question of terminology as to what we call summary judgment and without disturbing the provisions of (e) and (f) as to motions to strike and all that kind of thing.

That was merely to recognize that as to matter in abatement you have to raise your point before the responsive pleading, and as to matter in bar you may raise it before. If you raise it before, a single motion is made.

JUDGE CLARK: Yes.

SENATOR PEPPER: If you raise it afterward, it is a mere motion for a summary judgment in the ordinary way.

JUDGE CLARK: Yes; I think that pretty well states it.

SENATOR PEPPER: That is all I wanted to do.

JUDGE CLARK: I want to state that just calling this a summary judgment is not something that I want above all else. I am trying it as a means to an end.

SENATOR PEPPER: I understand.

JUDGE CLARK: It seems to me that 12 and 56 have been overlapping and a little confusing. There are other possible ways of doing it. You might dump all 56 in 12 (that is one way), or you might dump all 12 in 56, or perhaps you could keep them split but with ties that would keep them from being confusing. I am not trying for any one of those. I am trying to get one of those that will work.

My fundamental idea is to integrate the two together, as I don't think they have been done. I think they were done under our original rules, the ones now in existence. They were done, some of them, in May. In final result they were pretty well done in May, but you sort of started one way and then went

another.

SENATOR PEPPER: I realize that.

JUDGE CLARK: That is what I have been after. Let me say, Mr. Mitchell, that, for my part, I think that would be a good way.

SENATOR PEPPER: I think the ground ought to be laid for it by putting Dean Morgan's motion, and if there is a substantial difference of opinion on the motion, as I think there might be and certainly will be, then you would follow the course that the Chairman suggested. If you have that vote behind you--

THE CHAIRMAN (Interposing): And we have a substantial minority, they are going to put in a dissent and submit the other rule and say something, and then we have a quarrel. Why should we expose that? Why don't we just simply say we are divided?

DEAN MORGAN: I would substitute your suggestion for my motion gladly.

SENATOR PEPPER: That is right. That is all right.

DEAN MORGAN: I think that is exactly what we ought to do.

JUDGE DONWORTH: I should like to be made a little more clear on one thing. When I said that at present the defendant can raise one of these five points by preliminary motion without complicating the matter by going into the merits

at all, I was told, I think, by Dean Morgan that he may do it under the proposed redraft. I understand that, as a matter of fact, though, if he is going to raise these points, he must raise them by a motion for summary judgment and not by a motion to quash or a motion to vacate. The only motion he can make aimed at these results is a motion for summary judgment. As I understand Dean Morgan's comment on what I said, it is that while that is true, he may make a separate motion for summary judgment later on the merits involved, but not involving any of these points. Is that correct?

DEAN MORGAN: That is my understanding.

MR. DODGE: I am wondering if the new draft wouldn't be confusing with regard to ground (6), because all the other grounds are referred to in your new draft of Rule 56, and there naturally would arise a question in the minds of lawyers: "Seeing that 6 has been stricken out and isn't referred to anywhere else, just how should the old motion to dismiss because you haven't got a cause of action be raised?"

You say it is concealed in that initial statement that a man may move for summary judgment, but there is no express reference to that kind of motion, which is new in summary judgment procedure. It ought to be referred to either in 56 or in 12 or somehow, so the bar will know what has become of it.

JUDGE CLARK: It may be that it should be separately

stated. In the way I look at it, I wouldn't want to have it failure to state a cause of action, because that word "state" I think has raised various ideas which have not been good. If you wanted it in some fashion, I suppose we would put it in; "failure to have any right to relief," or something like that.

DEAN MORGAN: "to show any ground for relief."

MR. DODGE: Whatever is raised by the familiar motion to dismiss now in force in federal courts everywhere.

MR. TOLMAN: I think definitely we abandoned the use of the phrase "cause of action" at all and invented this new clause, "grounds for relief," as a substitute for it, and I think we ought to stick to it.

JUDGE CLARK: I think we can do that. This is a little more. This is a failure to plead a claim. I would hate to put it in just that fashion, but I think if it is desirable, we can put it in. "failure to have any claim for relief."

MR. DODGE: That there is no ground for relief.

JUDGE CLARK: Yes, we can put that in.

SENATOR PEPPER: In my short statement I said that matter in bar includes the objection that the pleading of the adverse party discloses no ground for relief.

MR. DODGE: I was very glad to have you include that, because these rules don't specifically deal with it.

THE CHAIRMAN: I think the Senator's supplement has remarkable clarity and covers a great deal of ground. If you

adopt the suggestion I made and put in this proposal about 12 and 56, the Senator's draft ought to be looked at by the drafting committee to see whether they can't use it as a basis.

SENATOR PEPPER: It may be all right to look into it, but I shouldn't like to offer it as a motion, sir, because I have seldom seen an impulsive draft, made during the course of a debate, that really turned out to be sound in the end. At most, it is simply provocative.

THE CHAIRMAN: The motion before the house is Mr. Morgan's motion.

PROFESSOR MOORE: Could I ask Senator Pepper a question?

THE CHAIRMAN: Yes.

PROFESSOR MOORE: Senator Pepper, would you think that the defendant should have the right to raise matters in abatement after answer, such as lack of jurisdiction over the subject matter and failure to join an indispensable party? We provide that matters in abatement can be raised by motion for summary judgment even after answer. Would you be willing to--

THE CHAIRMAN (Interposing): Of course, the jurisdiction point can't be helped. You can raise that any time.

JUDGE CLARK: I suppose the indispensable party is the same thing, isn't it. That is technically jurisdiction, but I suppose that if you really have an indispensable party, you

probably can raise that any time.

SENATOR PEPPER: I should certainly think that, by the terms of the proposition, the question of lack of jurisdiction or the absence from the record of a party who is really indispensable was vital to the progress of the cause, at whatever stage of the proceeding.

PROFESSOR MOORE: Both of those are matters in abatement rather than in bar. Don't you think that those two matters in abatement might be raised after responsive pleading by motion for summary judgment in abatement?

SENATOR PEPPER: I think so.

JUDGE DONWORTH: That is rather complicated. The Supreme Court decided that in the Associated Press or some radio controversy that arose in the State of Washington. The plaintiff alleged that the value in dispute exceeded $3000; the defendant denied that. At the trial of the case, which was entirely on the merits, the plaintiff forgot to do anything about this allegation, and he was defeated in the Supreme Court.

SENATOR PEPPER: You mean he was finally defeated?

JUDGE DONWORTH: Absolutely.

JUDGE CLARK: Associated Press against some radio station.

THE CHAIRMAN: On the ground that he didn't prove the amount involved exceeded $3000?

JUDGE DONWORTH: But the allegation is not conclusive,

if denied, because the jurisdiction then depends on a matter of fact which, being denied, must be proved.

SENATOR PEPPER: I see.

DEAN MORGAN: The trial judge found that there was much more than $3000 involved from the very nature of the controversy, and the Supreme Court upset him.

MR. DODGE: Didn't send it back for new trial?

DEAN MORGAN: Apparently not. No jurisdiction, they said.

THE CHAIRMAN: Are you ready to vote?

SENATOR PEPPER: Mr. Chairman, Dean Morgan withdrew his motion, as I understood it, in favor of the Chairman's suggestion.

DEAN MORGAN: Yes.

THE CHAIRMAN: That was the motion I understood I was going to put.

DEAN MORGAN: That is the one you are going to put.

THE CHAIRMAN: The substituted motion.

SENATOR PEPPER: I see.

THE CHAIRMAN: He can state what my suggestion was, but it was simply that we look over the draft that we agreed on last spring and see whether we want to alter that; that we not attempt here this afternoon to polish up one way or another the Reporter's last draft; that we leave him to do that, with the suggestions he has had; that, instead of deciding which one

of the two we will put up to the bench and bar now, we will put them both up, with an explanation that both of them have support, explaining each one of them carefully in notes; and that we wait until the lawyers and judges come back at us before we take our real vote on the question.

SENATOR PEPPER: Then if we are divided, we will be where we are now.

THE CHAIRMAN: Yes, but we will have the benefit of any suggestions and reasons they give pro and con.

SENATOR PEPPER: Yes.

THE CHAIRMAN: I think that is the way to make progress, because I feel sure that, if we took a vote today and said we would put one of the drafts up, then the fellows who voted the other way would demand the right to put in a minority report and have the other one published as the one they are for. I don't think that is a very dignified way of presenting our internal troubles to the public.

PROFESSOR SUNDERLAND: Under both drafts, Mr. Chairman, doesn't the rule suggest the extension of a motion for summary judgment beyond the question of the merits?

THE CHAIRMAN: Doesn't it do what?

PROFESSOR SUNDERLAND: Doesn't each draft carry the conception of a summary judgment beyond the question of merits?

THE CHAIRMAN: I don't so understand. We didn't change the summary judgment rule at all under our draft of last

spring, except to say that a motion to dismiss on the ground that the complaint didn't state a claim, the motion for it on the pleading, might be---

PROFESSOR SUNDERLAND: ---turned into it.

THE CHAIRMAN: Yes. But that is going only so far.

JUDGE DONWORTH: And that would be one of the alternatives presented?

THE CHAIRMAN: That proposal that we adopted last May would be one of the alternatives, and the latest proposal would be another.

MR. DODGE: Does your suggestion, Mr. Chairman, cover leaving (6) as it was in this draft or changing it as you have suggested?

THE CHAIRMAN: It covers leaving it just as we adopted last June. It is in our draft now, and it is left right in there with a statement that, however you make the motion to dismiss on the ground that the complaint doesn't state a good claim, it may be converted into a motion for summary judgment.

MR. DODGE: At the option of either party?

THE CHAIRMAN: Yes. I don't like that part of it. I had a suggestion a while ago about patching that up.

JUDGE CLARK: You intend to look that over, don't you, anyway?

THE CHAIRMAN: My motion involves our going through Rules 12 and 56 right now, ignoring the Reporter's latest

suggestion, and seeing whether, if we are going to adopt that principle, the rule suits us.

MR. GAMBLE: Mr. Chairman, I should like to make this observation: I would be opposed to submitting to the bench and bar a draft of a rule which does not recognize in its terms, as the present rules do, the ground of failure to state a cause of action as a basis for action on a motion, whatever you call the motion; and I don't believe that the Reporter's draft, the one that is presented here today, does that.

DEAN MORGAN: I understood, Mr. Chairman, the Reporter was going to change that, anyhow? Isn't it right, Mr. Reporter, that number (6) was to be changed?

THE CHAIRMAN: The Senator's proposal specially mentioned that and made it clear.

MR. GAMBLE: Yes, but, as I understand, these two drafts--the one that you adopted last summer and the one that the Reporter has brought in on Rules 12 and 56--will both be sent out to the bench and bar.

THE CHAIRMAN: That wasn't my proposal. It was that the two ideas should be presented to the bar, that we would now go through the original idea we had and see if it was in form, and that Rules 56 and 12, according to the last suggestion, be reconsidered by the committee in the light of Senator Pepper's suggestion. We will have another look at it, of course, if we want it, and it won't go out until it does cover everything

we think it ought to cover, but I think if we started now and tried to reformulate Rules 56 and 12 on the principles embodied in the last draft, it would take us about two days to do it.

MR. DODGE: I think the Reporter is in favor of making some slight change to cover the point just made by Mr. Gamble.

JUDGE CLARK: Yes, I want to make some change, and of course it is perfectly obvious (I don't think I need to say it) that I don't want to do anything unless I can get Pepper and Morgan and Cherry, at least, to agree to it. Of course, I shall be glad to send it to all of you, but if I don't get them, I am nowhere anyway. I am going to try to get them to do what they will on it, and anyone else who wants to come in, of course. But our present idea is that we want to add (6), the ground that we have been discussing, not quite in this language but more in the language you put it, Mr. Dodge. Then there may be other things that we will want to change. Maybe I can get Senator Pepper to write it himself, I don't know. I should like him to do it.

THE CHAIRMAN: Well, Mr. Gamble, my idea, as I have said (maybe you all disagree with me), is that when this thing comes back and the Reporter gets up what he thinks is going to be his final draft for submission to the bench and bar and his notes, personally I should like to do something I haven't done because I have been so busy up until the 21st of October;

that is, take even that and, in the quiet atmosphere of my study, paw the thing over and, if I find suggestions about draftsmanship or this or that, write him about it. I think that kind of consideration by each member of the committee would be a good thing, and some of us may dig up some. It might not be necessary to hold another meeting. It might be and might not be. We could at least do that by mail, and if this redraft of 12 and 56 that the Reporter is going to make doesn't work out the way some of us would like to see it worded, we can take care of it that way.

MR. GAMBLE: All right. I just don't want to see a draft sent out that gives the impression that we are abolishing it as a ground.

THE CHAIRMAN: I don't think as it comes back to us again it will do that, after what the Senator has said about it.

MR. HAMMOND: I was just wondering if there was any difference in the committee as to Senator Pepper's statement of what we are trying to accomplish here.

THE CHAIRMAN: There is a clear difference of opinion among the committee as to whether we ought to transfer these miscellaneous motions to the head of the summary judgment rule. I don't think there is any doubt about that.

MR. DODGE: My only question with regard to Senator Pepper's statement was whether it was quite accurate to say that it is only a question of phraseology. I think it is more

than that. It imposes additional burdens. I think it is more than mere phraseology.

THE CHAIRMAN: We haven't voted to adopt the suggestion. It goes to the Reporter for whatever it is worth.

SENATOR PEPPER: That is all.

MR. TOLMAN: I wanted to express my admiration of the suggestion.

SENATOR PEPPER: We "juniors" have to stand together, Major.

THE CHAIRMAN: Are you ready for the question?

MR. TOLMAN: State the question.

THE CHAIRMAN: I have stated it pretty clearly. It is quite evident that Charlie is going to pack the committee by counting noses and getting a group favorable to his draft before he exposes it!

JUDGE CLARK: I certainly am going to try to do that. When they get away, of course, I don't know. It is often hard to do that. But you have stated my objective.

THE CHAIRMAN: All in favor of this motion to put up both drafts in the alternative for suggestions from the bench and bar say "aye." (Carried.)

MR. GAMBLE: I should like to be recorded as voting against that.

