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ADVISORY COMMITTEE ON RULES

FOR CIVIL PROCEDURE

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TABLE OF CONTENTS

TABLE OF CONTENTS

WEDNESDAY MORNING SESSION

March 27, 1946

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

THE CHAIRMAN: We are on Rule 56, and we are up to 56(c). I have a little note in the margin that I made some weeks or months ago. It is a query on our new matter in lines 20 to 23:

"A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages."

The question I raise is this. I am wondering if by necessary implication we are tampering with the special statute in patent cases that says it is not interlocutory, that it is an appealable order. How about it? Do you think there is any implied conflict there, or is it just permissive?

DEAN MORGAN: You called it a partial summary judgment before, didn't you?

JUDGE CLARK: I supposed from the nature of those statutes on patent accounting--

THE CHAIRMAN [Interposing]: That it was interlocutory, but appealable.

JUDGE CLARK: Yes. That is the way we have always talked about it in the cases. Those were exceptional cases where the interlocutory orders were appealable. Isn't that so?

PROFESSOR MOORE: That is so.

THE CHAIRMAN: I see. The fact that it is interlocutory does not mean that it is not appealable if there is a statute to that effect.

DEAN MORGAN: Anything that was interlocutory was not appealable at common law.

THE CHAIRMAN: I withdraw my objection. Is there anything else that anybody has?

JUDGE CLARK: The Chicago Bar Association did raise a question about those terms.

THE CHAIRMAN: Is it in your comment?

JUDGE CLARK: It is in the supplementary statement on page 27. First, they want to put the matter as to liability in subdivision (d) instead of (c). We spent quite a little time on whether it would be in (c) or (d), and our previous conclusion after considerable discussion was to put it in (c).

THE CHAIRMAN: We had it in (c) before, and this is just a revision or restatement in better shape.

JUDGE CLARK: Yes. We kept it in (c). Then you will see in the next paragraph that they raise a question about the use of the words "summary judgment". They say that "summary judgment" is something of a misnomer. We say, "A summary judgment, interlocutory in character, may be rendered", and so forth.

THE CHAIRMAN: That is all right, isn't it?

JUDGE CLARK: I should think so.

THE CHAIRMAN: Has anybody any further question?

MR. DODGE: I would like to raise one minor point on line 11, "before the time specified for the hearing." I have found that ordinarily these motions are filed, and nobody undertakes to specify in the motion when the hearing is to be. You have to get the court to fix the time. I wondered what "specified" referred to.

THE CHAIRMAN: Normally, it means that your notice must specify the time and place of hearing, but if local practice doesn't allow you to do that and the court sets it down, this would simply mean that the date of hearing had to be set 10 days after the service, and work backwards.

MR. DODGE: Yes. It isn't necessary, and it certainly isn't the practice with us, to specify anything about the time of hearing in the motion for summary judgment.

DEAN MORGAN: You do it in your notice of motion?

SENATOR PEPPER: We really have inverted the thought. The idea is that the hearing should be at least 10 days after the motion.

THE CHAIRMAN: You can say "fixed" instead of "specified", and that will do it.

JUDGE DOBIE: Those notices usually say, "Take notice that in the district court at ten a.m., February 21, or as soon thereafter as can be heard, I shall make such-and-such

a motion."

MR. DODGE: The motion for summary judgment, which ordinarily takes time, can't be dealt with like an ordinary motion. I have never seen any time mentioned in one. It is at least 10 days before the time which may be fixed for the hearing, something like that.

THE CHAIRMAN: That leaves it to fit either case. If it is fixed in the notice, it is all right, and if it is fixed by the court, he has to fix it 10 days after service. The fact is that there are more jurisdictions in which the notice specifies time than there are jurisdictions in which it does not. All over the country you have certain days set aside for what they call special terms or motion days, and when a party makes a motion, he names the particular motion day that he is going to have his hearing, and it goes down on the calendar.

MR. DODGE: It is all right with ordinary motions, which with us is every Monday, but they won't take a motion like this on an ordinary motion day.

THE CHAIRMAN: How did you word it?

DEAN MORGAN: "fixed for the hearing."

THE CHAIRMAN: Is that all right, Charlie?

JUDGE CLARK: I should think so.

THE CHAIRMAN: "specified" indicates that it must be specified in the notice. What do our rules say about notice of motion? Where is that?

JUDGE CLARK: That is Rule 6(d), isn't it?

THE CHAIRMAN: We use the same expression there, "A written motion ... and notice of the hearing thereof [that is notice of the date of the hearing] shall be served not later than 5 days before the time specified". So, our motion rule contemplates that the normal practice is for the moving party to specify the particular motion day it is going to be heard. I don't see any reason that we should not change this rule if we want to. Unless there is some disagreement, the word "specified" in line 11 of Rule 56(c) is stricken, and in place thereof the word "fixed" is inserted.

Is there anything further on (c)?

JUDGE CLARK: No, I think not.

THE CHAIRMAN: Is there anything on 57, Charlie?

JUDGE CLARK: No.

THE CHAIRMAN: Nobody has anything on 57. All right, we are up to 58.

JUDGE CLARK: I have some comments. The first is a Pennsylvania case which follows the rule, and there is a second which is rather interesting to us locally. The Southern District of New York, which had rather dissented from the rule, has now rather accepted it. They have modified their local rules and are now following this. They have a new clerk there, and one of the first things they did was to follow this. I don't think there is anything to that except to comment on it.

THE CHAIRMAN: You mean the rule about the entry of judgment not being delayed for taxation of costs?

JUDGE CLARK: Yes. They follow that now completely.

THE CHAIRMAN: If there is no criticism of 58, if we think there is nothing brought up, and no member of the Committee wants to change it, we will pass on to 59.

JUDGE CLARK: On 59, we have Armstrong's suggestion again as to time. We collected statutes under the other rule, Rule 50, showing that 10 days was not an unusual time, and it is an old, settled time in the federal practice. I think it should not be changed. I take it that is what we have decided so far.

THE CHAIRMAN: You can make a motion then, if you need some more affidavits, records, and whatnot, to get that extended. Has anybody any suggestion on 59?

DEAN MORGAN: What is 59(e)? What is the Los Angeles Bar Association driving at? I couldn't quite see. They say that 62(b) should include a reference to 59(a).

PROFESSOR MOORE: I believe 59(e) is that they mean. I think their point is well taken there.

JUDGE CLARK: You are dealing with the Association of the Bar, aren't you?

THE CHAIRMAN: I don't understand what you are referring to. My notes don't show any Los Angeles kick about 59.

DEAN MORGAN: I guess it is the New York Bar that is

talking about this.

JUDGE DOBIE: Page 75.

JUDGE CLARK: It is the Association of the Bar.

THE CHAIRMAN: Yes. There is a Los Angeles matter at the top of page 75.

JUDGE CLARK: That is just about time. That isn't the one he is talking about.

THE CHAIRMAN: They want us to state on what grounds you can alter or amend judgments. Isn't that it?

JUDGE CLARK: The following language is suggested:

"(e) Motion to alter or amend a judgment: Except as provided in Rule 50(b) a motion to alter or amend a judgment may be made within 10 days after the entry of the judgment."

They say, "Reference to Rule 59(a) should also be included in Rule 62(b) as it has been in the proposed amendment to Rule 73(a)."

What do you think? You said you thought they had a point here.

PROFESSOR MOORE: That 62(b) include a reference to 59(e).

DEAN MORGAN: I think that is right.

THE CHAIRMAN: Haven't they made the point, too, that in Rule 50(b) we say that a motion for judgment notwithstanding the verdict, vacating the judgment, must be made within 10 days after the reception of the verdict, and then we have a

general provision in 59(e) that a motion to alter or amend the judgment shall be served not later than 10 days after the entry of the judgment. There seems to be one motion made 10 days after verdict and another made 10 days after entry, and they think the one collides with the other. Of course, it is obvious that we don't consider that 59(e) includes a motion for judgment notwithstanding the verdict, but it certainly does alter the judgment if it is successful. They want to clear that up. They want the rule to read:

"Except as provided in Rule 50(b) a motion to alter or amend a judgment may be made within 10 days after the entry of the judgment."

Then they make the point about the reference to Rule 59(a), that Rule 59(a) should also be included in Rule 62(b).

What about that?

JUDGE CLARK: Do you think that we should say, "Except as to 50(b)"?

PROFESSOR MOORE: I suppose so.

THE CHAIRMAN: Both of them are motions to alter a judgment. There is no getting away from that. They seem to be conflicting, one 10 days after judgment and the other 10 days after verdict. Presumably, the judgment is entered simultaneously with the verdict, but it may not be.

JUDGE CLARK: I should think, then, that it should be included.

THE CHAIRMAN: You think that their suggestion to insert in subdivision (e) of Rule 59 the phrase, "Except as provided in Rule 50(b)", should be adopted?

JUDGE CLARK: I should think so.

THE CHAIRMAN: If there is no objection, we will agree to that. What is their other point, the reference to 59(a)?

JUDGE CLARK: Yes, that that should be added in Rule 62(b).

SENATOR PEPPER: May I get in on this secret proceeding over there? Where are we now?

THE CHAIRMAN: If you will turn to page 75 of the Reporter's original notes, we are considering Rule 59. Have you got that?

SENATOR PEPPER: Yes.

THE CHAIRMAN: You will find there that the Association of the Bar of New York has made some suggestions. The suggestions are at the bottom of page 75. We have accepted the first one as to (e), Motion to alter or amend a judgment, by inserting "Except as provided in Rule 50(b)".

MR. LEMANN: Does Rule 50(b) now provide for altering or amending a judgment? Is that what you mean by altering or amending?

THE CHAIRMAN: That is the point. I don't think we do. The Bar Association says that the two butt each other

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MR. LEMANN: Does Rule 50(b) now provide for altering or amending a judgment? Is that what you mean by altering or amending?

THE CHAIRMAN: That is the point. I don't think we do. The Bar Association says that the two butt each other

because both of them involve altering or amending the judgment.

MR. LEMANN: I would not have thought so. I was trying to catch up with this a little bit. I heard the Reporter say there was no objection, so the Chairman said, "All right we will do it," but I wonder if the Reporter is right, or if his associate, Professor Moore, is right that there is no objection. I think it is more confusing. That would be my reaction. I would never think of 50(b) as altering or amending a judgment.

DEAN MORGAN: Neither would I.

JUDGE DOBIE: I don't believe that ordinarily, General, a lawyer would think of an n.o.v. motion as being one to alter or amend a judgment. Of course, in the technical sense, altering usually means that you delete something and put something else on there, but it might be confusing.

THE CHAIRMAN: I think you are right. You have to assume that a motion to alter or amend a judgment is not a motion to invert it or render judgment for the other party. That isn't altering or amending.

MR. LEMANN: You certainly aren't altering or amending it.

THE CHAIRMAN: You are vacating it.

JUDGE DOBIE: You are making it the opposite.

MR. LEMANN: If Mr. Moore thinks the opposite, I would like to hear from him.

SENATOR PEPPER: Isn't it just a question of words? After all, when under 50(b) you move first to have a verdict set aside and then to have a judgment entered in accordance with the motion, the net result, whether you call it substitution or whatnot, is really an amendment by way of substitute, and I suppose that is what is in their minds.

THE CHAIRMAN: The note says that "This subdivision has been added to care for a situation such as that arising in Boaz v. Mutual Life Ins. Co. of New York." Tell me what arose there. The note may make it sufficiently clear.

DEAN MORGAN: That was a case where the court set aside the judgment just for the purpose of allowing the time for appeal, wasn't it?

PROFESSOR MOORE: No.

THE CHAIRMAN: No. That was a case in the District of Columbia.

MR. LEMANN: I also wondered, Mr. Chairman, about the purpose of that clause, "Rule 77(d) governs notice." That is contained in the note that you just referred to. I didn't see anything about notice in 77(d).

JUDGE CLARK: What is that, Monte?

MR. LEMANN: I was a little confused by what you meant by the second sentence of your note under subdivision (e) on page 69. You say, "Rule 77(d) governs notice." I said to myself, "What about notice? Notice about what? There is no

word there about notice."

JUDGE CLARK: Maybe that was inadequate. It was the giving of notice by the clerk.

THE CHAIRMAN: That refers to the notice of the fact of entry of the judgment.

JUDGE CLARK: Yes.

MR. LEMANN: I think the sentence ought to be expanded.

THE CHAIRMAN: You can say, "Rule 77(d) governs notice of the fact of entry of the judgment."

JUDGE CLARK: We will make a note of that.

THE CHAIRMAN: Have we found out what the ruction was in the Boaz case?

PROFESSOR MOORE: Yes. The trial court first allowed the plaintiff to dismiss without prejudice. Subsequently, it set aside the voluntary dismissal and ordered a dismissal with prejudice.

THE CHAIRMAN: What was the question? Was it a motion having been served within 10 days after the entry?

PROFESSOR MOORE: No, sir, but we didn't think that our rules had any provision, unless you had something like (e), to allow a court to do what the court had done in the Boaz case.

THE CHAIRMAN: Oh, we wanted to prescribe a practice and limit the time. Is that it?

PROFESSOR MOORE: Yes. In this case they relied

upon the inherent power of the court to correct his error throughout the term.