THE CHAIRMAN: Even though the late draft is amended to make it perfectly clear that a motion to dismiss can be

made in the form of a motion for summary judgment?

MR. GAMBLE: Yes. Personally, I like the draft which the committee adopted last June.

THE CHAIRMAN: I see. Well, maybe we will all agree with you when we see the final wind-up on it.

Shall we now go over Rule 12, the redraft of it as we ordered it last June, and see whether we want to make any changes in it?

JUDGE CLARK: Mr. Chairman, may I ask what you want to do as to (a). (a) is not immediately controversial, or it is a different kind of controversy, if any. (a) was a question of our doing it to try to make it shorter.

THE CHAIRMAN: Is there any doubt but that (a) does practically what the original (a) did, without change except that it is an improved and clarified draft? There is no fundamental difference in it, is there?

MR. GAMBLE: May I ask a question? I am sorry that I wasn't present last May, but I noticed in this draft of (a) that you have deleted the provision for a bill of particulars. Is that purposeful?

JUDGE CLARK: We have done that, but that comes up particularly as to (e). I mean we deleted it in (a) because we had taken it out of (e). The real question, if you are interested, would be as to (e), and you are quite right; we did delete it from (e) and left only the motion to make more

definite and certain. If you will look at (e), you will see what is taken out. (e) is where that question really comes up, and that is one of the things we did do last May.

JUDGE DONWORTH: When that question was decided, I expressed grave doubt as to whether it would accomplish what was intended. I understand from the Reporter that motions for a bill of particulars have become practically a nuisance in some jurisdictions. I fear that the effect of this will be to substitute a motion to make definite and that it will not diminish the preliminary attacks upon the pleading for indefiniteness, with the result that, if the court grants the motion, there must be an entirely new draft of the pleading gotten up and filed, whereas when a motion for a bill of particulars is granted, the old complaint stays there, supplemented by a bill of particulars.

I hope that my misgivings are wrong, but I think that this will not diminish the technicality of the defense but will increase the difficulties of the formation of the pleadings in court.

THE CHAIRMAN: Of course, the reference to a motion for a bill of particulars has been stricken out of it, but we struck it out because the fundamental problem was settled in subdivision (e). Suppose we consider (a) and pass that point until we get to (e). Then, if we want to change the rule we have about definite statement and bills of particulars, it is

just a matter of course that we replace the reference in (a). I don't care. If you want to take up (e) next, we can take it up. I was trying to take the sections in order here.

JUDGE DOBIE: Did we take out "or for a bill of particulars" under 12(a)(2)? I know we took it out over in 12(e). We took it out of both? In other words, bill of particulars doesn't occur in here anywhere, does it?

THE CHAIRMAN: The essence of our action was a change in subdivision (e) of Rule 12. We used to have a provision that you could get a more definite statement or a bill of particulars, either one, if you wanted it, for the purpose of enabling the defendant to answer or to prepare for trial. Most of the courts read out of the rule the preparation for trial and said that had to be done by discovery. So we struck out the phrase "or to prepare for trial". Then we also struck out the bill of particulars and limited it to only a more definite statement in the complaint.

Then we added an admonition that "The motion shall not be granted except where the pleading is so vague or ambiguous or contains such broad generalizations that the party cannot frame an answer thereto."

That is what we did. Do you want to take subdivision (e) first? I should like to take (a) and pass that until we reach the substance of it. If we change (e), then we can go back to (a) and stick the reference back.

MR. GAMBLE: I asked the question in the first place, and your suggestion is entirely agreeable to me.

THE CHAIRMAN: I see.

JUDGE CLARK: May I suggest on Rule 12(a)--that is what we are considering?

THE CHAIRMAN: That is right.

JUDGE CLARK: I take it that you got what was sent out right after the committee meeting. As you see it before you, you see that it is cut down some without any change in substance. All the suggestions made here are not changes in substance.

THE CHAIRMAN: This is the revision of 12(a) as presented to me under date of June 24?

JUDGE CLARK: That is correct.

THE CHAIRMAN: The one of June 24 is the one you liked, isn't it? Which one do you want? Do you want June 24, or have you a later one?

JUDGE CLARK: I want the one of June 24.

THE CHAIRMAN: That is the one I have before me.

JUDGE CLARK: Notice, that is a little beyond the original one. The original one was earlier in June. All we did there was to take out the words "or bills of particulars", if you will remember. I will remind you again that the suggestion was made that the Reporter take it and see if there was a way of shortening the substance without making it so

cumbersome. That was our rule of June 24, and that is the rule you have before you, Mr. Mitchell.

THE CHAIRMAN: Yes.

JUDGE CLARK: I like that better because I think it says the same thing in a shorter way.

I will say this: I am afraid this gets a little complicated, but Mr. Morgan, in his letter of June 28, rearranged it somewhat, and his rearrangement is good. I am perfectly willing to take that. I don't know which is the better way to approach it.

THE CHAIRMAN: I take the rule of June 24 as representing your latest views on the subject, except for Mr. Morgan's suggestion.

JUDGE CLARK: That is correct, yes.

PROFESSOR CHERRY: He has no suggestions on (a).

DEAN MORGAN: I had in the letter of June 28 to Charlie. I thought you could shorten it a bit, but I wasn't insistent on it.

MR. DODGE: That is a change of the new draft, isn't it, and not a change of the one we voted on last May?

DEAN MORGAN: Yes.

THE CHAIRMAN: Yes. It is a simplification and, obviously, a great improvement.

MR. DODGE: As to section (a)?

JUDGE CLARK: Have you Mr. Morgan's letter? He just

rearranges it. His letter is June 28. What you have is June 24. Here is his letter of June 28, and he says to rephrase it and he puts in the sixty days first for the Government, and so on.

THE CHAIRMAN: There is only one way to avoid confusion, and that is to read the one the committee has put in and then read Mr. Morgan's and see which you prefer. Have you the committee draft of June 24 before you? Rule 12(a), When presented, reads this way:

"The time allowed for serving a responsive pleading to a prior pleading, when required by these rules, is 20 days" (that eliminated all the talk about cross answers and replies and everything else) "except that the United States or an officer or agency thereof shall be allowed 60 days, and an order for the service of process under Rule 4(e) may state a different time for service of the answer to the complaint. Provided that the service of a motion permitted under this rule suspends these periods of time as follows, unless a different time is fixed by order of the court: (1) if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading may be served within 10 days after notice of the court's action; (2) if the court grants a motion for a more definite statement, the responsive pleading may be served within 10 days after the service of the more definite statement."

Mr. Morgan says to rephrase as follows: "The time allowed for serving a responsive pleading, when required by these rules, is 60 days for the United States or an officer or agency thereof and 20 days for all other parties, but an order for the service of process under Rule 4(e) may state different times of service of the answer to the complaint. Service of a motion permitted by this rule changes the time thus prescribed as follows: (1)" as in your draft but add "unless otherwise ordered by the court". (That is a good suggestion.) "(2)" as in your draft, with the same addition.

Mr. Morgan wants to add to subdivision (1) and (2) the qualification "unless otherwise ordered by the court", and he has condensed a little bit the earlier part of the paragraph.

JUDGE DOBIE: He struck out "to a prior pleading". That is connoted in responsive pleading, isn't it?

THE CHAIRMAN: That is it.

JUDGE DOBIE: I think Mr. Morgan's phrasing is a little better.

THE CHAIRMAN: You don't see any holes in it, do you?

JUDGE CLARK: No, I think it is all right. Don't you think so?

PROFESSOR MOORE: Yes.

JUDGE CLARK: I think it is all right.

THE CHAIRMAN: What is your pleasure, then, about adopting the provisions of Rule 12(a) with the amendments as

suggested by Mr. Morgan in his letter of June 28?

JUDGE DOBIE: I move we adopt it.

MR. HAMMOND: I think there is one loophole. Under the original rule, the time of the service from the United States or an officer or agency thereof was within sixty days after the service upon the United States Attorney. In other words, we have it that you serve the United States or an officer or agency.

THE CHAIRMAN: I see your point; the old rule about service on the United States.

DEAN MORGAN: We have that.

THE CHAIRMAN: The same objection is open to the committee's draft.

DEAN MORGAN: That is all in the question of definition of service, isn't it?

THE CHAIRMAN: The service on the Government has to be a double-barrelled service, on the Attorney General and on the District Attorney, and those two events may take place one after the other. For reasons of our own, to settle that, we fixed the date of service on the District Attorney, not on the Attorney General, as starting the time to answer.

DEAN MORGAN: That was in the original just the same, wasn't it?

THE CHAIRMAN: You mean the draft of June 8?

DEAN MORGAN: Yes.

THE CHAIRMAN: There were the same holes in there.

MR. HAMMOND: No, I don't think so.

THE CHAIRMAN: Just read it.

MR. HAMMOND: Not in our redraft.

THE CHAIRMAN: This is the June 8 draft.

JUDGE CLARK: He is thinking of still another one.

MR. HAMMOND: That is a redraft of Clark.

JUDGE CLARK: That is true.

MR. HAMMOND: Here it is (indicating).

THE CHAIRMAN: There has been a perfect diarrhea of drafts here. It is pretty difficult to keep up with them. This is the one that conforms---

MR. HAMMOND: --with the changes that were made.

THE CHAIRMAN: The original redraft, made in obedience to our commands, calls for sixty days for the Government to run after the service upon the United States attorney, which we already had in the rules and which took account of the fact that we were serving on the District Attorney and the Attorney General and whatnot.

JUDGE CLARK: I suppose you could put that right in here.

MR. HAMMOND: Yes, I think so.

THE CHAIRMAN: We are getting down to words and accuracy now. Let's see where you want it in. Neither you nor Mr. Morgan has taken any account of that in your final draft.

JUDGE CLARK: That is true.

THE CHAIRMAN: You allow sixty days from the date of service on the United States Attorney.

JUDGE CLARK: That is it, yes.

MR. HAMMOND: After service upon the United States Attorney.

THE CHAIRMAN: And the same thing would be true in Mr. Morgan's draft.

DEAN MORGAN: You can't work it in mine.

JUDGE CLARK: It won't work in yours?

DEAN MORGAN: It says twenty days for all other parties. You would have to put--

THE CHAIRMAN (Interposing): We will refer the matter back to the Reporter, with the understanding that we like Mr. Morgan's draft and like the Reporter's draft, but they are both erroneous in that they don't take out the sixty days from the date of service on the United States Attorney. Suppose we adopt subdivision (a).

JUDGE CLARK: I think it can be done in this draft.

THE CHAIRMAN: In your draft?

JUDGE CLARK: Yes. I should think it could be. I don't think there is any hole.

DEAN MORGAN: I should think so, much more readily.

THE CHAIRMAN: All right, we will take the Reporter's draft, and after "60 days" insert "from the service on the

United States Attorney".

Before you vote on that, I should like to bring up a question that I raised at the last meeting about the time for the United States to answer. I was somewhat prejudiced against the sixty days' provision because of my personal experience with the Government. I asked Mr. Hammond to dig up every statute and rule that regulated the time for answer by the Government, so we could see what it all was.

I also wrote to the President of the District of Columbia Bar Association, the proposal being to shorten the sixty-day period in suits brought against the United States or an agency thereof in the District, to find out what they thought about it. The result of it was this: For instance, in the Court of Claims, which is in the District of Columbia, the Government is allowed thirty days to answer.

MR. HAMMOND: Forty.

THE CHAIRMAN: Forty. What about the Tucker Act cases outside of the District?

MR. HAMMOND: Sixty days.

THE CHAIRMAN: Forty days in the Court of Claims?

MR. HAMMOND: Yes, sir.

THE CHAIRMAN: I have your memorandum here. I haven't read it in quite a long while. In all these actions brought in the District against officers and agencies, not in the Court of Claims, to restrain the Government from doing that or an

agency or officer from doing this--and there are scores and hundreds of them here--it was twenty days before our new rule was adopted. We jumped that time from twenty to sixty. The District of Columbia Bar Association very seriously kicked about that increase. They didn't kick until I wrote to them and asked them what they thought about it. They said they had always had only twenty days for the Government to answer in these suits in the Supreme Court of the District of Columbia. Now the time has been raised to sixty.

As a result of all the information we have about the different times, my suggestion would be that we allow the United States or an officer or agency there of sixty days in actions pending outside of the District and thirty days in actions brought in the District. That increases the time for the Government to answer in such cases as I was complaining about from twenty to thirty, and the rule would be drawn on the theory that the government lawyers right here in the District, with the departments all here, don't need as much time to find out about a case as they do in a suit brought in California, where the District Attorney has to write to Washington to find out what his defense is.

I suppose we will have a howl from the Government, of course, but what of it? Let's put it in and see what they have to say about it.

I was the man who fought for this sixty-day business,

and I rode you all down five years ago because I had been a government lawyer and knew their troubles. Then the first crack out of the box, when I got into a suit with the Government, as I explained to you, they jumped on this sixty-day rule in a suit against the Secretary of the Treasury right here in the District, and instead of having twenty days as they used to have, they got their answer ready in twenty days and then held it up forty more, to defeat a motion for summary judgment. I admit that I got very much aroused about that.

Where is your memorandum (to Mr. Hammond)?

JUDGE DOBIE: What is the longest period in any of the statutes?

THE CHAIRMAN: Sixty. The Court of Claims is forty days. Then there is a clause about certain foreclosures of mortgage, in which there is a special provision relating to particular kinds of lawsuits, providing sixty days. There is a section about partition suits where the United States is a tenant in common. That is sixty. We leave all this sixty outside of the District in any case, according to my proposal.

JUDGE DOBIE: You want to cut it to forty in the District?

THE CHAIRMAN: I want to cut it to thirty in the District and leave it at sixty outside.

DEAN MORGAN: Why don't you keep it at twenty in the District? In the District it is twenty days. "except that

the United States shall be allowed sixty days after service in actions pending outside the District of Columbia". Just make it twenty and sixty. What is the use of having twenty, thirty, and sixty?

THE CHAIRMAN: Just simply say that it has to be twenty except that the United States shall be allowed sixty days in actions pending outside the District of Columbia?

DEAN MORGAN: That is it.

THE CHAIRMAN: That is the way to do it. That gets it back where it was before.

DEAN MORGAN: Back where it was before, and correct the mistake that we inadvertently made; that is all.

MR. HAMMOND: Can you do that as to the United States?

DEAN MORGAN: Why not?

MR. HAMMOND: The rule about twenty days in the District applied only to suits against officers.

DEAN MORGAN: Officers and agencies.

MR. HAMMOND: It didn't say agencies, but I suppose they would be covered, unless the agency was a corporation or something like that.

THE CHAIRMAN: You mean you couldn't sue the United States in the District of Columbia except in the Court of Claims? Is that it?

MR. HAMMOND: No. I mean this: Can we cut down the time for a suit against the United States in the District of

Columbia, say, under the Tucker Act, when the statute provides for sixty days?

THE CHAIRMAN: You bring suits in the District of Columbia under the Tucker Act?

MR. HAMMOND: Yes. I checked that, too, Mr. Mitchell, and they do.

THE CHAIRMAN: You mean, instead of going into the Court of Claims, you can go into the United States District Court for the District?

MR. HAMMOND: Yes. I checked that with the Claims Section of the Department of Justice, and they showed me a case they had right there and then.

JUDGE DONWORTH: Couldn't we put in a blanket clause saying something like this: "the United States, within the time specified in the statute under which the action is brought", or something of that kind, so that it would drift along with each one?

THE CHAIRMAN: That makes the lawyer chase around who doesn't have the statute before him.

JUDGE DOBIE: I think it would be better to put it in here. I think that would have a great many advantages.

THE CHAIRMAN: You think it is thirty days under the Tucker Act?

MR. HAMMOND: It is sixty days under the Tucker Act for a suit against the United States in the District of

Columbia as well as anywhere else. Then there are other suits here against the United States. They allow sixty days in suits for insurance under the War Veterans Act.

THE CHAIRMAN: Where is that?

MR. HAMMOND: On page 3, the note there.

THE CHAIRMAN: Suits in the District Court of the United States for the District of Columbia on contracts of insurance with the Veterans' Administration. It is pretty tough on the veteran if he has to wait sixty days to find out whether the Government has an out.

JUDGE DOBIE: In the government cases they usually have investigated them before the report comes down, too. They know pretty well what the defense is going to be and have it.

MR. HAMMOND: The partition suits against the United States, foreclosures of mortgages, are all sixty days. The point is that I don't know whether we can cut that time down as far as the United States is concerned.

THE CHAIRMAN: Your idea is the question of immunity to suit, and if they have waived immunity on condition, the condition can't be altered?

MR. HAMMOND: Yes, sir.

DEAN MORGAN: I think there is something in that.

THE CHAIRMAN: I don't like the present sixty-day provision in suits against the United States and the officers and agencies.

JUDGE DOBIE: As a matter of practice, do they almost always take the extreme limit?

THE CHAIRMAN: I should think so.

MR. HAMMOND: No, sir; I wouldn't say so.

JUDGE DOBIE: Sometimes the Government would want to speed up the suit and have it decided?

MR. HAMMOND: It does. I can speak only for the Tax Division. They try to dispose of their litigation as quickly as possible, but they are always held up by the bureau, getting information from the bureau.

THE CHAIRMAN: They probably write for it and say, "Gentlemen: We have to answer within sixty days, and give us the information before the sixty days are up," don't they?

MR. HAMMOND: Yes, and that is one reason that they didn't want the time extended by a stipulation of the parties. It takes us right back to that.

THE CHAIRMAN: If they wrote a letter saying, "Gentlemen" or "Mr. Secretary of the Treasury: We have to answer within twenty days. Please give us the information within the twenty days"--

MR. HAMMOND (Interposing): They just can't get it, then, Mr. Mitchell, from the bureau.

THE CHAIRMAN: What has always happened in the hundreds of cases in the District against the Secretary of the Interior, against the Secretary of the Treasury, against

Immigration, against the Secretary of Agriculture, and whatnot? For years and years the rules allowed them twenty days in which to answer.

MR. HAMMOND: You can make the distinction, I think, between them.

THE CHAIRMAN: But what happened? What did they do? If they had to get it extended, did they always do it?

MR. HAMMOND: That is a rather broad question, but I imagine they did. I think they are going to get it extended now, if you cut it down too much, and you are really not accomplishing anything except bothering the Judge about getting extensions.

JUDGE DOBIE: You think it ought to be left at sixty, as you have it now?

MR. HAMMOND: Well, I would say. Maybe you could cut it down to forty in the District against an officer or agency. But here is another thing in connection with the District: A lot of these bureaus have been decentralized now, and all the information is out in the field, and not here in Washington as it used to be.

MR. DODGE: But the law gives them only twenty days now in suits against officers and agencies in the District.

MR. HAMMOND: It did before our rule.

THE CHAIRMAN: Before our federal rules were adopted they had only twenty. We raised it to sixty without realizing

what we were doing. At least I didn't realize it.

MR. DODGE: You think we should increase the statutory limit there on officers and agencies?

MR. HAMMOND: I think we are going to avoid extensions of time if we do increase it to at least forty.

MR. DODGE: Do the District lawyers object to it?

THE CHAIRMAN: They object to the present rule of sixty days. The Bar Association committee considered it, but they reported that action only when I asked them to state what their attitude about the system was. They didn't like it.

Well, don't have any hesitation in acting on it, regardless of what I think about it. I have told you before that I got my dander up about it and mad, and every time I think about it I get mad again. I figured up the other day that it cost us $800,000 in that case. There were 25 million dollars in the Treasury. We had a motion for summary judgment on, and the Treasury had an affirmative motion for summary judgment ordering us to be paid. The plaintiff would never have appealed because it was a strike suit, and he couldn't have put up a supersedeas bond to pay damages. By our delay in getting that affirmative motion for summary judgment, because we couldn't make it for the Government hadn't answered, the time ran on, and at 4 per cent per annum the interest on our fund amounted to $800,000, and that is what it cost us because the government lawyers held the answer up (and I knew it was

ready for weeks before) until the full sixty days ran out. That is what happened. It was an outrageous performance.

JUDGE DONWORTH: I hate to disagree with our Chairman, but I still think that my suggestion is the only out. Instead of sixty days there, say "such time as is specified in the statute applicable to such defendant, in the statute authorizing such action."

THE CHAIRMAN: That, of course, will not fit the District, because it is fixed by rule in the District, and our rule now supersedes the District rule. There isn't any statute in the District fixing the time for answering in suits against officers and agencies of the Government.

JUDGE DOBIE: It is not customary in one of those statutues, is it, to provide the time for the Government to answer?

JUDGE DONWORTH: It is in the Tucker Act.

THE CHAIRMAN: It is in the Tucker Act. The Act leaves it to the Court of Claims to fix the time, and it fixes forty days.

DEAN MORGAN: Does the War Risk Insurance Act?

MR. HAMMOND: It is a separate act.

DEAN MORGAN: Sixty days there, too?

MR. HAMMOND: Sixty days there, too.

THE CHAIRMAN: Has anybody else any suggestions of changes to make in Rule 12(a)?

JUDGE DONWORTH: How are you leaving this?

THE CHAIRMAN: Leaving it just as it stands, as far as I am concerned.

JUDGE DONWORTH: Sixty days?

THE CHAIRMAN: Nobody seems to be very enthusiastic about any change, so it is all right with me.

SENATOR PEPPER: That doesn't indicate any lack of sympathy with you, Mr. Chairman.

THE CHAIRMAN: You are just puzzled as to the solution, I understand that, and so am I.

SENATOR PEPPER: We all feel the way you do.

DEAN MORGAN: Mr. Chairman, we have in this draft something that I have a constitutional objection to, "Provided that", particularly where it is not needed.

JUDGE CLARK: I think there is a good deal in what Dean Morgan says.

DEAN MORGAN: "Provided that the service of a motion permitted". You don't have to have any "Provided that" there.

JUDGE CLARK: Do you want just to take it out?

DEAN MORGAN: Yes. I move to strike that out.

THE CHAIRMAN: Strike out "Provided that".

MR. TOLMAN: What line?

THE CHAIRMAN: In line 6 of the committee's draft of Rule 12(a); so that the sentence starts, "The service of a motion permitted under this rule suspends these periods of time

as follows".

If there is nothing else in 12(a), we will pass to 12(b).

JUDGE DONWORTH: In 12(b) the Reporter has entirely departed from the vote of May, as I understand it.

JUDGE CLARK: Just a minute. You must have one of what the Chairman described as a diarrhea of suggestions. You go back to the original one. I thought that when I did what I was commanded to, I could do a little more. Do you want to go back, Mr. Chairman, in what you have, to the draft of June?

THE CHAIRMAN: Yes. I made a mistake. I have the draft of June 8 here.

JUDGE CLARK: That is it.

THE CHAIRMAN: Rule 12(b), How Presented.

JUDGE CLARK: Judge Donworth, you go back to June 8 now. I think I can follow commands first and then I will develop on my own a little.

THE CHAIRMAN: What is the reason for not sticking to the draft you made on June 8?

DEAN MORGAN: That is the one we are going to send over twice, isn't it?

JUDGE CLARK: The (a) of June 8, you remember.

THE CHAIRMAN: It is (b) that I am talking about.

JUDGE CLARK: You should stick to the (b) of June now.

DEAN MORGAN: That is changed as of October 21, isn't

it?

THE CHAIRMAN: He says it is changed by June 24. I was reading from June 24.

JUDGE CLARK: No, the June 8 draft.

THE CHAIRMAN: Oh, yes; I am wrong.

JUDGE CLARK: June 8 is the committee draft that we understood was voted to do. We have made other suggestions, several of them.

DEAN MORGAN: That is the mimeographed one, yes.

THE CHAIRMAN: We will go back to the draft of June 8, Rule 12(b), How Presented. We added there "failure to join an indispensable party", which was really an omission in the first rule. Then we added this sentence:

"When the court grants a motion hereunder, it shall not enter an order of dismissal without first affording reasonable opportunity for amendment--"

MR. DODGE (Interposing): How can you amend in some of those cases, such as in lack of jurisdiction over the subject matter, lack of jurisdiction over the person?

THE CHAIRMAN: Maybe your complaint can be amended to increase the amount involved.

JUDGE DONWORTH: The allegation of $3000 is amendable.

MR. DODGE: That is subject matter, isn't it?

DEAN MORGAN: Yes. Diversity of citizenship.

THE CHAIRMAN: This implies that there is something to

amend, of course. It means you will have a reasonable opportunity to amend if it seems susceptible of amendment.

MR. DODGE: If it is curable. I have seen that statement in some other draft of the rule.

THE CHAIRMAN: Then we added: "and providing further that a motion made under defense (6)" (a motion to dismiss because the complaint doesn't state a good claim) "may at the option of either party be considered a motion for summary judgment and disposed of as provided in Rule 56."

You talked about that. You don't like the phrase "at the option of either party".

JUDGE CLARK: Strike it out and say, "may be considered".

MR. DODGE: "may in a proper case".

THE CHAIRMAN: "may in a proper case".

JUDGE DONWORTH: That will keep the lawyers busy.

MR. GAMBLE: Why not leave it to the discretion of the court?

JUDGE CLARK: Mr. Gamble, that raises the question again. If it is in the discretion of any court, I suppose it is all right, but these in general are district court rules, and I think it would be a little unfortunate, if it is in the discretion of the trial court, if when the record comes up to us, there is all the stuff printed, and we can see what the merits are, that we are to have our eyes blinded to it. I

don't want our hands tied on appeal.

MR. GAMBLE: I recognize that.

THE CHAIRMAN: You might say, "if matter outside the pleadings is presented, it may be considered". What is your suggestion?

JUDGE CLARK: I should think that is the real situation where the thing comes up. When anybody puts in an affidavit, we can consider it. That is really about what happens.

DEAN MORGAN: What you really mean is that it shall be transformed into a motion by reason of filing affidavits, and so forth.

JUDGE CLARK: That is right.

DEAN MORGAN: I should suppose that ought to be at the option of the parties, and if you had said instead of "considered", "may be transformed into a motion" or "changed into a motion"--

PROFESSOR SUNDERLAND (Interposing): The trouble is, they don't know what to do to change it. They don't know what that involves mechanically.

JUDGE DONWORTH: You file affidavits.

PROFESSOR SUNDERLAND: Then we ought to say so.

DEAN MORGAN: You have to have something outside the pleadings, of course. Otherwise it is all on the statement.

JUDGE CLARK: I should say that you could do it. I don't see why not. "may, if affidavits are filed, be considered

a motion for summary judgment.

THE CHAIRMAN: It is not an affidavit. It might be a deposition. It might be some record outside of the pleading, like the court's record.

JUDGE CLARK: That is true.

THE CHAIRMAN: So you have to broaden it.

PROFESSOR SUNDERLAND: If new facts are brought into the record.

THE CHAIRMAN: Matters outside the pleadings are presented to the court. That is the idea I have in mind, not limited to affidavits or depositions.

PROFESSOR SUNDERLAND: That would indicate what we mean by considering.

THE CHAIRMAN: There is no act of option there. It is just material presented, and if it is done, then the court may consider the matter a motion for summary judgment.

PROFESSOR SUNDERLAND: I think that would make it clear.

MR. DODGE: You are dealing with a very exceptional case there. I have never seen it. You say you have.

DEAN MORGAN: There are a number of cases.

MR. DODGE: Recent cases have developed that practice of filing some kind of affidavit in connection with the motion to dismiss.

DEAN MORGAN: That is right; at the same time, a

speaking demurrer.

MR. DODGE: I wouldn't suggest that that was an important and prevailing practice. I would rather leave it in more general terms so that the court may treat it as a motion for judgment than to suggest to the parties that in connection with this kind of motion they are very likely naturally expected to file affidavits.

THE CHAIRMAN: You didn't say anything about my proposal not to mention affidavits, to strike out "at the option of either party", and to say "and providing that if material outside of the pleadings is presented to the court, the motion may be considered a motion for summary judgment", something like that.

JUDGE CLARK: I should think that would do it.