THE CHAIRMAN: I see.

DEAN MORGAN: Oh, yes. I remember that now.

JUDGE CLARK: One of the counsel in the case wrote to us, and then it came up in our Committee session here and we drafted this provision.

THE CHAIRMAN: That clearly shows it was not a vacation that we were talking about, but an alteration, with the judgment running still in favor of the same party, with additional rights attached to it. What had been done, Monte, in the Boaz case was to alter a judgment in favor of the party; it left it in favor of that party, but it made the judgment with prejudice instead of a judgment without. That is a plain alteration, and not a vacation.

MR. LEMANN: That is right.

THE CHAIRMAN: That leaves us with the question whether there is any need of amending subdivision (e) in the light of the note. The note would satisfy the court of what we had in mind.

MR. LEMANN: If you put the "except" clause in that the New York Association wants, I think it is confusing and not helpful, because it muddles my thinking to think of an n.o.v. judgment as an alteration or amendment of a judgment.

THE CHAIRMAN: Yes. You agree, then, that we will

reconsider the amendment that we just agreed to. Now what is your pleasure?

MR. LEMANN: Leave it as it is, I would say.

JUDGE DOBIE: I don't think there is any confusion there. Of course, it is a little technical in a way. You say that that alters the judgment without prejudice. What you do is really scratch out three letters, but you change it quite materially from without prejudice to with prejudice.

THE CHAIRMAN: I would say that we should let it stand as it is and enlarge the note.

JUDGE DOBIE: I think that would take care of it.

THE CHAIRMAN: Enlarge the note by saying that this subdivision has been added to care for a situation such as that arising in Boaz v. Mutual Life, that it relates only to alterations or amendments, and not to vacations or reversals.

JUDGE DOBIE: I think that would take care of it.

MR. DODGE: You mean it shall not operate to extend the time under Rule 50. Ordinarily, the judgment would be entered immediately upon finding of the verdict. It would be a rare case where the court ordered the judgment not to be entered forthwith, which is the only case where this might be claimed to extend the time.

THE CHAIRMAN: That is right.

JUDGE CLARK: I think we might expand the wording a little with reference to Boaz to say at least that it has

been added to make clear that the court possesses the power asserted in the Boaz case. In the Boaz case there was a dissent by Judge Johnsen. Two members of the court took the position that they had power to recapture the judgment. This is what Judge Johnsen said in dissenting:

"But under the rules as they stand, I do not believe that the court can in such a situation reach out and automatically recapture its hold upon the proceedings which the unconditional termination of the trial and the discharge of the jury without any reservation at the time seem to me to have wiped out and to which the order granting leave to dismiss is wholly inconsanguineous."

THE CHAIRMAN: Are you satisfied to leave (e) as we have it and to enlarge the note on the Boaz case to show exactly why we put that clause in? Monte, is that all right?

MR. LEMANN: Yes. I want to come back to my reference to Rule 77(d), but that is separate.

THE CHAIRMAN: Yes. Then, it is agreed that subdivision (e) of Rule 59 as written stands, but the note of explanation will be enlarged.

MR. LEMANN: I want to ask about expanding that note, that reference to governing notice. Rule 77(d) is notice of a judgment, particularly for the purpose of appeal, isn't it?

THE CHAIRMAN: I don't know why we mentioned 77(d)

at all.

MR. LEMANN: That is what I am asking, why it is mentioned here specially. It confused me. I thought it might be mentioned in many other places as well as here.

JUDGE CLARK: I am afraid I can't answer this. Do you remember why we put it in there?

THE CHAIRMAN: It infers that some notice of entry has to be made before you are bound. We are rather shying away from that. I think we ought to strike out the phrase, "Rule 77(d) governs notice."

JUDGE DOBIE: I don't think it has any place there. I would strike it out. I think you make too many references, and their correlation will confuse, unless the Reporter finds some reason for it.

SENATOR PEPPER: Mr. Chairman, it seems to me the Reporter's suggestion ought to be acted upon. If it is acted upon, it meets the difficulty suggested by the New York Bar Association, namely, that the reference to the Boaz case should contain a statement that this subdivision has been added not merely to take care of a situation such as that arising, but to make clear that the court has the power which it exercised in the Boaz case, because there we have a reasoned discussion, with an intelligent dissent. The New York Bar Association says that if we leave (e) in the shape in which our italics leave it, then it may still be argued that the only amendments

permitted are those specifically provided for in the rules, and this one isn't specifically provided for. Isn't there something in that, Mr. Reporter?

JUDGE CLARK: Yes, I think it is quite so. I am only wondering a little about this: Haven't we in any event recognized and may there not be a fairly extensive power? We speak of it as though it were a limited power, and the Association of the Bar does here. However, aren't we validating or okaying the action of the court, and if we say it is only in a limited situation, yet it has to be a general one to operate in a limited situation.

THE CHAIRMAN: The Senator's point about the note and the reference to the Boaz case was that it ought to be clear that we are not creating the power but are making it plain that it always existed.

JUDGE CLARK: That is all right. Perhaps I am adding something which is a little bit extraneous, but I am adding that the power which has always existed has been an extensive power;

SENATOR PEPPER: Couldn't the note be phrased to make it clear that the power exercised in the Boaz case was merely a particular application of the general power given by the rules?

DEAN MORGAN: The Boaz case did it after 10 days. They were using the term as the measure, weren't they?

THE CHAIRMAN: Which is wrong, of course.

DEAN MORGAN: Yes. That is what I thought. So, the majority had the notion that the old limitation as to the term still existed as to the power over the judgment, where we had not said anything about it.

THE CHAIRMAN: The effect of (e) is not only to recognize the existing power to alter or amend, but to place a time limit on it. If we had no 10-day limit and if we had no term limit, you could alter the judgment five years afterward.

DEAN MORGAN: Yes.

JUDGE CLARK: I think that in their opinion proper they don't stress the term very much. In the statement of facts it was very clear. In the statement of facts they say: "Two days later in the same term of court the Insurance Company filed," and so forth. "This motion was heard within the term, and the court set aside the dismissal."

THE CHAIRMAN: They are hooking on to the term all right.

JUDGE CLARK: They don't give that, however, as a reason below. They just discuss the rule.

PROFESSOR SUNDERLAND: What we are really doing is putting in a little rule to fill the gap left by the abolition of the term. That is what we are doing.

SENATOR PEPPER: That is right.

MR. DODGE: It would prevent the result in the Boaz

case.

THE CHAIRMAN: No, because the Boaz motion was made two days after the judgment.

MR. DODGE: I thought he just said it was after the judgment. I thought it was stated by the Reporter a minute ago that it was after the 10 days.

THE CHAIRMAN: No. It was two days after entry of the judgment that the motion was made.

JUDGE CLARK: That is right.

MR. DODGE: How do we care for that situation? How does this change care for that situation?

THE CHAIRMAN: It provides that that sort of thing can be done within 10 days, and prior to that time there isn't any limit at all in the rule.

PROFESSOR SUNDERLAND: No.

JUDGE CLARK: In Johnsen's theory, there is no stated power at all. Our rules in form seem not to permit it at all.

MR. DODGE: This rule confers the power which was exercised in the Boaz case.

THE CHAIRMAN: Recognizes it.

MR. LEMANN: Legitimizes a bastard practice.

THE CHAIRMAN: Places a limit on time. Did you want to add anything, Senator Pepper?

SENATOR PEPPER: I threw it out for the Reporter to

consider the propriety of expanding the note in the light of this discussion, because it is clear to me, as these gentlemen on my left have said, that the rule is sufficient as it stands. I think the dissenting opinion of the Judge and the opinion of the Bar Association are something that require attention by us, at least to the extent of a note. That is all I meant.

JUDGE CLARK: I think it is proper to be expanded.

THE CHAIRMAN: We haven't got this record business settled yet.

JUDGE CLARK: That should be included, I think, quite clearly, only it isn't a reference to 59(a).

DEAN MORGAN: It ought to be (e), oughtn't it?

JUDGE CLARK: Yes, it is a reference to (e). You see, in 62(b) we refer to the things by name.

THE CHAIRMAN: What is 62(b)?

DEAN MORGAN: Stay of execution.

THE CHAIRMAN: While we are on it, it is agreed, is it, that 62(b) will be altered by including a reference to 59(e)?

DEAN MORGAN: That is right.

THE CHAIRMAN: That is agreed to.

MR. HAMMOND: Ought it not to be (a), too? You say on a motion for new trial.

THE CHAIRMAN: That is already in.

MR. LEMANN: We could start 62(b), I guess, by

referring to the rules and not spelling out all those motions there.

JUDGE CLARK: Rule 59 is limited to a motion for new trial. If we just made it a motion under Rule 59, it would have been all right, but it is the specificity that raises the question.

THE CHAIRMAN: Then, we will pass on to the question of Rule 60, Relief from Judgment or Order.

JUDGE CLARK: There are some remarks on (a), but (a) has usually not given any difficulty. Mr. Youngquist has a suggestion for improvement, but we didn't like it particularly ourselves. Mr. Cantrell thinks it goes too far. Unless there is some question, I wouldn't raise any question about it.

JUDGE DOBIE: Isn't their difficulty there, Charlie, that they give very broad application and interpretation to the word "clerical"?

JUDGE CLARK: Yes.

JUDGE DOBIE: I think what we mean by "clerical mistake" there is pretty clear. If it means what it says, I don't believe there is any difficulty.

THE CHAIRMAN: Have we any suggestion from anybody to alter 60(a)?

SENATOR PEPPER: There is one question that is really entirely irrelevant to the matter immediately under discussion, but it is suggested to me by this reference to the

correction of mistake pending an appeal. In the pending Pullman case an appeal has been taken by the Government. Various administrative questions requiring the action of some court present themselves pending that appeal. For instance, there is a provision in the original decree, not appealed from, that heavy weight equipment belonging to the Pullman equipment may be purchased by railroads, but only with the approval of the court. An appeal is taken. Is there any residual authority in the district court after an appeal has been taken to do anything in the premises, or is that entirely out of their hands, in which case it means business is at a standstill because you can't apply very well to the Supreme Court for any such order.

THE CHAIRMAN: It isn't covered by this rule at all.

SENATOR PEPPER: Oh, no. I am apologizing for intruding the thing here, but just the necessity for providing that these mistakes may be corrected, and so forth, pending appeal led me to raise the question as to the sense of the meeting as to whether there was any residual authority in a district court where there is a big property and a going concern at stake, to do anything to keep things moving, or does the appeal just paralyze the entire business so far as recourse to the court is concerned?

JUDGE CLARK: So far as I know, I have always thought that that was a very considerable and quite conceivably a dreadful question. I know the general tendency is to feel

that the district court has no more power. You start with that sort of generalization. I know we do it in our business, and the district courts do it. Most of our rules are framed sort of incidentally, like this one, on that thesis. Yet, I never thought that could be quite as true as the generality assumes. There must be some limit to it. It obviously is not true that if an appellant appeals from a long decree and is affected by only part of it, it knocks out the whole decree.

THE CHAIRMAN: This is property in the administration of the lower court under decree, and an appeal is taken. I don't know anything about it, but my guess would be that the hands of the district court are tied against doing anything to carry out the decree, but I think he would be allowed to administer the property in his hands as long as he was not pre-judging the particular point. I just assume that. Like a receivership or anything else where a certain issue is taken up, the court can still go on and administer the property if the administration he is doing is not based on the assailed clause in the decree. That is just thinking out loud as far as I am concerned.

JUDGE DONWORTH: Wouldn't it depend to some extent on whether there had been a supersedeas in some form? As I understand, the general rule is that an appeal does not prevent the local court from going ahead with anything in the way of enforcement of the decree or judgment, unless there is a

supersedeas, and I should assume that, if there were no supersedeas in one form or another, applying to the court for the kind of order that Senator Pepper speaks of would be merely in the nature of enforcing the judgment. So, it would turn upon the question of whether what was done on the appeal amounted to supersedeas, I should think.

SENATOR PEPPER: I apologize for bringing it up. It was an interesting question suggested by this language.

THE CHAIRMAN: If nobody has anything further on 60(a)---

JUDGE CLARK: ---we come to 60(b), which has always caused us a great deal of trouble, which is one of the difficult rules. I might say that we have memoranda on the earlier rules. Do you want to go ahead with 60(b) or go back to the earlier ones?

THE CHAIRMAN: I think we had better keep along on our route here, and we can go back any time to those others, unless there is somebody who thinks we ought to stop now and start to study those things. I think maybe we can have time to read them over ourselves before we bring them up again. That is up to the Committee.

JUDGE DOBIE: I believe we will make better time by going ahead until we get down to some different thing, like appeals, and then going back to that.

THE CHAIRMAN: If there is no objection, we will

continue at least for the time being to plow ahead. We are on 60(b).

JUDGE CLARK: Bill, do you want to say just how it stands now? We have been working on this.

THE CHAIRMAN: You mean what the objections are to (b)?

JUDGE CLARK: It is a little broader than that. We have struggled here as to whether we could get a rule which was definite on finality, with the exceptions definitely stated. We have not succeeded very well so far, and I am not at all sure whether we can or not, but I think Mr. Moore has still been working on that. You asked him at the end of the last meeting to work some more on the idea of trying to get a rule that told the bar a good deal in itself.

THE CHAIRMAN: Just how did I phrase it? I have forgotten what mine was.

PROFESSOR MOORE: You wanted to know whether there was anything left out that we hadn't covered in 60(b).

THE CHAIRMAN: Any established powers to alter or vacate the decree.

PROFESSOR MOORE: That were covered by the old writs of coram nobis, coram vobis, audita querela, and so on, that we abolished.

THE CHAIRMAN: Our purpose in 60 is to establish the practice for every recognized way of changing and granting

relief from judgments, and I wanted to be sure that there were no ways left that the court could alter a judgment and grant relief from a judgment which we had not taken cognizance of and provided some procedure for. That is the point.

PROFESSOR MOORE: You got my short memorandum, did you? It has been distributed here.

THE CHAIRMAN: The one you brought to the meeting here. Suppose we read this aloud, shall we?

SENATOR PEPPER: Yes.

THE CHAIRMAN [Reading]:

"Memorandum Concerning the Inclusiveness of Rule 60(b) as Amended

"The rule as now amended covers the various situations where a party could obtain relief from a final judgment by an independent action in equity, or by a writ of audita querela, writ of error coram nobis, or bill of review or bill in the nature of a bill of review, except in two situations:

"(1) The writ of audita querela at law and the bill of review in equity could be used to show matter arising subsequent to the entry of the judgment, by way of satisfaction, release, or discharge of the judgment. (See previous Memorandum on Rule 60(b), pp. 20, 23, 28.)

"(2) The writ of audita querela at law and the bill of review in equity could be used to show that a prior judgment, which was made the basis of a subsequent judgment, had

been reversed or otherwise vacated. (See previous Memorandum on Rule 60(b), pp. 20, 23-24, 30.)

"It was also settled that where a final decree granting a permanent injunction has become of no use or benefit to the one whose rights were thus protected, or where it would be inequitable to continue it, because of the occurrence of facts and conditions since its rendition, the decree may be modified or vacated. In this situation the bill of review was not relied upon for the power, but rather the principles inherent in the jurisdiction of the chancery due to the continuing effect of an injunctive decree with prospective application. (See previous Memorandum on Rule 60(b), p. 11.)

"It was also settled that a judgment which was void for want of either jurisdiction of the subject matter or jurisdiction of the defendant was subject to collateral attack in any forum at any time. Pennoyer v. Neff (1878) 95 U.S. 714, 24 L. Ed. 565; Williams v. North Carolina (1945) 325 U.S. 226, 65 S. Ct. 1092. And hence the rule that a court can purge its records of void judgments finds express recognition in some statutes. California, for example, provides that the court 'may, on motion of either party after notice to the other party, set aside any void judgment or order.' (See previous Memorandum on Rule 60(b), p. 1.)

"If it is thought desirable to cover all these situations, we recommend that in line 40, after the word

'court' the following matter covering reserved power be added: or (4) to set aside a void judgment, or (5) to grant appropriate relief from the operation of a judgment because of its satisfaction, release, or discharge, or because a prior judgment upon which it is based has been reversed or otherwise vacated, or because of a change of circumstances it is no longer equitable that the judgment should continue to have prospective application."

SENATOR PEPPER: May I inquire of Mr. Moore whether that means that under the rule as we have it before any amendment, there is a possibility that in the two cases he specifies, in which audita querela and the bill of review would be available but have not been covered in our rule, we abolish those two procedures without making it perfectly clear that the relief which could have been obtained by them can now be obtained under the rule?

PROFESSOR MOORE: I think that is correct. Of course, I believe Judge Clark thinks that matter arising subsequent to the entry of the judgment by way of satisfaction and leave for discharge need not be covered in Rule 60.

JUDGE CLARK: Yes. As a matter of fact, I haven't felt quite so sure as Mr. Moore that these were properly matters that should be considered relief from a judgment. I still don't believe they are. Of course, it might be all right to put them in if you wanted to be quite sure. It is true

that some old cases did go after a judgment this way, but take the matter of injunction. I think it has been definitely ruled that the court has continuing power over an injunction, and I don't believe that is a matter logically or rationally within the kind of thing we are thinking of here. I think that in the Sherman Antitrust cases the Supreme Court has definitely said that after some years they can be modified.

JUDGE DOBIE: Isn't the same thing true of alimony?

JUDGE CLARK: Yes. We had a case involving alimony recently, but that has a little different angle to it. It seems to me the same is true as to satisfaction or payment or release of a judgment. I don't believe, when you say a judgment has been paid, that you are getting relief from a judgment. I don't know how important that necessarily is here. I don't think that I would have put it in, and perhaps I might have said in the note that that isn't applicable here, but I suppose that is just a question of how you get at it. If you wanted to be perfectly safe, you might put in everything that was ever reached by audita querela.

THE CHAIRMAN: You might say this: "Nothing herein shall affect the power of the court to set aside a void judgment or to grant appropriate relief from the operation of a judgment because of its satisfaction, or because a prior judgment has been reversed or otherwise vacated, or because of a change of circumstances."

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SENATOR PEPPER: I was thinking of the case in which a judgment still stands on the docket of the court, and the question is of the marketable title in a real estate settlement where, if the judgment is effective, its lien covers the property in question, and you want to get it removed as a cloud on your title. Isn't it important that there should be a specific provision enabling you to do so?

DEAN MORGAN: Not if it is void. You can attack it in your action to acquire title.

SENATOR PEPPER: I mean it prevents the necessity of an action. The title company raises the point that there is a judgment. You want to get rid of that without any proceeding. It seems to me you ought to be able to go in and, on motion, have that judgment struck off in any of the cases specified by Mr. Moore.

MR. LEMANN: His amendment would not cover that, because he proposes to put the amendment in line 40, and therefore you would get relief either by motion or by an independent action.

DEAN MORGAN: Either one.

JUDGE CLARK: Of course, as you read along, you have in mind the fundamental question that we have worried about a good deal, which is whether you can absolutely list all of these. Some members of the Committee rather objected to that, and you will notice that some of the commenters would rather

not have them listed. The virtue of listing is to make a definite rule, but that may also be its vice.

MR. LEMANN: For instance, would the language of Professor Moore cover the statute of limitations running against the judgment. He says, "to grant appropriate relief from the operation of a judgment because of its satisfaction, release, or discuarge".

THE CHAIRMAN: If a suit were brought on the judgment and the statute of limitations was pleaded, you might bring an action for a declaratory judgment.

MR. LEMANN: Senator Pepper says there is a cloud on the title, a judgment recorded twenty-five years ago, and that is now barred by the statute. He says he ought to be able to proceed by motion to have it cancelled to clear the title. Would that be a proceeding by motion in the original cause in which the judgment was rendered, by someone who was not a party to that cause but who is now affected by the judgment? Of course we would mandamus the recording to cancel that judgment. In fact, he would cancel it just on the showing that it was more than ten years old, but if we had any difficulty with him we would mandamus him to do it in a new proceeding.

THE CHAIRMAN: Would you name the heirs of the former owners of the judgment?

MR. LEMANN: We would have to make the people

claiming the judgment a party. You would do it by a new suit.

THE CHAIRMAN: That is what I mean.

MR. LEMANN: Senator Pepper suggested that it be done by motion. At least, he inquired about that.

SENATOR PEPPER: I didn't mean, Monte, a motion would be applicable in a case where you were dealing with an old judgment and there was no pending action. I agree that it will have to be by independent action there. All I meant was that if the action was still pending, it ought to be possible to strike off the judgment on motion. I quite agree that the Reporter's suggested rule covers both alternatives, both the motion where that is appropriate, and independent action where a motion is not appropriate. The only question is whether we ought to spell out the proposition. Having abolished audita querela and the bill of review, we surely have included everything that you could have gotten in that way. I understand that is what Mr. Moore has tried to do.

THE CHAIRMAN: If we put the clause in as he has it, have we really accomplished the purpose of this rule? The rule is not to establish these powers, but is simply to prescribe the practice in the exercise of every power that he possesses. We say, "grant appropriate relief from the operation of a judgment because of its satisfaction, release, or discharge, or because a prior judgment upon which it is based has been reversed or otherwise vacated, or because of a change

of circumstances", and that is followed by a provision that "the procedure for obtaining relief from judgments shall be by motion as prescribed in these rules or by an independent action."

I would infer that except when these rules say that these things may be done by motion, then your only method is by independent action. Is that the way we want it? If you want to be able to set aside a void judgment, do you have to bring an independent action? That is where we would be left unless the rules stated that it could be done by motion. I am afraid we failed to prescribe the practice if we did not say whether it was by motion or by independent action in these additional cases. Isn't that the result when your objective is to prescribe the practice?

JUDGE DONWORTH: Isn't the Reporter's suggestion here that it be made clear that a motion will accomplish these things?

THE CHAIRMAN: We are not sure that we want to do that.

MR. LEMANN: If he wants to put it in line 40, he is adding it to a sentence which deals only with independent action, isn't he?

PROFESSOR MOORE: That is not wholly true.

MR. LEMANN: Line 31 says: "This rule does not limit the power of a court (1) to entertain an independent action to relieve a party from a judgment, order, or

proceeding, or (2) to set aside within one year". You don't say how. That may be done by independent action or by motion?

PROFESSOR MOORE: No. Pursuant to that statute, it has to be done right in that proceeding.

MR. LEMANN: In that particular case.

PROFESSOR MOORE: Yes, sir.

MR. LEMANN: "(3) to set aside a judgment for fraud upon the court." How is that done, by independent action or motion?

DEAN MORGAN: Either one.

PROFESSOR MOORE: We don't say.

MR. LEMANN: You don't say, and when you add (4) and (5) in your amendment you don't say, either.

PROFESSOR MOORE: The only virtue it has is that you have reserved power over those, at any rate.

JUDGE DOBIE: It is simply a statement that there is nothing in this rule that curtails the power of the court in (1) and (2), and it does curtail it in (4) and (5).

THE CHAIRMAN: Then we leave it to the preceding practice, whatever it was under the decisions of the courts, to say whether it can be done by motion or independent action. We are doing that already, of course.

MR. DODGE: Shouldn't we change lines 42 to 45 and say, "and any relief that could have been obtained under any of those proceedings shall hereafter be obtained by motion or

by an independent action"?

DEAN MORGAN: That has been suggested by somebody.

PROFESSOR SUNDERLAND: That is what the Chicago Bar Association suggests.

THE CHAIRMAN: That is what we did in the case of mandamus and scire facias, but we had some objection to that before. I have forgotten what it was.

DEAN MORGAN: The point there was that nobody seemed to know what could be done under these.

THE CHAIRMAN: Oh, yes. I suggested it, and somebody hammered me and said we ought to tell the bar what could be done by these old writs. Otherwise, we were back again to examine Mr. Moore's memorandum telling us what they were for. I thought that was sound.

MR. DODGE: Those writs dealt with the substantial rights of the parties and what those rights are. We are dealing only with procedure with regard to them.

THE CHAIRMAN: That is it.

MR. DODGE: I don't see that we have to tell the bar what their substantial rights are, but simply refer back to the old law.

JUDGE DONWORTH: At the Washington Symposium in 1938 the point was raised that under the practice in the District of Columbia, there are certain reliefs that must be pursued by scire facias. That is prescribed by statute or by

rule. One of the questions propounded was, What have you done with that? I answered the question. I said that while we have abolished scire facias by name, any appropriate action that your courts by local rule might sanction would cover the point.

THE CHAIRMAN: You mean it could be done either by motion or by independent action instead of by a writ of that type, according to whichever is consistent with the former practice.

JUDGE DONWORTH: That is so.

THE CHAIRMAN: The objection to Rule 60 as it was before was that there were certain reliefs that the courts were in the habit of granting against judgments, which they continued to grant after these rules were adopted, and we didn't prescribe the practice. They were fishing around on bills of review, coram nobis, and all sorts of things. We agree that relief of that type is to be granted, but the rules have a vacuum in them if they don't prescribe the practice. So, we are attempting in this rule to prescribe the practice for all the things that a court can do with a judgment in the way of granting relief under 60.

SENATOR PEPPER: Wouldn't Mr. Dodge's suggestion be a useful one, that it should be made clear in line 42 that what we really mean is that in abolishing these writs we mean to substitute for them procedure under these rules? Isn't that your thought, Bob?

MR. DODGE: Yes, without affecting the substantial rights of the parties in any way.

SENATOR PEPPER: Yes.

THE CHAIRMAN: I brought that up, and we threshed that all out, and it was squelched by an overwhelming vote of the Committee on the ground that that was dumping back on the lawyers the necessity, obviously, on the face of the rule, to go and get out the Doomsday Book and a few other things and find out what a writ of audita querela could do. We were almost unanimous on that. Now we are bringing that up again and re-hashing it.

SENATOR PEPPER: Isn't there a little different viewpoint now, Mr. Chairman? As I understand it, what we want to do is to make sure that all relief which a court is competent to give in respect of the judgment, whether it is this, that, or the other, is to be sought not by some special form of antique proceeding, but by an appropriate proceeding under these rules, which means either a motion or an independent action.