PROFESSOR CHERRY: What would happen, then, Mr. Chairman, if one party wanted to present affidavits and the judge said, "I won't receive them"? The way it is in this draft, the party has a right to put them in. Isn't it the point we thought we were making in the June motion that either party could, to use the objectionable phrase, turn it into a motion for summary judgment, and oughtn't that to be true? I think we had the definite idea of having it at the option of either party.

THE CHAIRMAN: Your point is that, if you don't make it at the option of either party, the court may refuse to

receive the information outside it, and then you are stumped.

PROFESSOR CHERRY: His hands are tied, then, too.

MR. DODGE: But what he has can be put in by way of affidavit. I don't see how the plaintiff's rights are affected in the slightest degree.

DEAN MORGAN: The next thing that will happen is that he will make a motion for summary judgment on his amended complaint.

PROFESSOR CHERRY: Yes.

THE CHAIRMAN: Then he would put in affidavits.

DEAN MORGAN: Then he would put in affidavits. You couldn't stop him. So what is the use of making him go through two motions at once?

PROFESSOR SUNDERLAND: If we put in this proposal about when matters outside the pleadings are presented to the court, that will certainly imply the right of the parties to present the matters to the court. The court won't refuse in the face of that.

DEAN MORGAN: It says "may be considered". The court may ask, "Shall I do it?" That is all. "I am not going to listen to speaking demurrers here."

JUDGE DONWORTH: What is the real objection to that?

THE CHAIRMAN: There is no provision of what kind of action the lawyer has to commit in order to have it elective.

PROFESSOR CHERRY: If he hasn't presented any

affidavit, he hasn't effectively exercised his option. I don't think there would be any difficulty with that, Judge. If he has presented it, I think he has clearly exercised his option.

THE CHAIRMAN: The 3rd Circuit crowd, the judges over there, didn't object to the way we have it at the option of either party, but they wanted another clause, "or at the choice of the judge". In other words, give the judge the right to make it a motion for summary judgment, even though neither of the parties indicated any option about it. I thought that was rather well taken.

JUDGE CLARK: That is all right. I should be glad to make it broader rather than shorter.

JUDGE DONWORTH: All right.

JUDGE CLARK: I am perfectly willing to put in both. Would that help out?

PROFESSOR CHERRY: In the discretion of the judge or on the motion of either party.

THE CHAIRMAN: "on the motion of any party or in the discretion of the court may be considered a motion", something like that.

DEAN MORGAN: Then if you will strike out "and providing further that"--I think that is terrible.

MR. DODGE: I should think it is quite doubtful if one lawyer in a thousand knows what this means.

THE CHAIRMAN: Strike out, then?

MR. DODGE: "may at the option of either party".

THE CHAIRMAN: Say simply, "A motion made under defense (6)".

MR. DODGE: The plaintiff is met by a demurrer, and I have the option of calling that a motion for a summary judgment. What does that mean? I think it is perfectly mystifying.

THE CHAIRMAN: It is a motion for summary judgment, and it becomes immediately obvious under the rules that the court can't prevent him from putting it in.

MR. DODGE: What does it mean? What do I gain by electing to call it that? Suppose I call it that. What does it all amount to, anyway?

THE CHAIRMAN: The truth is that the courts in the 2nd Circuit have done this very thing up there. The courts in the 3rd Circuit have tried to get at the same result by labeling this thing a "speaking motion." One of the objects of this amendment is not only to permit you to do what the 2nd Circuit did, treat the motion as a motion for summary judgment, but to prevent the 3rd Circuit from grafting a so-called "speaking motion" on to the rule. It cuts both ways.

MR. DODGE: They were motions to dismiss where the plaintiff really did file an affidavit.

THE CHAIRMAN: They started out that way, and the lawyers started firing affidavits at each other. The 2nd Circuit said, "Under those circumstances it doesn't matter how you

label it, we will treat it as a motion for summary judgment." The 3rd Circuit said, "Well, it is not a motion for summary judgment, it is not a motion to dismiss, but it is a speaking motion," and they went on speaking motions.

JUDGE CLARK: The 5th and 6th and 7th and the District of Columbia have reached the same results. In fact, every circuit that has passed on it has done it, except that there is a dictum in the 8th Circuit that they don't think it can be done. They didn't really pass on it. But every other circuit that has passed upon it has done it, in whatever fashion it has been done. It may be done by just calling names or it may be done in other ways, but I mean the substance of it is that the circuit courts are pretty well united on considering the stuff that is in the record. We don't like to put blinders on our eyes.

MR. DODGE: What you want is to have the rule provide that, if matters outside the pleadings are introduced, it may be treated by the court as a motion for summary judgment.

THE CHAIRMAN: That is what the 2nd Circuit has done explicitly.

DEAN MORGAN: You said "introduced". You would have to say "offered".

PROFESSOR CHERRY: If you are going to take that approach, you have to say "offered". Otherwise the judge controls that completely. Then you are going to have the blinders

and your hands tied and all the other things.

DEAN MORGAN: In the record that Charlie talks about, suppose that when the affidavits were offered, the judge refused to receive them or, after they were received, he struck them because you couldn't have a speaking motion.

... Brief recess ...

THE CHAIRMAN: We are up to Rule 12(c), Motion for Judgment on the Pleadings. We changed that to give a man a reasonable opportunity for amendment. Have some courts refused to do that, Charlie? Why did you put that admonition in there when we have said over and over again that amendments should be freely allowed?

JUDGE CLARK: I don't believe that they refused to do it here. The history of that is this: That was provided first in (b), and you see that is in (b). Then I think the suggestion was made that we should treat (c) the same way.

THE CHAIRMAN: All right, but going back to (b), why did we have to?

JUDGE DONWORTH: Because it is a motion to dismiss the action, you see. This is one of the grounds for moving to dismiss the action, and we don't want to make it penal unless it can't be amended.

JUDGE CLARK: Of course, I am not sure myself it was so very necessary, particularly if you did it by affidavits. I don't think it did any harm. It wasn't my original suggestion,

but I didn't feel that I should oppose it. I don't think it is as important as some other members of the committee do, because I think, dealing with it on the merits, you probably have it covered, anyway.

THE CHAIRMAN: The only two things you would amend would be the insufficiency of the process on its form and the failure to state a claim. The other things you couldn't amend.

JUDGE CLARK: You can amend on jurisdiction.

THE CHAIRMAN: You could, at least over subject matter, by showing you had more than $3000.

JUDGE CLARK: I think you can amend over venue, over the person, any of those things where the facts are--

THE CHAIRMAN (Interposing): Why wouldn't the court grant leave to amend for a thing like that, if a party asked it?

JUDGE CLARK: I think he would.

THE CHAIRMAN: You reiterate so many times that amendments are freely allowed.

MR. DODGE: Do you think that the word "reasonable" covers the qualification if the defect is curable? Of course, the court doesn't have to do anything in the way of allowing an amendment if amendment could not be made that would cure the defect.

SENATOR PEPPER: I think "reasonable" covers it.

THE CHAIRMAN: I think the word "reasonable" might.

MR. DODGE: It ought to be so construed, certainly.

THE CHAIRMAN: I was asking whether some court was being hard-boiled and wouldn't do it.

DEAN MORGAN: When you turn this thing into a motion for summary judgment, you figure that way. If the court just dismisses, then you get a chance to start over, and so on, but if you get a summary judgment, you may be stuck. I think that was when the suggestion was made that we ought to put in this special provision about amendment, because, before that, we let the regular amendment rule take care of the whole business.

THE CHAIRMAN: Then if we are satisfied with (c), we will pass on to (d).

JUDGE CLARK: I might say that I have looked back in the minutes, and I see that Judge Donworth made the suggestion as to amendment. It came in in the course of the discussion.

JUDGE DONWORTH: I made that as a result of the debate, where some thought along the line was discussed with Mr. Dodge here, some thought that the case should not be decided upon the allegations but only upon the proof, and that if the allegations were insufficient and the party said, "I can supply that by amendment," it ought to be allowed. That was all.

SENATOR PEPPER: Mr. Chairman, may I make a purely stylistic suggestion? In the 49th line, wouldn't it be better to have a period after the words "opportunity for amendment", strike out "and providing further that", and begin a new

sentence, "A motion for judgment on the pleadings may at the option"? It seems to me it is a little awkward.

JUDGE CLARK: I think so. That suggestion was already made as to (b), and it would also apply here.

MR. DODGE: You are going to change those last two lines to correspond with any change in the former paragraph.

JUDGE CLARK: Let me see if I have clear what we have done. As I understand it, in both (b) and (c), in addition to the change striking out "provided that", and so on, it will now read: "may at the option of either party or by direction of the court be considered", and so forth. That is as I understood what we had done before.

MR. DODGE: I thought it was changed to read: "may, if extraneous matter is introduced, be treated by the court".

JUDGE CLARK: That was discussed. I don't know whether that was adopted or not.

PROFESSOR SUNDERLAND: I think it ought to be in. That is what we are driving at.

THE CHAIRMAN: Yes. That is the whole basis for converting it into the other.

PROFESSOR SUNDERLAND: If you don't have that in there, you wonder what in the world it is talking about.

JUDGE CLARK: If you have that in, I don't know whether you need the option business.

THE CHAIRMAN: My suggestion was simply that we leave

the option out and simply say that, if matter outside the complaint and the pleadings be introduced, the motion may be considered a motion for summary judgment.

PROFESSOR SUNDERLAND: I think that is perfectly simple.

THE CHAIRMAN: That makes it clear why you are converting it.

JUDGE CLARK: All right. "may, if matter without the pleadings is offered".

SENATOR PEPPER: "matter extraneous to the pleadings".

THE CHAIRMAN: Matters outside the pleading.

PROFESSOR SUNDERLAND: "if matters outside the pleadings are presented to the court".

JUDGE CLARK: Do you have that down?

THE CHAIRMAN: You can fix that up. Shall we pass over to (d)? The only change there was to make it (7) instead of (6), because we added (7) about indispensable parties. I see no point about that to be considered.

MR. GAMBLE: You are using the June 8 draft now, aren't you, Mr. Chairman?

THE CHAIRMAN: Yes.

MR. GAMBLE: I notice in the June 24 draft there is a difference in (c). It is abrogated and covered by Rule 56.

THE CHAIRMAN: That is the fundamental change that hasn't been agreed to yet.

Now we go to subdivision (e) of Rule 12 of the June 8 draft, in which, as I explained before, we struck out the provision for bills of particulars, so as to limit the motion to a motion for a definite statement, and we struck out the provision that a more definite statement could be asked for in order to prepare for trial and limited it to a motion where it was needed in order to enable the party to plead. We put in this admonition, "The motion shall not be granted except where the pleading is so vague or ambiguous", and so on.

That whole change, Mr. Gamble, resulted from the fact that this motion for a bill of particulars and more definite statement had been terribly abused. There are hundreds and hundreds and hundreds of cases in the district courts. Such a rule has been in most practice codes for seventy-five years, but the lawyers don't seem to have thought much about it or abused it, and when they got to reading over these new federal rules they were reminded of it. It is really the basis for many dilatory motions. The practice shows that.

Now we go to (f). No change.

DEAN MORGAN: It seems to me you can shorten the phrasing in this--

THE CHAIRMAN: In (f)?

DEAN MORGAN: No; in (e). --without doing any damage to the sense if you just say, "Upon motion, be made more definite on the ground that it is so vague and ambiguous that

he cannot frame an answer to it."

THE CHAIRMAN: That is a separate sentence?

DEAN MORGAN: Strike this out and add the separate sentence then.

THE CHAIRMAN: Did you get that? That is a matter of style.

JUDGE CLARK: Of course, I think it probably doesn't make very much difference.

DEAN MORGAN: I said it merely shortens it up, that is all, and gives you only the particular ground upon which you can make your motion.

JUDGE CLARK: In view of the history, the fact that there have been more decisions on this one section than any other section, I rather think there might be a little advantage in having a definite prohibition.

PROFESSOR SUNDERLAND: You are really saying the thing over twice there. You first say he moves on the ground it isn't particular enough so that he can frame an answer, and then you say it shall not be granted unless it isn't particular enough so that he can frame an answer. We really say it over twice there.

JUDGE CLARK: Of course, there is no question that what you say is true, but the reason that we put anything in here, I suppose, is because of what has been happening in the courts.

THE CHAIRMAN: Suppose you said this: "Before responding to a pleading, a party may move for a more definite statement of any matter where the pleading is so vague or ambiguous or contains such broad generalizations that the party cannot frame an answer thereto." You might say, "And the motion shall not be granted unless those conditions are shown to exist," if you want to add an admonition.

JUDGE CLARK: I do think there is a little reason for the admonition as I have suggested.

JUDGE DOBIE: Instead of "answer", don't you think it should be "responsive pleading", because this might be to an answer. We have used the word "answer" all the way through here in connection with the pleading filed by the defendant. If you file this as an "answer," wouldn't you think there might be a reply?

JUDGE CLARK: I should think that is all right.

JUDGE DOBIE: In other words, I don't think we ought to use "answer" unless we mean that specific pleading.

THE CHAIRMAN: You have made no change in (f).

DEAN MORGAN: I should like to cut out "or contains such broad generalizations". I don't know just what that means. If there is a broad generalization, and it is not ambiguous or vague, I should think it had to be answered.

JUDGE CLARK: This in the way of a broad generalization was your suggestion.

MR. DODGE: To begin with, yes, but when I read the text over I thought if you omitted the broad generalization it would be all right; just vague and ambiguous.

PROFESSOR SUNDERLAND: But, on the other hand, he might set up a mere detail of evidence which would be so specific and minute that you couldn't tell how to answer it.

DEAN MORGAN: I don't know about that.

PROFESSOR SUNDERLAND: You can do that.

DEAN MORGAN: If it were specific and minute, I think he could answer it. I could never see one that was too specific for answer, could you?

PROFESSOR SUNDERLAND: If it picked at one item of evidence, you wouldn't know what the general fact was back of that item of evidence.

SENATOR PEPPER: I think, in consistency with his general attitude toward history, that the Reporter ought to be precluded from bringing up these embarrassing references to changes in position on the part of different members of the committee. (Laughter)

JUDGE CLARK: It doesn't mean anything, anyway.

THE CHAIRMAN: What is your pleasure about "or contains such broad generalizations"?