THE CHAIRMAN: That is true, but after long discussion, we deliberately adopted the idea that we would not put that in the form of saying that whatever remedies were heretofore granted by audita querela, coram nobis, and whatnot, shall hereafter be granted by motion judgment or independent suit. We rejected that, and we undertook to make up our minds for

ourselves what kinds of relief under those things that were formerly granted were still available and then to specify them in this rule. The whole rule is constructed on the theory that we, this Committee, have studied audita querela and the rest of them and have made up our minds that we are specifying here all the kinds of relief that are now recognized as being grantable by a court from a judgment, whether under these writs or not, and are prescribing the practice. If we are going to take that all back, then I think we have to recast this rule and stop trying to specify all these different things, just wipe it out and say that any relief heretofore granted by audita querela and the rest of them can be granted by motion or independent action. We have to do one thing or the other.

The rule now is constructed on the theory that we have gone through the history of these old procedures and made up our minds that these are the things that are left that courts grant today, some of which used to be granted under the form of these old writs. We have attempted to specify them. I think we ought to stick to that now. We are trying to specify every kind of relief that still remains. I raised the question whether we had done a complete job and whether there were some kinds of relief that we had not even mentioned. I asked the Reporter to produce this note, and he says there are certain things that the court can do that we have not mentioned.

He says that they are "(4) to set aside a void judgment, or (5) to grant appropriate relief from the operation of a judgment because of its satisfaction, release, or discharge, or because a prior judgment upon which it is based has been reversed or otherwise vacated, or because of a change of circumstances it is no longer equitable that the judgment should continue to have prospective application." He wants to add that, and that would complete the list of all kinds of relief that courts today will grant.

The proposal now is to dump it back upon the lawyers to study for themselves what audita querela and the rest of them did. I don't think it is consistent with this draft.

PROFESSOR SUNDERLAND: I think, in fairness to the lawyers, if we leave all this old stuff in our rules, we ought to attach as a note Mr. Moore's memorandum of seventy-five pages on what you can do with all those old writs.

THE CHAIRMAN: I was the one who made the suggestion a year or so ago that Bob Dodge now makes, and I was squelched, and agreed to be squelched, by an overwhelming majority of the Committee, who thought it was not our business to leave to the lawyers the job of figuring out what all these kinds of old writs should be used for.

SENATOR PEPPER: Wouldn't your feelings be assuaged if it now turned out that you were right?

THE CHAIRMAN: No, I don't think it has turned out

that way. I think that it is an imposition on the bar for us just to draw a rule and say that any writs of audita querela, coram nobis, and so on, are abolished, and the relief heretofore granted by those writs may now be granted by motion or independent suit. The lawyers would just hit the ceiling. There isn't one in a hundred who has ever heard about a writ of audita querela. I think our choice of solving that problem for ourselves and listing the things is the right course.

SENATOR PEPPER: Mr. Chairman, isn't there a different course? You have used language which presupposes a knowledge of the relief you could obtain by those writs, but, as I understood Mr. Dodge's thought, it was not a specification of what could have been obtained by those writs, but that whatever power a court has to deal with a judgment, whether it is void or voidable or whatnot, is to be exercised in a proceeding under these rules. It is an awfully simple thought, it seems to me. It ought to be possible to state it. Either we have got to specify, as you suggest, all the categories in which a court may deal with the judgment, or else we must say that whatever a court may do with a judgment, it must do under these rules.

THE CHAIRMAN: I don't know where we are going to arrive if we take a question like this, which we have threshed over for two years, have reached a definite conclusion on it and constructed a rule on a definite theory, and go back now.

SENATOR PEPPER: What do you think we ought to do?

THE CHAIRMAN: I don't think I want to report a rule like that to the Court without going back to the bar.

MR. DODGE: What additional burden is imposed upon the lawyers? If a lawyer wanted to bring a bill of review or an audita querela now, he would have to study the old law and find out what was available. All we have told him is that instead of designating his proceeding in that way, he must bring an independent action. I don't see that the slightest additional burden is imposed upon the lawyer. I think that this sentence as it stands is the most confusing sentence in the whole rules to the bar. If we simply said that anything you could have done under those old proceedings, you can do by an independent action, it would help greatly in understanding what is open under the independent action. We must find out what they were.

I don't recall that you suggested what I have now suggested and that it was overwhelmingly overruled. It seems to me it was very much safer--

THE CHAIRMAN [Interposing]: We can go back to the record and find it there.

MR. DODGE: We can't list all the things. I am not prepared to vote on a list of items and to say that that is all that could have been open under those old proceedings. I don't think that we ought to undertake to affect the

substantial rights of the litigants, whatever they were, which could have been availed of under those old proceedings.

JUDGE DONWORTH: The point under discussion is affected and in part covered by Rule 81(b), which doesn't seem to have been referred to. Rule 81 relates to the applicability of the rules in general, and under subdivision (b) we cover the subject matter of this discussion, except that we limit it to two old-fashioned remedies, scire facias and mandamus. It may be that we should change 81(b) by enlarging after "scire facias and mandamus" these other writs which are mentioned here, then with perhaps some general language that will include all the old-fashioned remedies, leaving the rest of the sentence as it is now in the rule: "Relief heretofore available ... may be obtained by appropriate action or by appropriate motion under the practice prescribed in these rules."

It seems to me that is sufficient notice to the bar that they can go at it either by independent suit or, if we have made specific provision, then by motion. The difficulty here is only that we have confined this to two particular writs instead of including a lot of others.

THE CHAIRMAN: For instance, we have not prescribed any practice in these rules by motion for setting aside a judgment if it is void or for any of these other things that he has specified here. So, the course that you suggest would mean that we are requiring the man to bring an independent suit.

JUDGE DONWORTH: I don't think so. I think the word "appropriate" is helpful here, "by appropriate motion".

THE CHAIRMAN: "under the practice prescribed in these rules."

JUDGE DONWORTH: Yes.

THE CHAIRMAN: Where do you find a rule that calls for a motion to set aside a void judgment?

JUDGE DONWORTH: We have rules here about motions, and that is an appropriate method of going ahead.

THE CHAIRMAN: Yes, an appropriate method, you say, even though we haven't specified that a motion may be made to satisfy a judgment or to vacate it because a prior judgment has been reversed. The only motions we provide for are motions for new trial, and so on, but still there is prescribed in these rules a procedure by motion to set aside a void judgment? I don't think so. I think, as we have worded this thing in 60(b), unless there is a motion for a certain purpose included in the purposes specified in the rules, then your remedy is by action, because we have not specified that that is the object of any kind of motion that is outlined here.

JUDGE DONWORTH: I have an idea there will be many motions presented every day in the year for which we have not prescribed the procedure. We have specified how motions shall be served and, if they call into question matters dehors the record, then you can file affidavits, and so forth. I think

the general practice about motions comes in here, and if it doesn't, then the bar is thrown back to the independent action.

MR. LEMANN: We haven't undertaken to catalogue every case in which a point may be presented by motion.

JUDGE DONWORTH: That is so.

MR. LEMANN: The general thought is that you could proceed by motion in a great variety of cases, I suppose. It would be up to the judge, perhaps, on objection, to say that this is not a thing that can be presented by motion. You would not have to be able to point out a particular rule that authorized that particular point to be raised by motion. I don't believe that that would be necessary. I would have thought, like Judge Donworth, that many motions are presented every day for which we have no specific authority that that particular point may be presented by motion.

THE CHAIRMAN: The thing that bothers me is the phrase, "shall be by motion as prescribed in these rules". That would carry the idea with me that we have in the rules the description of a motion to cover that, and if there is no motion to deal with that subject, then it has to be a general action.

MR. LEMANN: Maybe we ought to change that parenthetical reference. I thought "as prescribed in these rules" was a reference to the motion practice generally.

THE CHAIRMAN: Maybe it was, but it is a very vague

clause.

MR. LEMANN: My own notion, reading these last lines, 43 to 45, "the procedure for obtaining relief from judgments shall be by motion as prescribed in these rules or by an independent action", is that that is about as broad language as you could find, that that really makes unnecessary the Reporter's suggested amendments, because all he has done is to put in some more categories of relief from judgments. It would seem to me that the comprehensive language that we now have was better than any attempt at enumeration, which might prove to be defective. I should think it better to rely on all-inclusive language.

THE CHAIRMAN: Let me ask you this. We specify certain grounds on which judgments can be set aside. Then we say that this rule does not limit the power of the court to do certain things. We have prescribed certain procedures for setting aside judgments on certain grounds, and the plain inference from the whole construction of the rule is that it does limit the power of the court unless we have saved that power in the rule.

The danger was that our saving clause was not broad enough where we said that this does not limit the power of the court to entertain an independent action to do this, or to set aside a judgment within one year as prescribed in so-and-so, or to set aside a judgment for fraud upon the court. If that

saving clause was insufficient, our rule was defective. So, to be consistent, I asked the Reporter to see if there were not some other grounds for relief that ought to be saved here, and he picked these up.

If you don't like that way of handling the thing and want just a blanket clause for relief, not specifying all these things, I think you have to reconstruct the whole rule. The theory of it is that we have expressly provided for certain kinds of relief, and then by a special clause we have expressly saved certain other kinds of relief. On that construction, if your saving clause does not cover everything, we are gone.

My idea is that maybe your theory of how the rule ought to be constructed may be preferable to what we have done, but you would have now to upset the whole theory on which the rule has been drawn and start anew if we were not going to proceed upon the theory that we are enumerating what can be done and enumerating what other rights are saved. That is the theory on which the rule is built. The minute that you depart from that, that you don't carry out your theory and make your saving clause complete, as I suggested and as the Reporter now recommends, you are mixing the rule up and switching from one theory to another, which will make the rule very confusing.

SENATOR PEPPER: Mr. Chairman, along the line of your thought, may I raise this question? You will observe that in (b) we are dealing primarily with what may be done on

motion, and the various things that are there catalogued, including the italicized matter about newly discovered evidence and fraud, all have to do with what you may do by motion. Then it is provided in line 31 that this rule (this rule specifying things you may do by motion) "does not limit the power of a court ... to entertain an action", which is properly amended to read "an independent action" as distinguished from a motion, "to relieve a party from a judgment, order, or proceeding," without specifying what the basis is, leaving that within the general power of the court.

THE CHAIRMAN: That is right.

SENATOR PEPPER: Wouldn't the rule perfectly carry out your view if, under those circumstances, it were to stop in line 40, and then the matter in lines 40 to 45 were made the subject of inclusion in Rule 81 in accordance with the suggestion of Judge Donworth? Then you would have the general proposition that the purpose of the rules is to abolish all special forms of procedure, to substitute proceedings under these rules, and then the particular rule we are discussing would have catalogued a lot of things you could do on motion. If, by any chance, we failed to state something that the court might do in the way of relief on motion, the most that could happen would be that an independent action for that relief would have to be brought. It seems to me that that carries out your thought, sir, almost perfectly.

THE CHAIRMAN: I am not willing to agree to any rule that would compel an independent action to set aside a judgment for fraud upon the court. Every day the courts are setting them aside on motion in the original case, years after the judgment was entered.

SENATOR PEPPER: Perhaps I didn't make myself clear, sir. I meant to include in the rule everything that it is proposed to include in it down to and including the word "court" in line 40, and that includes the setting aside of a judgment for fraud upon the court. Then I thought, having made it clear that a certain lot of things that we specify can be done on motion, having left in a provision about what you don't do by motion but by independent action, and then having put in 81(b) an abolition of all the special forms of procedure, you had the thing in pretty good shape.

THE CHAIRMAN: If you are doing that, specifying certain things that may be done by motion, saying this does not limit the power of the court to set aside a judgment for fraud upon the court, if you are making a list of them, then why don't you add after the word "court" the additional powers, some of which ought to be exercised by a motion?

SENATOR PEPPER: That may be.

THE CHAIRMAN: To set aside a void judgment, to grant appropriate relief from the operation of a judgment, and so on.

SENATOR PEPPER: That is all right with me.

THE CHAIRMAN: Or to make it clear that you can go into the court that renders an injunction judgment by motion instead of by independent suit and move to have the injunction lifted.

SENATOR PEPPER: It might easily be that we could put up in the catalogue of things you can do by motion this matter of setting aside a judgment for fraud upon the court. I think that is all right, but the point is that after you have done all you can to catalogue the things that can be done on motion, there is a residual power in the court to entertain motions not particularly specified, or if the court doubts its power to do the thing on motion, you have a saving provision that an independent action may be resorted to.

THE CHAIRMAN: I would say that if you added after "court" in line 40 the additional powers which the Reporter says the court is exercising every day on motion, I would not object to transferring the rest of it, that "Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished," over to Rule 81 the way we did with scire facias and mandamus; but again I raise the idea that there is reason for objection to altering that clause and saying that the relief heretofore granted by those writs may be had by motion, because we are dumping the question back on the bar then. It isn't like scire

facias and mandamus. Those are modern writs, and wherever they are used and have been used the bar is familiar with them, but, as Edson says, it would take a ninety-page memorandum to figure out what you could do under these other old writs, and you would not be sure then. The memorandum doesn't settle whether certain things could be done by audita querela and by coram nobis. I don't see any reason, when we think we have listed every kind of relief that a fellow ought to have and after we have made a full study of the thing, to throw that Pandora's box into the lap of the bar and find that there may be all kinds of things other than specified in this rule that you can do with a judgment. We will have to go and read up on audita querela and coram nobis and know what that means. You have seen the memorandum on it.