DEAN MORGAN: Really, the only reason I want to kill these motions to make more definite and certain wherever I can is that I think they are just almost as bad as a motion for a

bill of particulars.

PROFESSOR SUNDERLAND: I think they are worse.

DEAN MORGAN: That is what Judge Donworth is saying. They come in with the same sort of thing unless you say that it has to be so vague or ambiguous that you can't frame a responsive pleading to it.

THE CHAIRMAN: Your motion is to strike out the words "or contains such broad generalizations". Any second?

JUDGE DOBIE: I second it.

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

Now we are down to (g). That is the rule where we struck out the provision allowing two groups of motions and eliminated, as you will see in lines 85 to 87, the provision allowing two groups, with the result that these preliminary motions must all be contained in one group. Is there any discussion of that further?

JUDGE DONWORTH: What subdivision of (f) is that?

THE CHAIRMAN: Subdivison (g), lines 79 to 87. If there is no discussion, we will pass over to (h), waiver.

JUDGE DOBIE: Strike out that stuff in brackets?

THE CHAIRMAN: Yes, that stuff is stricken out allowing two groups of motions.

JUDGE DOBIE: All right.

THE CHAIRMAN: We are now making it one.

SENATOR PEPPER: Am I wrong or right in my recollection that this isn't strictly true in the case of the omission of a motion for summary judgment, that the ommission of a motion for summary judgment doesn't preclude the subsequent making of a motion after the responsive pleading has come in?

THE CHAIRMAN: No, because, you see, it refers specifically in line 83 to the objections then available to you by this rule--not 56, but this rule.

SENATOR PEPPER: This rule; oh.

THE CHAIRMAN: This rule doesn't permit a motion for summary judgment. It permits the conversion of a motion into a summary judgment, but that is a different thing.

SENATOR PEPPER: I see. It is a kind of trick provision, though.

JUDGE CLARK: You mean the trick provision is in (b), not here.

SENATOR PEPPER: As long as the two things are kept separate, there is going to be confusion between them, and this is an illustration of it, but I think the Chairman's answer, as the thing stands, is sound.

THE CHAIRMAN: We will pass to (h). The only change there was to add a reference to "the defense of failure to join an indispensable party".

DEAN MORGAN: Do you think that the objection of failure to state a legal claim ought to be made?

JUDGE CLARK: Personally, I don't like that form of phraseology; I don't like "the defense of failure to state a claim". I don't believe that is appropriate there. I think that the word Mr. Dodge suggested a while ago is appropriate, that it is the failure to have any claim, "except that the defense of no claim upon which relief can be granted", rather t han the stating of the claim. The stating of it is a little pious by this time.

THE CHAIRMAN: The point that you make is that the only points which you ought to refer to are the defense of failure to join an indispensable party and the court's lack of juriadiction.

JUDGE CLARK: No; or to have any claim. In other words, my chief objection is in line 91 as to the word "state".

JUDGE DONWORTH: How is the court going to find out about it if he doesn't state it?

JUDGE CLARK: He will have stated it in some fashion, on his feet or by his witnesses or by affidavit or in any other way. Originally I didn't think "state" meant anything different from that, but I think there has been a little tendency, particularly around this table, to read into the word "state" the meaning "to plead a claim."

THE CHAIRMAN: That is natural because that is the exact phraseology used in the rule.

DEAN MORGAN: A motion for judgment on the pleadings,

Charlie, if you didn't put in affidavits and turn it into a motion for summary judgment, would of course depend upon misstatement and the later pleading also. Isn't that what you meant? At the trial of the merits it seems to me it is too late to talk about stating the claim.

MR. DODGE: Yes.

JUDGE CLARK: Of course, this is the committee's draft. We have stated elsewhere the defense of failure to prove a claim, instead of stating.

DEAN MORGAN: I think that is what it ought to be there.

MR. DODGE: Yes, I think so.

DEAN MORGAN: Upon the merits.

THE CHAIRMAN: "Establish" is better than "prove."

JUDGE CLARK: "Establish," yes. But that is the idea, rather than "to state".

DEAN MORGAN: It isn't on a motion for judgment on the pleadings, is it? That is, you combine all three here.

PROFESSOR CHERRY: That is the trouble.

DEAN MORGAN: That is your difficulty.

PROFESSOR CHERRY: You are combining a later pleading with your motion and then what happens at the trial. No one phrase is appropriate to all of them.

DEAN MORGAN: You see, it is the orthodox rule, so called, Charlie, that you can raise it at the trial.

JUDGE CLARK: Yes.

DEAN MORGAN: You could raise it at common law the first time on a writ of error.

THE CHAIRMAN: I don't see but that it is perfectly plain that we did mean state the claim in your complaint. It is perfectly obvious that we did, because we wouldn't need to have said failure to prove a claim wasn't waived. That would have been silly.

MR. TOLMAN: Yes.

THE CHAIRMAN: What we meant was the failure to state in your pleadings the claim.

DEAN MORGAN: I think you ought to strike out the line, "or at the trial on the merits". That is what I think you ought to strike out.

SENATOR PEPPER: May I inquire whether there is any objection which does not, if valid, constitute a defense, because if "objection" is the more inclusive term, you don't need "defense". "A party waives all objections which he does not present", and so forth. It seems to suggest that there are--I agree that there are--objections which are not defenses, but I can't think of any objection that isn't also a defense. I wonder whether it oughtn't to read somewhat thus:

"A party waives all objections except those based on lack of jurisdiction of the subject matter, failure to join an indispensable party, or failure to state a legal defense;

waives all which he does not present either by motion", and so forth.

Can we just state it in a single short sentence, without these elaborate exceptions (1) and (2) and all that, spelling them all out? Maybe that is too ambitious a contemplation or undertaking.

JUDGE DONWORTH: You recognize, Senator, that this is dealing not only with the plaintiff's allegations but with the defendant's.

SENATOR PEPPER: Yes, sir.

JUDGE DONWORTH: The latter part of line 92 and line 93: "and the objection of failure to state a legal defense to a claim". Should you penalize, for failure to state, one party and leave the other immune?

SENATOR PEPPER: I think you are right, sir. I withdraw my suggestion.

JUDGE DONWORTH: I don't think you can get away from the fact that the office of a pleading is to inform the court what your position is, and I think we have safeguarded the matter of amendments and avoided some technicalities by other rules that we have put in.

SENATOR PEPPER: I see.

THE CHAIRMAN: If we did strike out subdivision (1), the defense of failure to state a claim, we would be permitting a case to go to judgment without any amendment, either before

or after trial, on a complaint that never introduced a claim. I wonder if we want to do that.

SENATOR PEPPER: No, no.

THE CHAIRMAN: Well, if there is no motion--

DEAN MORGAN (Interposing): I move to strike out "or at the trial on the merits".

MR. GAMBLE: Wouldn't you strike out the last sentence, Mr. Morgan?

DEAN MORGAN: Yes; and the last sentence.

JUDGE CLARK: What do you say to that? He wants to strike out "or at the trial on the merits" and the last sentence.

THE CHAIRMAN: In line 95 he wants to strike out "or at the trial on the merits".

DEAN MORGAN: That is right, sir.

JUDGE CLARK: He wants to strike out all reference to waiver at the trial.

THE CHAIRMAN: Not waiver at the trial, but the right to make issue at the trial.

DEAN MORGAN: You are making an exception at the trial, Charlie. That is what I object to.

THE CHAIRMAN: We are talking about defenses and objections, and if you haven't made them, either by a motion or by your pleadings, you waive them, except on the point that the complaint never did and doesn't yet state a good claim or that there is an indispensable party absent, and the objection of

failure to state a legal defense may be made by a later pleading. So why talk about the merits when you are talking about whether you properly raise things in your pleading? That is your point, isn't it?

DEAN MORGAN: Yes, sir. You see, you say that the defense of failure to state a claim upon which relief can be granted may be taken advantage of by motion at the trial on the merits, and I don't think it ought to be there. I think when you get to the trial on the merits, the statement of the claim ought to make no difference, frankly. It is a question of what you are proving then. If you don't prove it, talking about stating a claim, taking objection at the trial on the merits that a claim hasn't been stated, seems to me futile.

THE CHAIRMAN: How about an indispensable party? That can be raised at the trial on the merits, can't it?

DEAN MORGAN: No, not unless--at the trial on the merits? Yes, I suppose so.

PROFESSOR SUNDERLAND: That really goes to jurisdiction.

THE CHAIRMAN: Yes. If you strike out "or at the trial on the merits," you couldn't make the point about an indispensable party being absent at the trial on the merits.

DEAN MORGAN: I guess that is right.

MR. DODGE: You start this by saying that he waives all the defenses and objections not raised in pleadings or by

motion. If he has waived them, how can he raise them at the trial?

DEAN MORGAN: That is by an exception.

THE CHAIRMAN: "except that".

MR. DODGE: Yes, but it is suggested that the words "at the trial" be eliminated.

DEAN MORGAN: Yes. Well, I think you ought not to be able to raise the point of failure to state a legal defense to a claim or a failure, any more than a failure to state a cause of action at the trial on the merits.

MR. DODGE: Perfectly true.

DEAN MORGAN: It is too late for that, but the failure to join an indispensable party, I suppose, could be proved at trial.

PROFESSOR CHERRY: If you put under (2) instead of (1), "the defense of failure to join an indispensable party," wouldn't that do the trick?

THE CHAIRMAN: That is right.

DEAN MORGAN: Yes.

THE CHAIRMAN: Transfer "the defense of failure to join an indispensable party" down to (2). Then you can strike out "or at the trial on the merits," and it will be all right.

JUDGE DONWORTH: I should like to ask Dean Morgan if he thinks there is anything in this. It may be fanciful. Suppose we strike out as now suggested, and suppose the

plaintiff says at the trial, "Why, he didn't make any motion against this pleading, and it is too late now for him to say it doesn't state a claim. So, if I have proved what I have alleged here, I am entitled to judgment. He has waived the point that that isn't a cause of action."

DEAN MORGAN: I don't think there is anything in that, Judge, because he waived the objection of failure to state a cause, but not failure to prove a cause.

MR. DODGE: It says he waives all defenses if he hasn't pleaded them or put them into a motion.

THE CHAIRMAN: I suppose his answer would raise a defense to the merits, wouldn't it, if he had one?

The Reporter has his notes now to transfer "the defense of failure to join an indispensable party" as is stated in subdivison (1) on line 92, from that subdivision down to subdivision (2) and couple it up with jurisdiction of subject matter, so that failure to have an indispensable party can be raised by suggestion or otherwise at any stage.

Coupled with that, he strikes out in line 95 "or at the trial on the merits".

DEAN MORGAN: You need lines 89 and 90, that he has made no motion, that he does not present either by motion or in his answer.

THE CHAIRMAN: Yes. That is the basis of the whole rule. If you strike that out, there isn't any rule. We are

talking now about the exceptions.

PROFESSOR SUNDERLAND: The point is made there that, as we state it, "A party waives all defenses" ...."which he does not present either by motion", and so on. He can't waive failure to prove, because he couldn't raise that by a motion. That comes later.

MR. DODGE: He shouldn't waive it, and yet you say in substance that he waives all defenses not pleaded or made the subject of a motion.

PROFESSOR CHERRY: That isn't a defense. You are defending against the pleading.

MR. DODGE: Suppose it appears at the trial. Suppose at the trial the evidence plainly shows an affirmative defense which, through oversight, was not pleaded.

DEAN MORGAN: Then he has to amend, I suppose, doesn't he?

PROFESSOR CHERRY: If it goes in, our other rule takes care of that. The case is decided on the evidence.

MR. DODGE: You say here that he has waived it.

PROFESSOR CHERRY: No.

DEAN MORGAN: That is what you say, all right.

THE CHAIRMAN: You waive the failure to state a defense. That is a different thing from waiving a legal defense.

MR. DODGE: It doesn't say that. It says he waives all defenses.

DEAN MORGAN: That is what it says.

THE CHAIRMAN: Oh, yes, I see. Maybe we had better leave that in and just simply transpose "the defense of failure to join an indispensable party" to subdivision (2).

JUDGE DONWORTH: And leave in the failure to state a claim?

THE CHAIRMAN: The failure to state a legal defense can be raised at the trial on the merits.

MR. DODGE: Failure to prove a claim or the objection of failure to prove a defense may, of course, be raised at the trial, regardless of the pleadings.

THE CHAIRMAN: Why shouldn't a party waive all defenses? Whether they are meritorious or not, he doesn't need to set them up in a motion or in his answer or reply.

DEAN MORGAN: Suppose that at the trial, as Mr. Dodge suggested, an affirmative defense appeared on cross examination of the plaintiff's own witnesses. You say it is not pleaded. Is it waived then?

THE CHAIRMAN: The rule says that you amend your pleadings, and if you do that, then you have raised it in your answer or reply. That is Mr. Cherry's suggestion.

DEAN MORGAN: That is right, by the amended answer or reply.

THE CHAIRMAN: Yes.

DEAN MORGAN: Then we have another rule that the

pleadings should be deemed amended.

THE CHAIRMAN: I think Mr. Cherry is right.

DEAN MORGAN: I guess that is right.

THE CHAIRMAN: When you once get them in, you have to waive them. Under our rules, if the proof shows that you have something that you didn't plead, you can get an amendment to put it in.

DEAN MORGAN: That is right.

THE CHAIRMAN: They are granted with great freedom in the interests of justice, and even if you forget to amend until after judgment, the court will allow amendment. Then it is in, and not waived. It is waived on the original answer, but the court allows you to withdraw the waiver by putting it in the answer. Then, if you never do amend, if the issues are tried by consent, you are all right. So I don't see why it doesn't work. There has been no trouble under it that you know of, has there, Mr. Reporter?

DEAN MORGAN: No.

JUDGE CLARK: No. I think this rule is well known under the code. It goes back to that. I still think that these suggestions rather go to the nonessentials. What people think about is what they can still fight over, and if we were only to make it in the form that, "If you haven't followed the rules hereinbefore provided, you can't do it," it doesn't seem to me we have said anything. In one sense it seems to me that

the suggestions make it only as to the manner of stating the thing and not keeping to the real guts, which is the trial on the merits. It really doesn't say anything more than we say above.