MR. DODGE: We aren't putting anything into the lap of the bar that is not there now. What I am anxious to do is to be sure that we are not taking away any right which under any of those proceedings could have been availed of by a lawyer. One of those is not an archaic proceeding at all. The bill of review is a very common procedure. There is a great bulk of litigation as to what is open under it, and I don't think we can try to summarize it safely. I don't see that we are doing anything unfair to the bar in any way, but I think we are aiding them, and I will make a motion to bring the matter up. We needn't discuss it indefinitely. This is in

accordance, I see, with the recommendation made by the New York Bar Association.

I move to amend lines 42 to 45 after the word "abolished," by inserting "and the relief from judgments formerly obtainable in any of those procedures shall hereafter be by motion as prescribed in these rules or by an independent action."

SENATOR PEPPER: May I inquire, Mr. Dodge, whether it is important that this should appear in this rule, or is it consistent with your motion that it be grouped with scire facias and mandamus in Rule 81?

MR. DODGE: Wherever the abolition of those rules comes, I think it should be added to it immediately. I don't find in 81 the provision referred to.

JUDGE DONWORTH: It is subdivision (b) in 81.

DEAN MORGAN: "The writs of scire facias and mandamus are abolished."

MR. DODGE: Yes, exactly. That is a good place for the whole thing.

SENATOR PEPPER: I am in favor of your motion if it is to transfer that declaration into 81(b).

JUDGE LARK: Senator, might I call to your attention that we discussed this before. That, of course, doesn't settle it, but it might bring back some of our thoughts. Judge Donworth actually made the mtoion on this, and then at the

same time he said, "Isn't there a question as to scire facias, and so on?" Then Rule 81 was read. Then the Chairman said that we would just dump the lawyers into a sea of uncertainty, and so on. Then he said, "I think the Judge's approach is better for this purpose than the one we had on mandamus," meaning Judge Donworth.

"Professor Sunderland: Furthermore, mandamus was a little different situation because we had no rule which gave the procedural remedies which mandamus gave, but we do have some rules here which give the remedies which these various old common law writs gave.

"The Chairman: I have a great deal of deference for Judge Donworth's draft here, but I rather wonder if it can't be condensed and if we can't develop this procedural thought by the clause that I have suggested here."

It was read, and there was some consideration of it.

THE CHAIRMAN: What was read? I am not clear.

JUDGE CLARK: "Judge Dobie: Read it again, will you?"

This is Judge Donworth's suggestion, which you read:

"Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review are abolished and the procedure [that emphasizes that we are dealing with procedure] for obtaining relief from judgments shall be by motion as prescribed in these rules or by original action."

THE CHAIRMAN: Surely.

JUDGE CLARK: The Chairman continued: "That develops the idea that we are abolishing the old practice and we can get relief by motion under the conditions stated in these rules, but otherwise the procedure would be by original action."

THE CHAIRMAN: That is all right.

JUDGE CLARK: "Mr. Dodge: I don't see why that doesn't cover the idea, and I move the adoption of your language."

THE CHAIRMAN: Now we come along and throw a monkey wrench into that by adding a clause that the relief heretofore granted by audita querela and the rest of them shall be by motion as prescribed in these rules or by an independent action. That is a very different thing. The idea I have about the matter is that we have sent this matter out to the bar twice, and we have reached a conclusion about the construction of it and the method of treating it. Then, after we are through consulting the bar, the thing comes back here and we bring it up and reverse the practically unanimous action of the Committee and make a change in it and then put it to the Court without the bar seeing it.

MR. DODGE: Why is it a change?

THE CHAIRMAN: Why should we bring these things up and switch at the last minute without any particular point in

it?

MR. DODGE: We aren't switching. We are just clarifying what we did before, making it plain to the bar.

THE CHAIRMAN: I think, Bob, the record shows conclusively that the question of saying that the relief heretofore granted by these writs shall be by motion was raised here. I made the suggestion originally, as I made the suggestion which resulted in the scire facias rule, and I was squelched by it. Eddie Morgan led the fight, didn't you? You said the bar ought not to have that thing dumped on them, and you all agreed to it. Now you come back here and want to upset the whole thing and throw it at the Court. I will submit the motion and I suppose it will be carried, but I am going to file a dissent and ask the Court not to adopt that rule unless they send it back to the bar.

MR. DODGE: We have already dumped back on the bar, to use your language, the relief that could have been obtained by scire facias. I don't know what it is, but I suppose very likely most of you do. The only question is whether we shall not adopt exactly that same provision that is now in Rule 81(b) by consolidating the abolition of these other proceedings with scire facias and mandamus, following that with the clause now there: "Relief heretofore obtainable by any of these proceedings may be obtained by appropriate action or motion."

I amend my motion so as to make it applicable to

81(b).

THE CHAIRMAN: You have all heard the motion. Is there any further discussion?

DEAN MORGAN: May I hear Judge Donworth's motion of the last time read again?

THE CHAIRMAN: It is exactly the way the rule reads today.

JUDGE CLARK: I think that is true. I think it is the same.

JUDGE DONWORTH: You mean with these italics in here?

JUDGE CLARK: Yes.

THE CHAIRMAN: There is no statement in them that the relief heretofore granted by coram nobis, audita querela, and so on, may be granted by motion. There is nothing in there putting the bar back to find out what those writs can do.

DEAN MORGAN: Was Judge Donworth's motion that the procedure shall be?

PROFESSOR MOORE: Just like the language here.

JUDGE CLARK: When the Chairman read it here, he said, "and the procedure", and then he inserted what is in brackets here, "that emphasizes that we are dealing with procedure". "and the proceudre for obtaining relief from judgments shall be by motion as prescribed in these rules or by original action."

The Chairman said: "I tried to do that here, and I

was brushed aside, and I think properly so, by Eddie Morgan--"

THE CHAIRMAN: There you have it.

JUDGE CLARK: "--because he said if we use that phraseology and say that the relief heretofore granted by coram nobis, audita querela, and so forth, shall be by motion or suit, we just dump the lawyers into a sea of uncertainty--"

THE CHAIRMAN: That is right.

JUDGE CLARK: "--which we ourselves are in because we don't know just what these old-fashioned things were."

THE CHAIRMAN: And you all agreed to it; every one of you thought I was haywire in making the suggestion.

JUDGE DONWORTH: If you will allow me to make a suggestion, I think, with all deference, that you are slightly in error in the view that we can determine what kind of relief shall be granted by motion in every situation and what kind requires a new action. Sometimes the question of whether a new action is necessary depends upon bringing in new parties. On a motion you cannot bring in new parties. Perhaps there are some exceptions, but as a general rule you cannot bring in new parties on a motion, and if new parties are necessary for the adjudication, you must bring an independent suit. So, it seems to me that it is not practicable to define the cases in which always a motion is available and in which always you must have the independent action.

THE CHAIRMAN: That is probably so. I hadn't

thought about that at all.

SENATOR PEPPER: Gentlemen, we have a rather delicate--

THE CHAIRMAN [Interposing]: Don't have any hesitancy just because I feel that way. Here we are at the last minute of our rules, and I want to get out of here tomorrow. We have settled the thing that way, and I am the only man who wanted it the other way. The thing about it is that I don't like to make fundamental changes in these when the bar has not had a shot at it. If we make a bull on the thing and it turns out badly, having sent it to the bar a couple of times, we have an alibi, but we have nothing if we start tinkering with fundamentals at the last minute.

MR. LEMANN: The only bar suggestion we have is one that says to put in this language that you make the point against.

THE CHAIRMAN: What is that? That means that all the rest of the bar are satisfied with it as is.

MR. LEMANN: That might be inferred.

MR. DODGE: I don't think it is a fundamental change. I think it is just clarifying what the rule must have contemplated.

THE CHAIRMAN: How can you say that in the light of our discussion at the former meetings, where we fought it out and discussed this question of whether we did want to preserve

all the remedies by a writ of audita querela and put the bar up to considering that. It was not a question of classification. It was a flat issue and a fight.

MR. DODGE: Are you contemplating doing away with any relief that could have been obtained under those old proceedings?

THE CHAIRMAN: The whole construction and all the work that has been done on this subject for more than a year, including the ninety-five-page memorandum and the supplemental one handed in today, have all been based on the theory and agreement of the Committee that we should not dump the thing on to the bar, but we would try to specify every live, surviving method of relief from judgments, prescribe a practice for it, and list them.

MR. DODGE: Suppose that by inadvertence we overlooked something that could have been obtained on a bill of review, are we undertaking to take away from the parties that right?

THE CHAIRMAN: No, we are not, but we are not prescribing any practice for it. We are trying to prescribe a practice for every kind of relief which we know anything about.

PROFESSOR SUNDERLAND: I agree with prescribing the practice and the saving clause that goes in with an independent action. You do have that saving clause. So, if we have omitted anything among all these old remedies in our catalogue

of relief that can be had by motion, he can get it under an independent action by the saving clause, can't he?

MR. DODGE: I simply wanted to make it plain that we do preserve it.

THE CHAIRMAN: It is as plain as can be. It says, "This rule does not limit the power of a court ... to entertain an independent action to relieve a party from a judgment, order, or proceeding". That is as broad as can be. It does not restrict it, and it does not say what ground the independent action may be grounded on. It leaves it all to the established law. So, at the very utmost, we do say that the rights not enumerated can be enforced by independent action.

SENATOR PEPPER: Mr. Chairman, I think this is a rather delicate situation. I go along with Mr. Dodge as a matter of reasoning. It seems to me the proper thing to do. But I am not going to vote for a motion as to which the Chairman gives notice that, if it is passed, he is going to ask the Court--

THE CHAIRMAN [Interposing]: I will probably cool off and not do it. Don't pay any attention to that.

SENATOR PEPPER: I do pay attention to it, because you are so uniformly right that I don't want to get myself wrong. I do think that, before we vote on Mr. Dodge's motion, we ought to have a clearer idea than I have at present as to what the Chairman would prefer. Suppose that you alone, sir,

were a committee of one to determine what this rule ought to be, just what would you do?

THE CHAIRMAN: I thought I had stated it. In the light of the supplemental report, I would add to the mentioned kinds of relief we recognize affirmatively the additional ones that the Reporter has brought in in the supplemental memorandum.

SENATOR PEPPER: Would that be included in the category of things that can be done by motion?

THE CHAIRMAN: I would say, "This rule does not limit the power of the court to entertain an independent action ..., or to set aside within one year ... a judgment obtained against a defendant not actually personally notified, or to set aside a judgment for fraud upon the court." I would not say "by motion". Let me finish what I would favor doing. I would have no objection whatever to taking the clause in lines 40 to 45 and slipping it over into 81. The point about it that I would object to was modifying the clause in 42 by putting in a statement that all of the relief heretofore granted by audita querela, and so on, is preserved.

MR. DODGE: Do you want to take away some of them?

THE CHAIRMAN: I don't take them away, and I don't preserve them.

MR. DODGE: All I want to do is to make it plain to the bar.

THE CHAIRMAN: Half of them are obsolete, for all I

know. I wouldn't revive them by saying they still may be granted. If they have any rights, they will be presented by an independent action, any way you look at it, under (1). They wouldn't be lost. It is notice to the lawyer by express provision of these rules that every kind of relief heretofore granted by those writs can be granted today.

SENATOR PEPPER: Would you be willing to put in line 43 "for obtaining all relief" or "any relief", some word like that, "from judgments", so as to cover Mr. Dodge's point? Then maybe he wouldn't press his motion.

THE CHAIRMAN: "procedure for" what?

DEAN MORGAN: "obtaining any relief from judgments shall be by motion as prescribed in these rules or by an independent action."

THE CHAIRMAN: I don't know that I see that that would make any difference. It is as broad as that now, isn't it? It says any procedure for obtaining relief from judgments.

SENATOR PEPPER: The question is whether it means such relief from judgments as has been heretofore specified or whether we mean any and all relief, which is really the thing that we are trying to say.

DEAN MORGAN: If it means any relief that a court will give.

SENATOR PEPPER: That is it, yes. Any relief that a court is willing to give is to be sought either by motion

or independent action.

THE CHAIRMAN: I don't see that that would change the meaning of it one way or the other.

JUDGE CLARK: I would like to ask a question about this. I take it, Senator Pepper, you and Mr. Dodge both think that there are probably things that we haven't thought of. I think Mr. Moore has thought up some things that aren't quite so; I mean by that, that really don't come into this thing. To put it another way, it seems to me that long, careful study by him chiefly and more or less by all of us and by the bar, and so on, has dug up all kinds of little things that we have here. Do you think there is anything more? It seems to me, if there is anything more, it is so inconsequential that it would not trouble me, I believe. As I say, it seems to me that Mr. Moore has been very generous in what he has granted in these independent actions already.