THE CHAIRMAN: Have you any suggestion for change in the rule other than transposing "the defense of failure to join an indispensable party" down to the jurisdictional point?

JUDGE CLARK: Of course, the way I would do it first is that the redraft that we made--

THE CHAIRMAN (Interposing): Let's forget that. We are not considering that.

JUDGE CLARK: Forgetting that for the present, I would change the word "state" to "establish", leave in the trial on the merits and leave in the last sentence.

DEAN MORGAN: But, Charlie, would you say, "establish .... may also be made by a later pleading" of a motion for judgment on the pleadings?

PROFESSOR CHERRY: You can't talk about establishing.

JUDGE CLARK: It is possible that that wording could be improved.

MR. TOLMAN: Judge Clark, doesn't (h) deal wholly with pleadings and defenses on paper, all prior to trial?

JUDGE CLARK: No, I didn't think it did. Of course, that is a question. Does it? The suggestion made here is that it does. I didn't suppose it did. In fact, I didn't suppose

you needed one very much to deal with just the paper stuff.

THE CHAIRMAN: I think it is perfectly clear that we didn't have in mind that we were dealing with the defense of failure to state a claim. We are dealing with Rule 12(b)(6). There is no question about that. The phraseology of if that was adopted here was "failure to state a claim". What do you mean? State it in your pleading? That is what that means. To say "prove" it now, not "state" it, would give an entirely different meaning to the clause.

JUDGE CLARK: You see, originally, we had two thoughts in the last sentence. "The objection or defense, if made at the trial". That is just as it was before.

THE CHAIRMAN: That makes it perfectly clear that when we said "state a claim" in 91, we were talking about the pleading, and we were invoking the rule that, if there is evidence on this subject and the issue is tried, we needn't regard the omission of the pleading.

I don't hear any motion to do anything other than transfer that indispensable party matter down to subdivision (2). I think we agree to that just as a matter of appropriately connecting the language of jurisdiction with the subject matter. Is there any other change that anybody wants to move?

PROFESSOR CHERRY: Where does that leave "or at the trial on the merits"?

THE CHAIRMAN: It leaves it in.

MR. TOLMAN: Did you strike out those words at the beginning of line 90?

THE CHAIRMAN: No.

MR. TOLMAN: I think they are superfluous and confusing.

JUDGE CLARK: Oh, no; I don't think so. That means that you can't make your motion--let me see.

THE CHAIRMAN: It means that he has waived all the defenses and objections unless he does one of two things: either by a motion or, if he has made no motion, in his answer or reply.

DEAN MORGAN: A motion as herein provided for, or in his answer or reply.

JUDGE CLARK: The point is that he can make a dilatory motion and, if you don't have this in, he can make other dilatory grounds in his answer. Of course, that is what he couldn't do before. If you come in and make some sort of appearance, it is general, but, you see, in the exact words, if you left that out, if he had made no motion--

THE CHAIRMAN (Interposing): Then he could do it twice, two dilatory actions, one by motion and one by answer, in the same thing.

JUDGE CLARK: Yes; two dilatory answers.

You could make up a question as to service of process and a question as to whether these other matters or venue or

something like that are proper. You could raise one by motion; you could raise the other in the answer. This wording says that, if you raise one by motion, you raise the other by motion, too.

MR. TOLMAN: I don't understand it that way. It seems to me so clear, as you say, that you waive a defense if you don't raise it either by a motion or in your answer. That seems to be so plain that this other language seems to me not to conform and to confuse.

JUDGE CLARK: Suppose you have the case I put. Suppose you raise the issue, by motion, of improper venue, and you lose on that. Then you want to raise the issue of insufficiency of service of process in your answer. There is nothing in the exact wording of the rule, if you strike out your words, to prevent your doing it.

MR. TOLMAN: No, the rule says that you can do it in either place, that you can raise one on motion and one by answer.

DEAN MORGAN: "as hereinbefore provided", Major, takes care of that.

THE CHAIRMAN: The point is this: You have already provided perfectly clearly up above that you can make it either by motion or, if you don't make it by motion, in your answer or reply. Why repeat that here? Why not simply say, "As hereinbefore provided, if you have done it either by motion or answer,"

and so on? "If you don't do it either by motion or answer as the rules provide, you waive it." Why reiterate? If you have tried it one way, you can't do it the other. You have made it plain in the other rule. Is that your point?

MR. TOLMAN: That is my point, exactly.

JUDGE CLARK: I still don't see where, outside of here, just the point I am making, we have said elsewhere that you have got to make all your dilatory objections at one time.

DEAN MORGAN: You could change it to read, "A party waives all defenses and objections which he does not present in the manner hereinbefore provided", and let it go at that, "except that".

JUDGE CLARK: The manner hereinbefore provided is either way.

DEAN MORGAN: Sure.

JUDGE CLARK: Of course, then it seems to me we are making not only a succession of dilatory proceedings, if they wish, but we are also extending the rule of waiver (limiting it, if you please) beyond what the present law is. I take it, if you make a motion on venue, as I have said, you would waive any question of the process.

SENATOR PEPPER: Am I wrong in the understanding that what we are now discussing is based on the presupposition that the dilatory defenses must be made the subject of a single motion?

JUDGE CLARK: Yes.

SENATOR PEPPER: That has been hereinbefore provided.

JUDGE CLARK: Where?

SENATOR PEPPER: I don't know what the rule or number of it is, but certainly in any draft that finally emerges about these motions and rules, we are all agreed that there is to be one motion, and only one, as respects dilatory defenses. I am assuming that that is provided for. If it is, my only point is that we ought not to repeat the provision here.

I don't see why this whole thing doesn't come down to something like this: "All objections not presented as hereinbefore provided are waived, except that when at any stage it appears to the court that no ground for relief has been averred or, if averred, has not been followed by proof, or that the court lacks jurisdiction of the subject matter, or that there has been a failure to join an indispensable party, the action shall be dismissed." It seems to me to be as simple as that.

THE CHAIRMAN: I tell you, I believe Charlie is right about it.

MR. GAMBLE: Doesn't (g) provide for a single motion?

THE CHAIRMAN: (g) or some previous section provided that if you once chose the motion method for raising some of these preliminary defenses, you were through; you couldn't do it by answer. I am frank to say I have just gone through

those previous rules, and I don't find that to be so.

PROFESSOR CHERRY: Doesn't (g) do it?

THE CHAIRMAN: It wasn't (g). "A party who makes a motion under this rule may join with it the other motions herein provided for and then available to him. If a party makes a motion under this rule and does not include therein all defenses and objections then available to him which this rule permits to be raised by motion, he shall not thereafter make a motion". It doesn't say he shall not thereafter put it in his answer.

JUDGE CLARK: That is the point.

THE CHAIRMAN: "based on any of the defenses", and so on. Now you come to (h), and it says you do waive all these defenses and objections which you do not present either by motion as hereinbefore provided or, ir you have made no motion, in your answer or reply.... The idea that you have tried to get over is that if you have done it once by motion, you can't put it in the answer.

JUDGE CLARK: That is just exactly it.

THE CHAIRMAN: I don't think it is very clear, far from it.

JUDGE CLARK: Of course, it is conceivable that (g) could have been expanded in some way to cover it, but when you start expanding (g), you hit something else. I can't say for the moment whether by just expanding (g) you would do this,

but that is the theory of it, and this is all built with a purpose, so to speak.

MR. TOLMAN: It certainly does no harm to do it. I thought it was a waste of words. I begin to shake a little in my position.

JUDGE CLARK: I think there is no place now where there is any such waiver stated.

DEAN MORGAN: You are right, Charlie. I thought there was at first.

JUDGE CLARK: You were thinking about (g), I think, but as Mr. Mitchell points out, it is carefully limited, for a reason which escapes me at the moment. I have forgotten why we limited (g) to motions. Can you tell now? These things all sort of fit in together.

DEAN MORGAN: "Every defense, in law or fact," .... "shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may" .... "be made", and so forth.

THE CHAIRMAN: I agree that it is a half-baked, back-handed, side-swiped way of doing it to stick in this clause if he has made no motion. I don't think that the average lawyer would say at once that, if you have done it by motion, you can't do it by answer, and I think if you wanted to do that you ought to have said pointblank, "If you do choose to take the motion route on these preliminary defenses, then you

shall not repeat the defense and reiterate it in your answer." It doesn't say so anywhere.

JUDGE CLARK: Or make a new dilatory defense. That is the point. That may be. I wouldn't say, however. I do feel badly about the half-baked. I think that is not the expression. It is overbaked, if anything.

THE CHAIRMAN: Has anybody any amendment to suggest to Rule 12(h)?

JUDGE CLARK: If you wish, we will go over this again and see if we can't put it in (g). It is more natural. I think there was some reason we didn't have it in (g). I don't remember at the moment. Do you remember? I don't see now why it couldn't go in (g), that is, the provision of waiver we have in mind.

THE CHAIRMAN: You have to take either one horn of the dilemma or the other, either motion or answer.

JUDGE DONWORTH: It is not unusual for a judge to deny a motion early in a case and say, "With leave to raise the same point at the trial." We don't want to cut off that.

JUDGE CLARK: We have no intention of stopping that. I don't suppose we would stop that. Of course, it is directly provided that the judge can always postpone a decision on the thing. We have provided that expressly.

THE CHAIRMAN: Let's pass on. I think that the Reporter will think that over--

SENATOR PEPPER (Interposing): Because, really and truly, the idea of the consolidation of defenses is implicit in the idea that we are discussing, about the waiver of those not raised. That is in the interest of consolidating defenses, I should think, and (g) ought to cover it all.

JUDGE CLARK: I can't say for the moment why it doesn't. I think we had some reason, but it escapes me for the present. We will look it over and see if we can't put it in (g).

MR. DODGE: I am afraid of the initial provision that all these things are waived unless pleaded. I don't know whether "pleaded" means including all these alleged, implied amendments that are made during the trial or not. I think we have to be very careful about that waiver of all defenses not pleaded.

THE CHAIRMAN: You can say in your answer, pleading as originally drawn or subsequently amended, but I think that would be implied in the rule.

Well, we are on Rule 13.

JUDGE CLARK: I think Dean Morgan objected to the "Provided" here. I think you had an objection here, if I remember.

DEAN MORGAN: I probably have, if you have it there.

JUDGE CLARK: This is a question mainly of form. You remember the decision in the Court of Appeals down here

in the District of Columbia which is cited in the footnote to this rule.

DEAN MORGAN: Oh, yes, I remember that now.

THE CHAIRMAN: Has anybody any proposal to amend the redraft of Rule 13?

DEAN MORGAN: In lines 7 to 11, I suggest that, instead of "Provided, however, that," you say "except that such a claim need not be so stated if it was at the time the action commenced the subject of another action pending in another court."

JUDGE CLARK: That is all right, isn't it?

JUDGE DOBIE: "except that" for "Provided, however, that"?

JUDGE CLARK: That is in Dean Morgan's letter of June 24, a point he raised sometime back.

THE CHAIRMAN: Say that again, Eddie. I didn't get it.

DEAN MORGAN: My suggestion, what I am reading, is what I sent to Charlie.

THE CHAIRMAN: In place of "Provided that"--

DEAN MORGAN: In place of "Provided, however, that," say, "except that such a claim need not be so stated if it was at the time the action was commenced the subject of another action pending in another court."

THE CHAIRMAN: The thing provided does something the

opposite. It gives an option to state such a counterclaim or to omit to state it.

DEAN MORGAN: No.

THE CHAIRMAN: Do you do that by your change?

DEAN MORGAN: No, I don't do it, but I say simply that he need not, not that he may not.

JUDGE CLARK: That is true.

THE CHAIRMAN: That is right, then.

JUDGE CLARK: I think the substance is the same, and I don't see any objection to shortening it up, do you?

THE CHAIRMAN: Without objection, Mr. Morgan's suggestion is adopted. It is a re-phraseology of the proviso clause, without changing the legal effect of it.

Now we come to (1), Separate Trials: Separate Judgments.

JUDGE CLARK: On this I might say that in the original rules we brought up before there were several provisions for separate judgments and separate trials, and so on. They probably meant all the same thing, but there was a little ambiguity. So we suggested last time and the committee decided that we would tie them all up to the one provision for judgment. So in all these separate places now, we have inserted this limitation by reference to the main section, which is 54(b). That is the only change.

THE CHAIRMAN: If there is no change proposed on

that, we will pass on to Rule 14.

JUDGE CLARK: On that there is one question of detail. Of course, you will have in mind that this is a very substantial change. We struck out, in effect, the provision that the defendant may cite in a third-party defendant and, in effect, so to speak, force him on the plaintiff.

THE CHAIRMAN: When he is liable over to the defendant.

JUDGE CLARK: Yes; and that is taken out here.

THE CHAIRMAN: We did that in line 5 by striking out the words "or to the plaintiff".

JUDGE CLARK: Beyond the main thing and working out a matter of detail, there is something that Mr. Hammond called to my attention, and I have a long letter in response to mine that I haven't thoroughly digested, but I guess we can bring it out.

If you will look down in line 12, "The third-party defendant may assert any defenses which the third-party plaintiff has to the plaintiff's claim." Then there is a provision that the third-party defendant may bring in any claim under Rule 13. That is up above, lines 10, 11, and 12.

Mr. Hammond's fundamental point was that the third-party defendant, that is the new defendant, ought not to be able to bring any claim against the plaintiff who had not amended over against him, except one arising out of the same transaction or occurrence that was sued upon.

Let me say first that I think that is logical, and I should think that was probably what we intended. Before we go into that too much, however, I raised a question in that same connection. We have the provision that a third-party defendant may assert any defense which the third-party plaintiff has to the plaintiff's claim. That was voted by the committee. That is what the committee decided, but I still wonder if that is a proper thing to put in. Isn't it substantive law, really, how far the new defendant may control the claim against the original defendant? Suppose that the original defendant doesn't wish to make the claim, should it lie in the mouth of the new third-party defendant to make it? It may well be that that will give the new third-party defendant an excuse on the claim over against him, but is he entitled to raise the question in the original action?

THE CHAIRMAN: Claim over against him? Isn't it the original defendant who has the claim over?

DEAN MORGAN: The plaintiff brings it against the original defendant, and then the original defendant says that B, the third-party defendant, has to reimburse him in part or in full or anything.

SENATOR PEPPER: Does that extend in the case of the insurer of the defendant?

JUDGE CLARK: The insurer, of course, is one example of the kind of thing involved. How far the insurer may raise

the defense is a matter of his contract with the insured, isn't it, and should we attempt to provide beyond the contract in a procedural rule?

DEAN MORGAN: Suppose that you have one of these family automobile cases (that is just exactly the kind of case) where the daughter doesn't want to raise the defense against her mother. She wants to see the insurance company stuck. The daughter, who owned the automobile or was driving it, is insolvent. Do you mean to tell me that the insurance company couldn't raise the point that the mother was guilty of contributory negligence or that the defendant was negligent? It would be outrageous.

JUDGE CLARK: Now wait a minute. Lots of things may be outrageous. I mean just that. I mean that the insurer, without doubt, under the terms of its contract, and so on, could say to the insured, "You haven't properly defended and therefore I am not responsible on my policy."

DEAN MORGAN: To the plaintiff?

JUDGE CLARK: No, he says that to the original defendant. But I think there is very serious doubt whether the insurer can say to the plaintiff, "You can't have a judgment against my insured because I am going to make a defense that my insured won't make." It seems to me that there, under the guise of a procedural rule, you are going to try to right what you say is a manifest injustice but which the parties

want.

THE CHAIRMAN: You mean, instead of allowing the insurance company that has been brought into the case to raise the defense the original defendant doesn't want to raise, you forbid the third-party insurance company to do that, and then compel it to resort, in a suit against the policy, to claim that the original defendant hasn't properly defended the case?

DEAN MORGAN: It will take two lawsuits instead of one.

MR. HAMMOND: I don't think so. Why can't he make that as a defense to the counterclaim?

DEAN MORGAN: That is what I said. Why shouldn't he make it a defense so far as he is concerned, and he can assert any defense. He can show that the defendant isn't responsible to the insurance company for the purpose of showing that he ought not to be able to respond over, and if the defendant himself wants to let the plaintiff get a judgment against him, that is a different matter. This is to prevent an injustice against the defendant.

THE CHAIRMAN: I would appreciate it if you would point out the exact wording in this draft that you have got, that you are referring to, and state just what it does and what you think it ought not to do.

JUDGE CLARK: It is all tied up with this question of how far the third-party defendant may counterclaim, and so on,

but for the moment it would seem to me that the sentence in lines 12 and 13 ought to come out.

THE CHAIRMAN: "The third-party defendant may assert any defenses which the third-party plaintiff has to the plaintiff's claim."

JUDGE CLARK: Let me explain just a little more. If you will look at the previous sentence, you will see there that the third-party defendant, that is the new man brought in, shall make his defenses as provided in Rule 12 against the third-party plaintiff. That is all covered. If he has any defense of improperly taking care of his interest, and so on, he makes it all there. Lines 12 and 13 add something more. What they say is that the third-party defendant may assert any defense which the third party has to the plaintiff's claim--not to the third-party plaintiff, the original defendant's claim, but to the plaintiff's claim. I say that I think that is substantive law in the guise of procedure.

SENATOR PEPPER: May I inquire against whom the judgment would go if, in an accident case, the defendant brings in the insurer as a third party, and all the defenses that either wishes to raise are raised and disposed of adversely? If there is a judgment, against whom does the judgment go?

JUDGE CLARK: It would have to be a kind of divided judgment in that case. The judgment in the first instance would be that the original defendant must pay the plaintiff,

and then there would be a judgment that the second defendant pays the first defendant.

SENATOR PEPPER: But there certainly could be no judgment in favor of the plaintiff against the third person.

JUDGE CLARK: Not unless he amends. That is the change in the rules.

SENATOR PEPPER: But no amendment would cover it because there is no privity between the insurer and the plaintiff. There is no legal relationship that I can think of, is there, which gives the plaintiff--

JUDGE CLARK (Interposing): I think you are right as a primary matter, although statutes are very usual that so provide.

THE CHAIRMAN: Suppose, instead of its being an insurance company, the defendant who was claimed to be negligent was sued in a personal injury case, and there was some other party involved in the action and he was interpleading.

SENATOR PEPPER: Ah! In the case of the joint tort or in the case of any original cause of action against the third person, I can understand his being brought in, and then when the judgment goes in favor of the plaintiff, it goes against all those who are on the record. But this way, you bring in somebody against whom the plaintiff has no cause of action on any theory.

THE CHAIRMAN: That is right.

MR. DODGE: And the third-party defendant's only defense, admitting that he is liable too if the defendant is liable to the plaintiff, is that the defendant is not liable to the plaintiff. To say he can't set that up and prove it is--

JUDGE CLARK (Interposing): I think that is not the effect of this. The third-party defendant, under lines 8 and 9, can put up all the defenses he has against the original defendant. That is so stated there.

SENATOR PEPPER: All the defenses?

JUDGE CLARK: Which he has, that the defendant has improperly looked after his own interests, or whatever the defense may be.

SENATOR PEPPER: But his only defense as against the original defendant is that the original defendant is not liable to the plaintiff for such-and-such reasons.

JUDGE CLARK: Yes. He puts that up under 8 and 9. But now, under 12 and 13, there is an original provision that he may assert any defenses which the third-party plaintiff has to the plaintiff's claim.

DEAN MORGAN: That is right, for the purpose of his obligation to the defendant. That is what it is for.

JUDGE CLARK: You have already covered that.

DEAN MORGAN: I don't know whether you have.

JUDGE CLARK: Of course you have.

DEAN MORGAN: I don't know whether you have. Your

technical defense against the defendant there would be that he had interfered with your control of the action very frequently in the insurance case.

JUDGE CLARK: You see, we really are not at one as to what these simple words mean. Of course, it may be that they are clear, and I don't see it. I say these simple words mean that the new defendant may put up the defense to the plaintiff because it seems to me that is what it says.

DEAN MORGAN: All right. I grant that. Then what is the result?

JUDGE CLARK: The result is that the plaintiff cannot take a judgment against the original defendant which the original defendant is willing that he should take and which the plaintiff wants to take.

DEAN MORGAN: In other words, the original defendant can't confess judgment; is that it?

JUDGE CLARK: Yes. That is one.

DEAN MORGAN: You won't let the court decide a moot case, which is really what it amounts to, isn't it?

PROFESSOR MOORE: The original defendant may have a personal defense. He may not care to interpose the statute of frauds or the statute of limitations.

DEAN MORGAN: There might be a statute of limitations good against him, and he might not want to plead it. He might think it an immoral defense. He might think the statute of

frauds an immoral defense.

THE CHAIRMAN: If he doesn't plead it, how can it be that the third-party defendant who has been brought in is liable over to him? I don't understand that. As an usual rule, ordinarily one person is liable over to another because the other is liable. If the other isn't liable or, if he is but had some defenses like a statute that he could have gotten out of the claim and didn't assert them, why should the surety be called on to make good? I don't get that.

JUDGE CLARK: He probably wouldn't be. That is, probably the law of insurance contracts or the law of suretyship or whatnot will take care of it, so you don't need lines 12 and 13.

THE CHAIRMAN: But the trouble is that the surety has been brought in in order to be bound by the result and get a judgment over against him in the case, and if the judgment is rendered in favor of the original plaintiff against the original defendant in that kind of suit, what position is the other party to the action in, the surety brought in, to say that the judgment ought to have--

JUDGE CLARK (Interposing): He says it right in the pleading, "My answer to you is that you have not, in this very same action, pleaded the statute of limitations, as you should have."

MR. DODGE: That may not be a defense to a surety.

JUDGE CLARK: "Therefore, you cannot get any judgment against me."

MR. DODGE: It may not be a defense against a surety who has agreed definitely, without any qualification, to pay any judgment that may be recovered against you growing out of these circumstances.

JUDGE CLARK: If that is true, then we certainly ought not to do this. My point is not the morality or the justice of the thing. It is that, under the guise of procedure, you are changing very important rules of substantive law. It is just a procedural rule. You are saying, in a procedural rule, that, whereas formerly without this rule the plaintiff and the defendant controlled that litigation, this third party comes in and he now to this extent--

THE CHAIRMAN (Interposing): He doesn't come in. He is dragged in by the nape of the neck.

DEAN MORGAN: By the other fellow.

JUDGE CLARK: To this extent, he controls. I may say that I don't believe that that provision is really good, in addition to certain ambiguity as to what it means.

DEAN MORGAN: It may be, Charlie, that it isn't good to prevent a judgment against the original defendant.

JUDGE CLARK: That is just what I mean.

DEAN MORGAN: A judgment which will bind only the original defendant but not the third-party defendant. But it

certainly seems to me it is good to prevent a judgment in favor of the defendant which will bind a third-party defendant, and that is what we put it in for.

THE CHAIRMAN: The lines 12 and 13 that you object to, I think, are these: "The third-party defendant may assert any defenses which the third-party plaintiff has to the plaintiff's claim." You object to that, don't you?

JUDGE CLARK: Yes.

THE CHAIRMAN: If you strike it out, it doesn't say the third party may assert against the third-party plaintiff lack of any defenses or his failure to assert any defenses against the original plaintiff. If you strike out those two clauses, you raise the inference that the third-party defendant couldn't claim as against the third-party plaintiff that the third-party plaintiff hadn't raised all his proper defenses.

JUDGE CLARK: I shouldn't think that was a possible construction in view of the wide, exclusive statement in the previous sentence: "shall make his defenses"--his legal defenses, the defenses that the law gives him.

MR. DODGE: Suppose the contract is to reimburse the defendant for any money for which he is liable to the plaintiff. He is sued by the plaintiff, and this third party is brought in, and the defendant then confesses judgment. The only question between him and the defendant is whether the original defendant was liable to the plaintiff. That certainly can be

tried in that case, can't it?

JUDGE CLARK: I should say if you got a contract--that isn't the way insurance contracts are drawn. As we know, insurance contracts always provide that if the defense isn't immediately undertaken, and so on, and there are even provisions as to controlling the defense, but suppose you got a contract to pay any judgment just like that, then I say all the more should you not be able, by getting in the federal tribunal, to do something you wouldn't be able to do in the state courts. I don't believe the courts would let you. If you made an extensive agreement to pay anything that the other fellow has confessed against himself, then you ought to have to pay it, and there ought not to be some rule of procedure in the federal courts that says you don't have to.

THE CHAIRMAN: Charlie, that interests me, because I don't remember any time in the history of this committee that you have ever conceded that a thing was substance, and not procedure.

JUDGE CLARK: I think there is something in what you say.

THE CHAIRMAN: I want to call your attention to this--

JUDGE CLARK (Interposing): I think that point is well taken.

THE CHAIRMAN: --that the third-party defendant doesn't come in on his own motion under this rule. The original

defendant drags him in, forces him into the case, and if you have a rule that says to the original defendant, "If you bring in this third-party defendant by the scruff of his neck, then he is going to have the privilege of seeing to it that you assert every defense against the plaintiff," if there is a matter of right involved, he has agreed right then and there, by bringing him in, that he may step into control of the defense sufficiently to raise every possible defense that the original defendant had. The original defendant has waived his right to waive his defenses. Do you see my point there?

JUDGE CLARK: I see it, but I am not convinced, I must say.

THE CHAIRMAN: I think when you have a rule that says that the original defendant can bring in a third party and make him a third-party defendant, that he is liable over to the original defendant, if you in that rule say to the original defendant, "If you do that sort of thing, your freedom to control what sort of defenses you are going to raise is gone, and the fellow you drafted in the case for the purpose of getting a quick judgment against him, in a circle, is going to be in a position to see to it that you, the original defendant, raise every defense that might defeat the claim."

JUDGE DOBIE: It might very well be that for strategy or tactics there are sometimes certain defenses he thinks he has a fairly good chance on on the main issue, but

he believes it will be bad for him before the jury.

PROFESSOR CHERRY: Then he doesn't have to bring the stranger in.

JUDGE DOBIE: I know. He wants to bring the stranger in, but he doesn't want to make the stranger dominus litis and plead for him. Maybe your idea then is that if he takes the benefit, he must accept the burden.

JUDGE DONWORTH: It isn't a benefit. He has been dragged in, and the man who drags him in must abide by the consequence of dragging him in.

THE CHAIRMAN: As specified in the rule, before he drags him in.

JUDGE DONWORTH: As specified in advance. He knows the option, and he elects to bring him in.

MR. DODGE: I move that the rule stand as written in that respect.

JUDGE CLARK: Without going too far, I will say that the rule in that respect isn't very clear, because there is still a good deal of question as to what it means. I am not sure what Eddie has come around to think, anyway. When we first started, I think there was a suggestion that this meant any defenses, that he may raise the defenses but raise them only against the original defendant. That is one meaning of it. I should think that wasn't the meaning that really applied here, because I think that part of the rule is already covered in

lines 6 to 12. But if it means that you supplant the defendant in the original action, I don't think that you would ever have a defendant dreaming that by a short-cut which is announced as a procedural short-cut, he is waiving important rights. If he is, of course he isn't going to do any citing in, and if you make this a kind of trap for him, a penalty, I almost think it ought to be stated.

PROFESSOR SUNDERLAND: What you are trying to do is to keep this original defendant from springing a trap on the third party.

JUDGE CLARK: It isn't a trap, if that is the provision of the law already, if that is the provision, either, of his contract.

JUDGE DOBIE: You won't find many such contracts, Charlie.

JUDGE CLARK: I don't think you will, as a matter of fact. I don't think you will anywhere, but that is all the more reason, because if the contract governs it, then you don't want a rule butting in to vary the contract, however it may be. The insurance contract, I think, normally would have very careful provisions on this.

THE CHAIRMAN: Tell me, Charlie, is any criticism made of the clause that is underlined, "and may assert any claim which he might have asserted in an original action"?

JUDGE CLARK: Yes. As a matter of fact, that is in

part where the discussion originally arose. Mr. Hammond wanted to suggest that that sentence be changed to limit the third party's counterclaim. This is the way Mr. Hammond wants to make it read, if at all: "The third-party defendant may assert against the plaintiff any claim he has against him which arises out of the same transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff."