SENATOR PEPPER: Yes. I can't think of anything that hasn't been included. I do think that there are a lot of motions not connected with judgments for which there is no specific provision. For instance, you want to make a motion that a case that has been listed for trial before judge A shall be transferred to judge B because judge A is disqualified. I should think we didn't have to point in the rules to authority to make a motion where a judge is disqualified. So far as categories of things entitling you to relief from judgments

I can't think of anything that Mr. Moore hasn't included.

THE CHAIRMAN: He has raked up a lot of things I never knew anything about before myself.

SENATOR PEPPER: I would be willing to take exactly what the Chairman says and abandon the idea of transfer to 81, although my own view is that that is the place where this provision for abolition of pre-existing special procedures really belongs. I think that is Mr. Dodge's thought. I guess he will feel that if there is a clear provision in here for obtaining any relief that a court will grant from a judgment, it is to be by this procedure.

MR. DODGE: My eye just falls on the point that the Chicago Bar Association made in this very good report of theirs. They suggested almost the exact words, I think the exact words that I had used. I notice that the New York Bar Association also favored it. I was more or less following their language. The Chicago Bar Association suggested inserting: "relief formerly obtainable under any such proceedings". I think that is exactly my wording.

SENATOR PEPPER: You do agree, if the thing gets to a point where our minds become crystallized and we feel that somehow or other we are unsettling what we have settled, that it is the best thing not to press that too far.

MR. DODGE: Oh, yes. I haven't the slightest intention of pressing the motion.

JUDGE CLARK: There is one other minor thing. We have talked about the motion as prescribed by these rules, and so on. I had supposed that really the motion we had in mind was the motion by this rule. We may have put in a general thing for fear we had forgotten something, but I am not at all sure that the thing we should say here is not "by motion prescribed by this rule".

THE CHAIRMAN: No, I think it was our intention to cover the whole set.

JUDGE CLARK: That is true. There is no question that the way Judge Donworth first brought it up, he said something of that kind. He said "by any motion under any of these rules". I mean he made it more inclusive. What other motion is appropriate there except this one?

THE CHAIRMAN: Of course, the motion for new trial for newly discovered evidence is one of the things that used to be granted by a bill of review, so it would not do to say "by this rule", because you have already said it shall be done by motion under the new trial rule.

JUDGE CLARK: That was already appropriate when we had the newly discovered evidence in 59, but haven't we taken that out of 59 and put it in here?

THE CHAIRMAN: No.

PROFESSOR MOORE: I think you still need the plural "these rules", because you get relief from judgments under

60(b), 59, and 52.

JUDGE CLARK: That is certainly a different kind of thing. You are still carrying on the original battle, so to speak. The judgment isn't final. This applies only to final judgments.

THE CHAIRMAN: You see, one reason we put this last clause about abolishing these writs, and so on, in 60(b) instead of in 81 was that the courts had been using bills of review to grant the kind of relief specified in 60. We thought it was more appropriate, when we were abolishing the whole procedure, to put it in this rule to show the courts that when they are granting the kinds of relief called for by 60, as they often do, they are not using bills of review any more, as they had been doing right along in the district courts in the Second Circuit. You could refer them over to 81, but they might miss it.

JUDGE DONWORTH: There wouldn't be any harm not to ask the point directly now and to leave open the question whether we shall put in the other writs until we get to 81. That wouldn't affect what we are passing on here. My view is that lines 40 to 45 are substantially all right as they are here, and that is without prejudice to what we might do about inserting the same language to some extent in 81.

SENATOR PEPPER: That would come to the question of whether we will cremate them as well as bury them.

THE CHAIRMAN: I haven't any objection at all to transferring lines 40 to 45 into Rule 81, but I just felt that the judges who had been fooling with these bills of review and writs of coram nobis under 60 would have it under their noses right here instead of back in a sort of buried clause which somebody had to hunt for.

SENATOR PEPPER: Mr. Chairman, as I understand it, the parliamentary situation is that a motion has been made so to amend Rule 60 that there will be inserted in line 40 after the word "court" the material suggested by Mr. Moore beginning with the words "or (4) to set aside a void judgment" and ending with "prospective application." Is that right? The motion is to do that and then to adopt the whole rule, including the italicized matter with the insertion of the word "any" before "relief" in line 43, so that it will read, "for obtaining any relief from judgments", and so forth.

THE CHAIRMAN: That wasn't the motion that Bob made.

SENATOR PEPPER: He is not pressing that motion, Mr. Chairman.

MR. DODGE: I withdraw it because I understand that this proposed change is designed to accomplish the same result.

SENATOR PEPPER: Yes.

THE CHAIRMAN: I don't think it does.

DEAN MORGAN: May I suggest, before that is voted on, Mr. Chairman, that that last alternative "or because" just

doesn't make sense. It is muddy to me.

THE CHAIRMAN: That is a matter of statement on the supplemental report.

DEAN MORGAN: He says, "or because of a change of circumstances it is no longer equitable". He means "on account of a change of circumstances it is no longer equitable".

MR. LEMANN: Are you proposing to use this language? Have you got to the point that you are going to debate that language?

DEAN MORGAN: There is a motion.

SENATOR PEPPER: I am offering the motion so as to get the question settled, and I am willing to make the motion subject to the right subsequently to clarify the language.

DEAN MORGAN: That is fine. I second that motion.

MR. LEMANN: You mean to insert the additional clause?

SENATOR PEPPER: Yes. I move that the rule be so amended as to include the insertion of the additional categories suggested by Professor Moore, with the right of the Committee subsequently to pass upon the exact language of them, to insert in line 43 the word "any" before "relief", and to leave open, if Judge Donworth wants to do it, the question whether we will hereafter do anything to Rule 81.

MR. LEMANN: Have you a motion to put in all this new language, plus this change in 40 to 45?

DEAN MORGAN: That is right.

SENATOR PEPPER: Yes. That is included in the motion, subject to subsequent revision of the language if it seems desirable to revise it.

JUDGE DONWORTH: Senator, the new matter you are suggesting is on page 2 of Mr. Moore's draft, including subdivisions (4) and (5) and the rest of that paragraph?

SENATOR PEPPER: That is correct, sir. I will read it so that there will be no doubt. In line 40 after the words, "(3) to set aside a judgment for fraud upon the court", new matter: "or (4) to set aside a void judgment, or (5) to grant appropriate relief from the operation of a judgment because of its satisfaction, release, or discharge, or because a prior judgment upon which it is based has been reversed or otherwise vacated, or because of a change of circumstances it is no longer equitable [it might be "on account of a change of circumstances"] that the judgment should continue to have prospective application."

That would be inserted in line 40. Then the rest of it would stand as is with the word "any" inserted in 43 before "relief".

JUDGE DONWORTH: Very clear.

MR. LEMANN: If that is up for debate, I would have a good deal more doubt about the suggested insertion of clauses (4) and (5) than I would on the motion to put in the

word "any" in line 43. I don't know that I would have any objection to "any", but I am a good deal troubled by this enumeration, and I think we ought to consider criticisms that we have from the New York Bar Association of some of the present enumeration, including enumeration (3) which they are now criticizing. Subdivision (1), line 32, specifies independent action; (2) in line 35 doesn't say how you do it; (3) doesn't say how you do it; and (4) and (5) don't say how you do it. I just wonder.

DEAN MORGAN: They can do it sometimes by motion and sometimes by independent action.

THE CHAIRMAN: That is true.

MR. LEMANN: I wonder whether it is clear or good draftsmanship.

THE CHAIRMAN: That is true, but there is a saving clause here. The way they set aside judgment for fraud upon the court, the practice is pretty well established. You go and call their attention to the fact that in the original case, not an independent suit, fraud has been committed on the court, and they rise up in their wrath and vacate the judgment. I think that section of the Judicial Code probably prescribes--

MR. LEMANN [Interposing]: The New York Bar Association says subdivision (3) on page 69 covers fraud, and they ask whether that doesn't mean fraud on the court.

THE CHAIRMAN: No, that is fraud by one party upon

the other party. This is fraud upon the court to deceive the court by some trick or device. For instance, in the case I have in mind in the Third Circuit, somebody in a patent case had hired an expert to write an article about a patent, and then they presented it to the court as an independent expert view, or something like that. The court was impressed by it, and on the strength of it they rendered their judgment. Then it turned out afterward that someone party to the case had gone and bought this fellow to write this brief for him. It really was a brief, but apparently was an independent scientific article.

It is like the situation I had in the Black Tom case, as I have told you, where one of the parties to the case got a poor little editor of the Yale Law Review to write an independent and learned article in the Yale Law Review about a case I had pending in the district, in which he blew me off the map. When I got into the court, the lawyer on the other side got up and said, "Your Honors, here is an independent, scholarly article from the Yale Law Review which says Mitchell is haywire."

I happened to know what the facts were, and the minute they did that I jumped up and named the man who had the article written and stated that the material on which it was written had been supplied by briefs by my adversary. The judge grinned and looked at me and said, "Don't worry, Mr.

Mitchell. I will treat it as a brief for your opponent." From that time on in that litigation, which went through two more courts, there never was a peep from the other side about this learned article.

That is exactly what happened in another case. Was it the Atlas case in the Third Circuit?

JUDGE CLARK: Yes, Hartford Empire v. Hazel-Atlas.

THE CHAIRMAN: Yes. There the court had received this scientific stuff and recognized it, and they found out afterward that it was phony. When they found it out, they didn't call for an independent action or anything else. They just got together and brushed their judgment off the record nine years afterwards.

SENATOR PEPPER: In the Third Circuit, growing out of some unhappy instances of judicial misconduct, we have had a lot of judgments opened not for fraud upon the court, but for fraud by the court.

DEAN MORGAN: Fraud upon the court by the judge.

SENATOR PEPPER: So, there must be lots of cases like that for which we can't provide.

JUDGE CLARK: We have quite a few, too.

SENATOR PEPPER: Of course you do.

JUDGE CLARK: Those were opened after several years.

SENATOR PEPPER: Oh, yes, a number of years.

MR. LEMANN: Is this a full summary on page 77 of

the objection of the New York Bar Association? You have a man named Youngquist with some comments, too.

SENATOR PEPPER: As I understand it, Mr. Chairman, Mr. Lemann is worried by these suggested particulars. May I ask him, through you, whether if they were rejected, he would want to do something to the enumerations that are already in the rule? Would you think the rule would be better just to stand as is without these additions, or would you want otherwise to modify the rule?

MR. LEMANN: I am not sure, Senator. I am in the process of cerebration.

SENATOR PEPPER: I see.

MR. LEMANN: I am not very happy about it. I think the language could be changed, in any event. I am not very happy about attempting more enumerations. I am not too happy about the whole setup of the rule right now.

SENATOR PEPPER: It seems to me, if we keep any enumerations, we ought to add to them such as occur to us, which in our best judgment is an exhaustive list; but if we are not going to add to them, I should think it would require some of the enumeration that we have got.

MR. LEMANN: Perhaps we should read what the New York Bar Association says. They say that the meaning of clause (3), lines 39 - 40, is not clear. "If it means that a judgment obtained by fraud upon the court may be set aside by

means of an independent action it is unnecessary because it is covered by clause (1) (line 32) which is unlimited in scope. If, however, fraud upon the court is not to be raised by independent action (and bills of review are abolished) then relief on this ground must be 'by motion as prescribed in these rules'." They practically say that (3) must be confined to motion because if you mean an independent action, you already have it covered under (1). They say (3) must by implication refer to motion only.

THE CHAIRMAN: That is pretty logical, isn't it?

MR. LEMANN: I should think so.

THE CHAIRMAN: Your idea would be to say, "or (2) by motion to set aside within one year ... or (3) on motion to set aside a judgment for fraud upon the court."

MR. LEMANN: That would meet that particular argument so far. Then they say, "The only motion prescribed for relief from fraud is in clause (3) (line 23) of the first part of the rule, and such action must be made within one year." Does the fraud in line 23 include fraud on the court, or is that not fraud on the court?

THE CHAIRMAN: "or (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party." I think that makes it fairly clear that it is a trick played on the party instead of on the court.

MR. LEMANN: Would "misconduct of an adverse party" include fraud on the court? Take the cases you described.

THE CHAIRMAN: It is not so very well worded, but don't you think that on the whole it really shows that, especially as we later say "fraud upon the court"? The mere mention of that in a separate clause shows that in the previous fraud we are not talking about that but are talking about tricks played by one party upon the other.

MR. LEMANN: Why not put all the fraud in (3)? Why would that not be a better thing to do, instead of having a separate (3) in line 39? Why not expand your (3) in line 23 so as to cover fraud on the court and all kinds of fraud? Why have this distinction, if it is all to be made by motion? If it is to be made by motion, why not put all fraud under line 23?

MR. DODGE: After the one-year limitation.

PROFESSOR MOORE: We reserve (3) to fraud upon the court as something more serious.

THE CHAIRMAN: That is why it was constructed the way it was. Setting aside a case for fraud upon the court may be done years after, but not so if it is a trick played by one party on the other.

MR. LEMANN: I guess that would answer that one.

THE CHAIRMAN: The only correction I can think of to make there is that you could preserve the power of independent action on any ground in (1). There is no need of saying

(2) if independent action is the only remedy you are using. So, you say, "or (2) on motion to set aside within one year ... or (3) on motion to set aside a judgment for fraud upon the court."