THE CHAIRMAN: That is pretty tough on him because, if he were sued in an independent suit, he wouldn't have any such limitation. He could assert any counterclaim he had against the original plaintiff arising out of anything, but if you drag him in by force as a third-party defendant, then he loses his right to assert outside counterclaims, because he can set off against the plaintiff matters arising out of the same transaction. That is hardly fair.

JUDGE CLARK: No; wait a minute. If the plaintiff amends later on (you see in lines 16 to 19 the plaintiff may amend), in that case Mr. Hammond and I would agree than then you make the claims against the plaintiff as wide as if you had originally been joined; but if you are dragged in and if the plaintiff doesn't accept you as a defendant, you see, our general idea is to keep the controversy between the two defendants.

THE CHAIRMAN: Yes.

JUDGE CLARK: Both my suggestion and Mr. Hammond's are along the line of separating the controversy as just between the defendants, unless the plaintiff accepts him. If the plaintiff accepts him, then all these restrictions are off, but if the plaintiff doesn't accept him, then it is in general my theory and, I think, Mr. Hammond's, too, that the claim should be just between those two.

THE CHAIRMAN: Then if you amended it up above in line 11, which says the third-party plaintiff "may assert any claim which he might have asserted in an original action", so as to say, "any claim he might have asserted against the original plaintiff in the original action, provided it arises out of the same transaction", then down below you would have to say, in 16 to 19, which now says, "The plaintiff may amend his pleadings to assert against the third-party defendant any claim which the plaintiff might have asserted against the third-party defendant had he been joined originally as a defendant", that "as such, the third-party defendant could assert any claim, regardless of whether it arose out of the same transaction."

MR. HAMMOND: That was the thought.

JUDGE CLARK: Yes. Mr. Hammond has gone into that very extensively. He has even given me a redraft. Suppose you take up the battle for a while, Mr. Hammond.

DEAN MORGAN: Charlie, on the jurisdictional question,

you have to have diversity between the plaintiff and the third-party defendant, to assert a claim against him, haven't you?

JUDGE CLARK: Well, cases have so held, and that is likely to be the rule.

DEAN MORGAN: But as between the defendant and the third-party defendant, that is an ancillary proceeding and you don't have to have it, as I understand. Am I right there?

JUDGE CLARK: Again, a good many cases have held. I might say that the insurance companies have agreed to that. I don't suppose you can say it is settled. I think the better way to have the law settled would be just as you say.

MR. DODGE: Is there any jurisdictional requirement of residence as between the defendant and the third-party defendant?

JUDGE CLARK: As I said, the Insurance Counsel raised the question that there would have to be. To date, the lower court decisions in general support Rule 14 pretty widely, on the theory that the controversy is ancillary. I think that that contention can be well supported as between the two defendants. It is a little more difficult to support it as between the plaintiff and the new defendant.

MR. DODGE: We have assumed that the defendant can summon in anybody who can be reached by process, no matter where he lives?

JUDGE CLARK: We have, yes.

THE CHAIRMAN: Subject to the general clause. We don't say anything about jurisdiction in this particular rule. We have the general rule, of course, that nothing in these rules shall be construed as an attempt to enlarge jurisdiction.

MR. DODGE: I had forgotten what the assumption was.

JUDGE CLARK: We haven't very directly settled it. You can't say that it is settled as yet by the decisions, because practically all the decisions on that point are district court decisions.

SENATOR PEPPER: How would it work out jurisdictionally in a case where the defendant is the insured and the third party is the insurer, when the plaintiff is a citizen of A, the defendant is a citizen of B, and the insurance company is a citizen of X, another state. What can the defendant do in B to bring the company in X into the jurisdiction of the district court in B?

JUDGE CLARK: Your case is a comparatively easy one, assuming you get service of process on that. There always has to be service of process.

SENATOR PEPPER: Of course, if the company is doing business--

JUDGE CLARK (Interposing): But you have assumed there the requisite diversity as to each angle.

SENATOR PEPPER: I have assumed the requisite diversity as to A and B, and there is diversity as to X, but I

was wondering, as a practical matter, if the only way of getting X in is where X is doing business in B.

JUDGE CLARK: Yes.

SENATOR PEPPER: Then I was going to assume that X is a citizen, also, of B, so that the plaintiff, A, has a claim against defendant B in the state of B's residence, and X, who is B's insurer, is also a resident of the same state as the defendant.

JUDGE CLARK: As to that, the argument--and I think it is a sound argument--is that the claim between B and X is only ancillary to the main dispute, and you don't need new jurisdictional grounds.

SENATOR PEPPER: That depends upon whether it is a case in which the third person was somebody originally liable to the plaintiff or whether the plaintiff's only claim against him comes through the plaintiff's cause of action against the defendant.

JUDGE CLARK: We make the argument--I put it in this hesitant way because it hasn't been settled. You can't say it has been settled. It has been held by some district court cases, but we make the argument, in effect, that this is simply a way of carrying out the right against B, and B brings in the man who really should pay, and it is ancillary to the main dispute. There is a little gap there, and that is why I have to put it with a bit of apology. If you were to say that you

could put the three parties in one suit only where they all could originally have been sued as now in the same jurisdiction, you wouldn't have jurisdiction.

SENATOR PEPPER: Yes.

JUDGE CLARK: But if you rationalize it and say that this is really a way, so to speak, of enforcing the judgment against B, you do have.

SENATOR PEPPER: I see.

JUDGE CLARK: There is an additional point, however. Suppose that X is in A's state so that now B can bring X in. There is diversity there, but how about the plaintiff's amending over as to X?

DEAN MORGAN: He can't do it.

SENATOR PEPPER: The plaintiff and X being in that case citizens of the same state?

JUDGE CLARK: Yes. On that, we had a case before us in which the district court had held there was no jurisdiction, and we sidestepped it there and threw out the joinder on another ground, but I think that it is pretty hard to find jurisdiction there.

DEAN MORGAN: And most of the district court cases don't allow it. Isn't that right?

JUDGE CLARK: I don't know....

JUDGE DOBIE: Haven't there been some cases the other way?

JUDGE CLARK: I think so.

JUDGE DOBIE: A judge decided one in West Virginia, Charlie, where he said it didn't make any difference about the citizenship of the third party.

JUDGE CLARK: Mr. Oglebay says there is one case in the Eastern District of Pennsylvania. Judge Knight held there was no jurisdiction there. We affirmed it on the ground that you couldn't cite in a fellow whom the plaintiff wouldn't accept, under New York law. Do you remember the name of the case in that?

MR. OGLEBAY: Sklar v. Hayes, or something of the sort. I believe that is it.

THE CHAIRMAN: Am I right about this? I must confess I haven't understood it thoroughly. There are two points, are there? The first is whether the third-party defendant may assert any defenses which the third-party plaintiff has to the plaintiff's claim? The question of the right of the third-party defendant to come in and assert against the plaintiff defenses which the original defendant doesn't want to assert is one point. The other is about this clause, "and may assert any claim which he might have asserted in an original action." The proposal there, that Mr. Hammond makes, is to limit that to claims arising out of the same transaction, unless the plaintiff accepts the defendant as the fellow that he is going after, in which case then he could assert any counterclaim.

Are those two separate propositions?

JUDGE CLARK: Yes. I think that states it, doesn't it, Mr. Hammond?

MR. HAMMOND: Yes.

THE CHAIRMAN: I don't remember seeing Mr. Hammond's redraft. Was that widely distributed?

JUDGE CLARK: No. It came to me just this morning, and I have hardly had time to read it.

THE CHAIRMAN: We have a proposal here that we haven't a draft of. It is pretty hard to deal with it. What is your pleasure now?

JUDGE CLARK: Do you want to explain it any more?

MR. HAMMOND: I can have it mimeographed, if you wish, tomorrow morning.

DEAN MORGAN: Your idea is that it ought to have arisen out of the same transaction; is that it?

MR. HAMMOND: That was the whole idea at the last meeting. Nobody mentioned anything except something that arose out of the same occurrence or transaction as the claim of the plaintiff against the original defendant.

SENATOR PEPPER: That is to say, the plaintiff had an original claim against the third party which he did not pursue when he sued the defendant?

DEAN MORGAN: That is right.

SENATOR PEPPER: He had a claim directly against the

third party, had he not? If it arose out of the same transaction, the third party was either a joint tort-feasor or a co-promissor, or in some other way there was privity between him and the plaintiff.

MR. HAMMOND: Yes.

MR. DODGE: That refers only to claims against the original defendant. "and may assert any claim which he might have asserted in an original action" against the defendant.

DEAN MORGAN: This is another point.

MR. DODGE: Aren't those the underlying words that we are discussing?

DEAN MORGAN: He is down to 16 and 17: "The plaintiff may amend his pleadings to assert against the third-party defendant any claim".

JUDGE DONWORTH: I had supposed that all this we were talking about were matters growing out of the same transaction. I didn't suppose that you could bring in a third party by another promissory note case.

DEAN MORGAN: When you once get him in, though, you can treat him as if he had been a party from the beginning, according to this, and you can join as many claims against him as you might have in the whole. That is what this original notion was. Of course, the original notion was that you were going to try to clean up in one lawsuit as many things as you possibly could, and you just threw them all in, practically.

That is the reason we had the "or to the plaintiff" up here in line 5; "may be liable to him or to the plaintiff", and so on.

MR. DODGE: We out that out.

DEAN MORGAN: We out that out because it had been held that you couldn't make the plaintiff amend. If you couldn't make the plaintiff amend, it didn't do any good.

THE CHAIRMAN: In this redraft, in line 5 we have stricken out the words "or to the plaintiff" in that sentence which allows you to bring in as a third-party defendant "a person not a party to the action who is or may be liable to him" (that is, the original defendant) "or to the plaintiff". We have stricken out the words "or to the plaintiff" so that you can bring him in if he is liable over to the defendant, but you can't bring him in merely because he is liable to the original plaintiff.

SENATOR PEPPER: Mr. Chairman, isn't that the end of Mr. Hammond's idea about its growing out of the same transaction?

THE CHAIRMAN: That is just what I was leading up to. At least as far as the original plaintiff is concerned, this idea of that third-party defendant's asserting counterclaims against the third-party plaintiff certainly doesn't arise unless the plaintiff has a direct claim against the third-party defendant.

You really have two types of cases here. You can't

bring a third-party defendant in merely because he is liable to the plaintiff. You can bring him in if he is liable over to the defendant, and it may be that he is not only liable over to the defendant but liable to the plaintiff, too. There are two types of cases that are possible here, even with this amendment, so when you get this third-party defendant, it may be that he must be liable over to the defendant or have a claim of liability before you can bring him in. It may be that he is also liable to the plaintiff but that the plaintiff hasn't yet seen fit to sue him. There are the two different situations that arise.

In the first case, where he is only liable over to the defendant and there is no liability to the plaintiff, he can't be asserting any claims against the plaintiff and ought not to be allowed to--counterclaims or whatever--but if he is not only liable over to the defendant but is also has asserted liability against him by the plaintiff, then he ought to be able to assert against the plaintiff any counterclaim in the world that he has, whether it is arising out of the same transaction or not. Those two things, it seems to me, have to be borne in mind.

I would have to study Mr. Hammond's idea to see whether it carefully distinguishes between the two possible situations. When it comes to asserting defenses against the plaintiff or counterclaims against the plaintiff by the third-

party defendant, you have to know whether it is one situation or the other.

SENATOR PEPPER: There are two typical cases. One is the case of the plaintiff suing a defendant who is the insured. As against the insurer, the plaintiff has no direct claim at all. The only interest of the insurance company is the claim of the defendant against it.

The other case is the case of two joint tort-feasors, of whom the plaintiff sues only one, but there is by statute a right of contribution in favor of that defendant against the absolute joint tort-feasor.

Those are two radically different cases. In the second, if the joint tort-feasor is brought in and put in the record, he ought to have his counterclaim against the plaintiff as freely as the original defendant.

THE CHAIRMAN: Provided the plaintiff wants to sue him.

SENATOR PEPPER: Of course, the question doesn't arise unless the defendant brings him in.

THE CHAIRMAN: If he is brought in, still you can't force him on the plaintiff unless the plaintiff wants him to be sued, you see.

SENATOR PEPPER: Yes.

THE CHAIRMAN: So I think if you are going to juggle around with what kind of defenses he can assert, what kind of

counterclaims he may assert, against the plaintiff, you must bear in mind all those differences.

MR. GAMBLE: Mr. Chairman, wouldn't it be well to get Mr. Hammond to draft copies so we can see it?

THE CHAIRMAN: I think so, yes. For myself, I don't grasp this until I get my nose down on something definite that I can read.

MR. GAMBLE: I confess I am in a state of confusion about it.

JUDGE DOBIE: It is hard to visualize all these things and to balance them all, just how that would come up.

JUDGE CLARK: I can read it, if you like. I don't think it would stop him from having it done, but would you like me to read it? I think I can shorten it.

SENATOR PEPPER: Let's hear it.

JUDGE CLARK: I can give you this in just short order. I won't try to give the whole business, but I think I can give it very shortly, so you may have it in mind.

Look at line 11. You will see the provision there is that he may put in "his counterclaims and cross-claims against the third-party plaintiff, or any other party as provided in Rule 13, and may assert any claim which he might have asserted in an original action."

Then, the next sentence, "The third-party defendant may assert any defenses which the third-party plaintiff has to

the plaintiff's claim."

Mr. Hammond restricts that first sentence and makes it, "shall make his defenses to the third-party plaintiff's claim as provided in Rule 12, and his counterclaims against the third-party plaintiff and cross-claims against third-party defendant as provided in Rule 13."

You will notice in that sentence that he has carefully limited it so that there is no claim against the plaintiff. I suppose that in our original 11 and 12, "any claim" might have been a claim against the plaintiff.

He takes care of the claim against the plaintiff by substituting for the next sentence in 12 and 13, the following: "The third-party defendant may assert against the plaintiff any claim he has against him which arises out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff."

I won't read you the rest of it now. I think he has made the rest of it to correspond, but I think this is the real, central point of the suggestion.

THE CHAIRMAN: Shall we adjourn until 9:30?

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