MR. LEMANN: Then what would you do with this new language that we are now discussing, where we are going to add (4) and (5) and (6)?

MR. DODGE: (4) and (5).

THE CHAIRMAN: They are all motions; (4) and (5) are both motions. That can be done by motion in an appropriate case. If you can't get new parties in, then you have to resort to an independent action.

SENATOR PEPPER: The obscurity about line 23 might be cleared up by making the distinction between fraud upon a party and fraud upon the court. We could say in 23, "or (3) by fraud upon a party (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party."

THE CHAIRMAN: That would clear that up.

SENATOR PEPPER: That would clear that up. Then we would deal with fraud upon the court when we come to it. That leaves open the question Mr. Lemann is raising about the suggested additions of (4) and (5).

MR. DODGE: Why wouldn't it be well to put in the words "on motion" in both (4) and (5) as well as in (3)?

THE CHAIRMAN: I think it would be. It is a saving clause, and not a grant. It saves the power, whatever it is on motion, and if you find that the motion won't work because you have new parties of interest--

MR. LEMANN [Interposing]: This would all be subject to the one-year limitation, would it, or would these not be subject to the one-year limitation?

THE CHAIRMAN: No, the later ones have no limitation of time on them.

MR. LEMANN: Ought that not to be specified, then?

THE CHAIRMAN: An independent action to relieve a party from a judgment is governed by the ordinary statute of limitations, I suppose. It just recognizes that the independent action can be brought according to the usual rule.

SENATOR PEPPER: I am willing to accept the amendments suggested, that the words "on motion" should be included in an appropriate way in the proposed subsections (4) and (5).

THE CHAIRMAN: And also inserted in (2) and (3).

SENATOR PEPPER: And also inserted in (2) and (3). I would suggest also that the motion include the insertion of "fraud upon a party" in line 23, so as to mark the distinction between that and what we subsequently deal with, which is fraud upon the court.

JUDGE DONWORTH: I would like to ask Senator Pepper about putting in the words "on motion", whether in line 14

the present reading is not sufficient. It begins with "On motion". Doesn't that "On motion" then cover all the subdivisions down to the end of it?

SENATOR PEPPER: I would have thought so, sir, and I should have supposed that the place to put in this whole category of things, including (4) and (5), would be under that portion of the rule which deals with motions, and then go on that "A motion under this subdivision does not affect the finality of a judgment" nor limit the power of the court to do thus and so.

THE CHAIRMAN: The difficulty is that you have a one-year limitation.

SENATOR PEPPER: Yes. I say that is the only answer I can make to Judge Donworth. Logically, if you were free of that limitation of time, I think all this ought to be up under the general provision about motions.

PROFESSOR SUNDERLAND: We can easily specify which motion has a one-year limitation and which one does not. We can say that motions (1), (2), and (3) must be made within one year.

SENATOR PEPPER: We could do that.

MR. LEMANN: How would this do? Make a new paragraph at the end of the sentence in line 31 and have that new paragraph read as follows:

"This rule does not limit the power of a court (1)

to entertain an independent action to relieve a party from a judgment, order, or proceeding, or (2) without limitation of time--"

THE CHAIRMAN [Interposing]: There is a statutory limitation there now, one year.

MR. LEMANN: You couldn't do that. "or (2) by motion (a) to set aside within one year", et cetera, "(b) to set aside a judgment for fraud upon the court".

THE CHAIRMAN: You would have "on motion" in (3).

MR. LEMANN: Yes, (3) would be by motion, because the independent action covers everything, as I understand it. (1) would be independent action and would cover everything. You could always go by independent action under (1), if you wanted to.

THE CHAIRMAN: I don't think you would have to put motion in (3), because the court does that of its own motion the minute it finds it has been deceived.

MR. LEMANN: I guess that is true.

THE CHAIRMAN: It doesn't even call for a motion. It just fires away. It is a suggestion.

MR. LEMANN: Perhaps leave out the (3) in this category and insert as (3) what appears in Mr. Moore's memorandum as (4) and (5), and then put a separate clause in for fraud on the court, a separate sentence.

It would take rather extensive reconstruction of

this language, but I believe it could be clarified, and I think it would be helpful to the bar to make it plain, either in the rule or by comment, that this second paragraph that I suggest setting up under this rule would be free of the limitation of time applying to motions under the first part. Really, now, as I understand it, we have a time limitation on the first set of motions and no time limitation on the second set.

THE CHAIRMAN: Let me see Title 28, section 118, of the Judicial Code and see what it says about it. That is the question of vacating the judgment on application where the party didn't receive any actual notice, where there is published notice.

MR. LEMANN: I wonder if, instead of taking (4) and (5), we could put in a blanket clause saying "or to obtain relief from judgment on any grounds not above specified". I am afraid we are going to leave something out, perhaps. What are you going to do about the statute of limitations? How do you proceed in the case Senator Pepper put to get relief from a judgment that is barred by statute.

THE CHAIRMAN: You see, when we really started this whole business, certain additional grounds for setting aside judgments were mentioned in these rules, and we found that the courts were firing away and exercising the power, and the rules were silent as to procedure, didn't say that they could be done by motion or independent action. Therefore, the judges were

reviving the old bill of review and stuff to find a means of doing it. I thought the rules were very bad if the practice rules did not prescribe a practice for the kinds of relief that were being commonly granted. So, if we are failing in accomplishing that purpose, if we don't mention all the things we think of and say by motion or independent suit, you want to put in a saving clause besides that and say that an independent action on the grounds that are usually followed is preserved, and whatever the practice is, to do it.

MR. LEMANN: I would say "on any other proper ground not above enumerated." What do you do in Minnesota or New York? Do you have audita querela?

THE CHAIRMAN: Oh, no. Your remedies on judgment are practically all prescribed by statute.

MR. LEMANN: Nobody has trouble?

THE CHAIRMAN: I wouldn't say about New York. I won't be responsible for what the Civil Practice Act says. It is the worst document in the world to practice under. However, in all the code states out West the objective of the codes and the theory on which they are constructed is to specify all the grounds, how and why. We are going further than that with some of these saving clauses, you see, about independent actions and whatnot. We have a further saving clause that any relief from judgment shall be by motion as prescribed in these rules. That sort of raises the inference

that if we have missed out and they still want to dig up a bill of review to do it, they will do it by a motion. The only thing I am shrinking from is going back at this stage of the game and telling the bar that notwithstanding all the enumerations here, if they can find any old kind of relief that ever has been granted, even a hundred years ago, on a writ of audita querela, they can revive it and go at it by a motion or suit.

MR. DODGE: I didn't mean to revive any hundred-year-old action which is now obsolete. Any right which the parties now have under any of those proceedings, we ought not to take away from them.

THE CHAIRMAN: You might say that the procedure for obtaining any relief the party may be entitled to shall be by motion as prescribed, which amounts to the same thing.

Well, where are we now? Do you want to start in and reconstruct this thing?

SENATOR PEPPER: This is where we are. I made a motion which in substance was a motion to accept (b) as presented by the Reporter, with three modifications. One was to insert the additional matter, (4) and (5), at some appropriate place as suggested by Mr. Moore. The second was to insert in line 23 "fraud upon a party" as distinguished from the subsequently dealt with fraud upon the court. The third was to insert in line 43 the word "any" before the word "relief".

That was my motion, subject to the right of the Committee subsequently to clarify the language of (4) and (5), if that needed clarification.

Now Mr. Lemann is uncomfortable about these categories for fear that they are not exclusive. I was going to make a suggestion which would require a modification of my motion, but it may have some merit. It is, in the light of Judge Donworth's suggestion, to let the rule as it stands read:

"On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding on the following grounds: [this is just motion] (1) mistake ...; (2) newly discovered evidence ...; (3) fraud upon a party ...;" (4) and (5) as suggested by Mr. Moore, and then, "The motion in cases (1), (2), and (3) [that is, mistake, newly discovered evidence, and fraud upon a party] shall be made within a reasonable time but in no case more than one year after the judgment, order, or proceeding was entered or taken." That would be a complete statement as to motions. Then the cautionary provision that "A motion under this subdivision does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court (1) to entertain an independent action to relieve a party from a judgment, order, or proceeding, or (2) on motion to set aside in pursuance of the provisions of the Code, or (3) on motion to set aside a judgment

for fraud upon the court."

THE CHAIRMAN: You wouldn't have the last motion, because the court does that of its own volition.

SENATOR PEPPER: That could be left out.

THE CHAIRMAN: I have only one other suggestion, and that is that I think the provision to set aside within one year as provided in Section 57 of the Judicial Code ought to be transferred back to those things that may be done by motion, because the statute says so, and you have the time limit of one year.

SENATOR PEPPER: Very good. It would be very simple to do that. So, in line 32 and subsequent lines, instead of having three categories, we would have a provision that "This rule does not limit the power of a court to entertain an independent action ..., or to set aside a judgment for fraud upon the court."

MR. LEMANN: It seems to me that suggestion would be very helpful. I wonder whether, as a detail, you would say that all motions should be made within a reasonable time, but in cases _____ and _____ they must be made in not more than a year.

SENATOR PEPPER: I think that is all right.

MR. LEMANN: What would be a reasonable period would vary according to the circumstances.

PROFESSOR MOORE: There is no reasonable time on the

right under Section 118. He has an arbitrary time limit of one year.

THE CHAIRMAN: The statute fixes that.

MR. LEMANN: I would include that, therefore, in the category as to which the one-year limitation applies. I would say that all motions should be made within a reasonable time, but in cases falling within certain categories, namely, those that you now have spelled out here in lines 18, 20, 23, and 35, the motion must be made within a year.

THE CHAIRMAN: As far as the statute is concerned, you would not want to say it should be done within a reasonable time and in any event within one year, because the statute now gives you an absolute right to come in within a year, and you would be placing a further limitation on the right to set aside a judgment against a person who had not been personally served.

SENATOR PEPPER: I guess we are all agreed to that. What I would like to do, if I could, is to get the question of principle as to how we should attack the rule and then take up such a question as this last one and the question of the clarification of language in (4) and (5) subsequently. Mr. Lemann thinks what I last suggested might possibly be an improvement.

MR. LEMANN: I wonder if we could add a grab-all clause without enumeration and say, "on any other proper

grounds."

SENATOR PEPPER: Yes. I will withdraw the motion that I made and substitute this one: That subdivision (b) be so redrafted as to read:

"On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding on the following grounds: (1) mistake, inadvertence, surprise, or excusable neglect; or (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); or (3) fraud upon a party (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party".

THE CHAIRMAN: Then comes (4).

SENATOR PEPPER: Subject to clarification of language, "or (4) to set aside a void judgment; or (5) to grant appropriate relief from the operation of a judgment because of its satisfaction, release, or discharge, or because a prior judgment upon which it is based has been reversed or otherwise vacated, or because it is no longer equitable that the judgment should have prospective application; or (6) to set aside within one year as provided in Section 57 of the Judicial Code, U.S.C., Title 28, s118, a judgment obtained against a defendant not actually personally notified. In all cases other than (6) the motion shall be made within a reasonable time, but in

cases (1), (2), and (3) in no case more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court (1) to entertain an independent action to relieve a party from a judgment, order, or proceeding, or (2) to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from judgments shall be by motion as prescribed in these rules or by an independent action."

I make that motion with the suggestion that, if it is passed, when we come to discuss (4) and (5) Mr. Lemann can bring forward the catch-all clause that he has in mind. I will put that just to clear the air.

JUDGE DONWORTH: I should like to suggest this. At the bottom of printed page 69 is clause (3), fraud, and so forth. It seems to me that is fine language as it is there, and it should not be weakened because of the fact that we have later on put in something about fraud on the court. Fraud is far-reaching. I don't think it need be fraud against a party. For instance, a witness might be suborned for money to remain out of the jurisdiction, and so on. I like the word "fraud" there as being all-inclusive just as it is, and "fraud upon a party" seems to me to limit it unduly, and that undue limitation

is not rendered necessary by the fact that in another clause we mention fraud on the court.

SENATOR PEPPER: I will accept that amendment. If we want to put it in, we can later. Just to get the thing before the Committee, I make the motion that I have just read in extenso, leaving out the words "upon a party" in deference to the suggestion of Judge Donworth.

MR. DODGE: Now what about fraud other than fraud upon a party?

SENATOR PEPPER: We can protect that.

MR. DODGE: It is quite important to explain why we have dealt with fraud twice.

SENATOR PEPPER: We can do that. Doesn't this motion really raise the question on principle and leave us full liberty to clarify if the motion is passed?

THE CHAIRMAN: Is there a second?

PROFESSOR SUNDERLAND: I second the motion.

THE CHAIRMAN: Is there any further discussion?

[The question was called for, and the motion was put to a vote and carried.]

MR. DODGE: I vote for it on the assumption that it will be construed by the courts as carrying out the idea which I expressed before, namely, that we are not taking away any substantial right which the parties have today under any of these old proceedings.

MR. LEMANN: To emphasize that, we put in a grab-all clause at the end of this enumeration.

JUDGE DONWORTH: I think that is very important. I don't think any of us would vote for anything which we thought would take away any present remedy.

SENATOR PEPPER: That is right, and, as Mr. Lemann suggests, that can be made more emphatic by a catch-all clause, which should read how, do you think, Mr. Lemann?

THE CHAIRMAN: You have a clause in your motion for new trial provision which you might look at and see whether it fits. Suppose you take a look at that. What is the motion for new trial rule? Does anybody remember the number?

MR. LEMANN: Rule 59. I could easily give a grab-all clause, but what troubles me is that I will make it too grab-all.

SENATOR PEPPER: You would put at the end, after (6), something equivalent to the prayer for general relief in the bill in equity.

MR. LEMANN: Or any other proper ground.

SENATOR PEPPER: Any other ground which to the court may seem just.

THE CHAIRMAN: For instance in 59(a), "in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States".

MR. LEMANN: "or on any other ground heretofore deemed sufficient to entitle a party to relief from a judgment."

MR. DODGE: That would open up by motion everything that formerly was available only on a bill of review.

DEAN MORGAN: We can't do that.

THE CHAIRMAN: "heretofore" is pretty broad. You mean "prevailing". The word "heretofore" goes back for a thousand years. I am wondering if you can't word it so as to say "any established ground".

PROFESSOR SUNDERLAND: Why not say "any proper ground"?

MR. LEMANN: "any ground which may be deemed by the court sufficient to entitle the party to relief from the judgment."

THE CHAIRMAN: I don't mean that. He could invent a new one.

SENATOR PEPPER: Any recognized ground.

THE CHAIRMAN: That is right. That excludes the idea of going back and reviving anything that is obsolete.

SENATOR PEPPER: Yes. "or (7) on any other recognized ground for the granting of relief."

PROFESSOR SUNDERLAND: They have recognized it, but they are about to recognize another one. That would be possible. Why not just say "any proper ground"?

SENATOR PEPPER: Yes. Wouldn't that be better?

THE CHAIRMAN: What you are trying to do is to refrain from abolishing a recognized ground. You don't want the court to invent new ones or proper grounds which he now thinks are proper.

MR. LEMANN: "any ground recognized as a proper ground for relieving a party from a judgment."

THE CHAIRMAN: "judgment or order." Yes, that is it. It is a recognized and established right, not a new one that he can invent. Isn't that what Bob was trying to say?

MR. LEMANN: All I am worried about is that in this enumeration that we are presented we haven't covered everything that we should cover. I don't want to deprive a party of anything.

THE CHAIRMAN: I don't see why a phrase of that kind is not all right, if it is now recognized.

SENATOR PEPPER: "or on any other ground recognized as appropriate for the granting of relief from the operation of a judgment."

MR. DODGE: That means any other relief properly obtainable by motion, doesn't it?

SENATOR PEPPER: It is all in motion.

MR. DODGE: You are not meaning to open up by motion actions on grounds that formerly were obtainable only by bringing an independent action.

MR. LEMANN: If you were putting that limitation,

then you could not get any relief from these old remedies by motion, because they afforded relief by a bill of audita querela. We don't want to do that, do we? Don't you want to permit by motion anything that might have been asserted under those?

DEAN MORGAN: If you have to bring in new parties, you can't do it, can you?

SENATOR PEPPER: That is inherent with the independent action in case you can't do it by motion.

MR. LEMANN: You have an over-all protection on your independent action, anyhow.

DEAN MORGAN: Yes.

SENATOR PEPPER: Don't you think, Mr. Dodge, it would suffice if the catch-all clause read, "or (7) on any other ground recognized as appropriate for the granting of relief from the operation of a judgment"?

THE CHAIRMAN: By motion.

SENATOR PEPPER: This is all under motions.

THE CHAIRMAN: Oh, yes.

SENATOR PEPPER: And Mr. Lemann points out that we may want to make motion more flexible than heretofore. If we leave it to the court that he can't do it on motion, then we have provided for the independent action.

MR. LEMANN: Wouldn't it be well to have this written out now and passed around?

SENATOR PEPPER: Wouldn't it be well to spend a minute or two to try to perfect the language in (4) and (5), if we need to do that, so that when it is written out, it will be as nearly final as possible? You had some thought about (5).

[Discussion off the record.]

SENATOR PEPPER: May I dictate to the reporter what we have just done, so when he comes to write out that last motion of mine he will have the wording we have agreed to for (4) and (5)?

"or (4) to set aside a void judgment; or (5) to grant appropriate relief from the operation of a judgment because of its satisfaction, release, or discharge, or because a prior judgment upon which it is based has been reversed or otherwise vacated, or because it is no longer equitable that the judgment should have prospective application".

MR. LEMANN: How about our statute of limitations case, a case where the judgment was recorded twenty-five years ago, and it is now outlawed by limitation. That is the case you put, isn't it, Senator?

SENATOR PEPPER: Yes.

MR. LEMANN: Is that covered by these enumerations or the grab-all clause?

SENATOR PEPPER: Don't you think that is clearly a case where you have to proceed by independent action?

MR. LEMANN: I should suppose he might proceed by

motion if he is one of the original parties, might he not?

THE CHAIRMAN: Maybe there has been no change of title or interest in the judgment.

MR. LEMANN: Yes, no assignment of the judgment recorded. I was just asking, not answering.

SENATOR PEPPER: My suggestion would be that if it is a proper case for motion and no new parties have to be brought in, you are protected by your grab-all clause, and if it is a case where a motion would be inappropriate, then you have your independent action.

MR. LEMANN: I think if the grab-all clause really remains in, it will relieve us of concern in this case and other cases whidh we may not be thinking of.

SENATOR PEPPER: I think that is right.

THE CHAIRMAN: Is there anything further on this draft? If not, we are through with 60(b), I think it was. Have we anything under Rule 61?

JUDGE CLARK: No.

THE CHAIRMAN: Anything under Rule 62?

JUDGE CLARK: We made one change which we have discussed, in addition to 62(b). We have already covered that. That was a reference.

THE CHAIRMAN: Yes. Then we are up to Rule 65(c).

JUDGE CLARK: There are some questions raised, but I have nothing to suggest on 65(c).

MR. DODGE: What happens if there is a real trial of fact opened up there?

JUDGE CLARK: You mean upon the bar?

MR. DODGE: Against the surety.

DEAN MORGAN: In a regular trial.

JUDGE CLARK: You could have a serious difference of view in the ascertainment of facts upon a motion. I suppose all this does really is to cover the question of jurisdiction and to simplify the way to bring it to issue.

THE CHAIRMAN: It is a consent proceeding, bear in mind. The fellow who goes under bond, the surety, submits himself and agrees that it may be tried that way.

MR. DODGE: He appoints the clerk as his agent to accept service---

DEAN MORGAN: That is right.

MR. DODGE: ---but he doesn't agree to waive his right to a jury trial.

DEAN MORGAN: No, not necessarily.

JUDGE CLARK: This wouldn't settle that either way, I think.

DEAN MORGAN: No.

MR. DODGE: His liability may be enforced on motion.

JUDGE CLARK: I think he could have jury trial on motion if it raises an issue. Under the Constitution, there is a jury trial right.

THE CHAIRMAN: Yes. Are there any suggestions? Mr. Armstrong insists that we say they can also sue if they want to.

JUDGE CLARK: We say "without the necessity of an independent action." I should think that might do it.

DEAN MORGAN: Surely. He can do it.

SENATOR PEPPER: Because his liability may be enforced.

JUDGE CLARK: Yes. Then there are the two bar associations. One of them believes that service upon the clerk "should be conditioned upon the surety not having filed with the clerk an appointment of an agent ". We have had the provision in Rule 73(f) on the cost bond.

THE CHAIRMAN: For years.

JUDGE CLARK: Yes.

THE CHAIRMAN: Shall we pass on to 66, Receivers Appointed by Federal Courts.

JUDGE CLARK: There are some suggestions of wording that we didn't think were very necessary.

THE CHAIRMAN: Mr. Youngquist says, "The heading makes it plain, but I do not suppose the heading is a part of the rule."

JUDGE CLARK: It was Judge Goodrich, wasn't it, who raised the question originally? We put it in after the Third Circuit Conference. Somebody raised the question, and then the Committee voted it was unnecessary.

THE CHAIRMAN: You mean to say in the rule that it

is a receiver appointed by a federal court?

JUDGE CLARK: That is it.

THE CHAIRMAN: It is in the title.

JUDGE CLARK: We finally put it in the title.

SENATOR PEPPER: Is there some demand for this reform which dispenses with the necessity of ancillary appointment? Is the old practice an evil? I am wondering why we are doing that.

JUDGE CLARK: You will see that that is discussed on page 77 of our blue book, down in the note. This seems to have been liked by the bar. The only thing I can think of that might possibly be wrong with it is that the lawyers didn't seem to find anything wrong with it.

MR. OGLEBAY: It was unanimously approved.

THE CHAIRMAN: That makes Clark suspicious! Well, we are up to 68. Are there any changes in that?

JUDGE CLARK: I don't think so. There are suggestions, but we don't consider them important. Now we are up to 71A.

THE CHAIRMAN: We will pass that here. Rule 73?

JUDGE CLARK: Of course, we have had a discussion of the matter of time.

THE CHAIRMAN: Time is passing. On 71A, we were trying to get action by the Department of Justice as to whether or not they agree with our stand that our proposed revision of

rules of procedure should be uniform in all condemnation cases of every kind and every agency, except that the constitution of the tribunal that awarded the damages should be as specified in a federal statute and, in the absence of that, by the local state law. The Department wanted jury trial, but Congress turned the jury idea down, and the TVA is set against the jury. Their system has worked to great advantage. You have had their memorandum in which they have demonstrated that the jury system would not produce uniformity. They have areas that they take. If they have a jury awarding verdicts on each piece, there is no uniformity in the compensation that is awarded. Having the commission system to start with, the commission can deal with a whole area on the same basis for evaluation all through. We have gone all over that.

You tried to get them to say whether they are against it or for it. Have you any idea whether they are going to be able to report to us on it?

JUDGE CLARK: I don't know. I sent it over by messenger yesterday afternoon. I can call them a little later. Of course, our committee has been really acting, and I think that this suggestion has never been discussed by the gentlemen before us.

THE CHAIRMAN: That is right. Senator Pepper made the point yesterday that the Committee as a whole ought to pass on that.

SENATOR PEPPER: It seems to me, sir, that that suggestion has been talked over a good deal informally, and it seems to me that it met with pretty general approval. I should think the proper course was to vote on it, and if the proposition of the Chairman is approved, then it seems to me the rule should be drawn in conformity with it. We should then serve it on the Lands Division or the Department of Justice, and they can either accept it or reject it. If they reject it, we are through. We have tried and have gotten nowhere. However, if they accept it subject to a few relatively unimportant changes, that could be settled by a mail vote, could it not, sir?

THE CHAIRMAN: Yes. They have had this draft with that proposal in it for how long?

JUDGE CLARK: They haven't had this wording here, which is the new wording we have on page 30 of our supplemental report. They didn't have that until sometime yesterday afternoon.

THE CHAIRMAN: They have had the general idea before them from your previous draft since when?

JUDGE CLARK: The general idea they have had somewhat informally this way: Just before Christmas, I think it was, I had some talk with the Attorney General and with his assistant. This wasn't the Lands Division at all. I told them that we were working on something, and I let them see it.

About that time I sent them a statement, saying, "For your information I am sending you this, and I understand that Major Tolman will get in touch with the Lands Division." So, I don't know how seriously he took it, of course.

THE CHAIRMAN: The trouble is partially my fault because from September through to January 15 I was busy with this Pearl Harbor business, wasn't in my office, and had no time to do anything with this. I sort of took it for granted, if I thought of it at all, that Major Tolman was taking care of it. I had had extended correspondence with him about this thing and told him that I thought it was up to him to get hold of the Lands Division and get them to state what their position was before we went any further. I was busy in that way, and I didn't follow it up. The Major hasn't been well, and apparently he didn't follow it up. So, there has been no pressure on the Department up to date, apparently, to fish or cut bait on that proposal. I think the Senator is right; the Committee itself hasn't really authorized that proposal.

JUDGE CLARK: I would like to add a little more to that, because the Major really has said to me in extensive correspondence that I haven't understood the Chairman's proposal. There has been a difference of view as to what he was to present. He has written me several times.

THE CHAIRMAN: I wrote him a letter more than three months ago in which I said that the proposal was perfectly

clear, and I stated to him what it was so there wouldn't be any question that he misunderstood. You remember, you had some letters with him.

JUDGE CLARK: Yes.

THE CHAIRMAN: I wrote him directly, and I said I thought he misunderstood your position entirely. So, for two or three months he has known exactly what the idea was.

JUDGE CLARK: Of course, I ought not to try to comment. He isn't here, and I am sorry he isn't. It seems to me he hasn't accepted that version. Don't you think that in his later correspondence with us he goes back to the same thing?

THE CHAIRMAN: I don't think he is quite as clear on the subject.

JUDGE CLARK: I would like for my own information to know whether we have been going beyond it or not, and I think it would be worth while to get the view of the Committee. This is the place to settle it. The thing is, the Major hasn't believed in this compromise. He has argued that it destroys the uniform rule, as it does. It does it in a very, very vital aspect. There is no question about it.

THE CHAIRMAN: He wants the rule to provide that there should be jury trial in every case, instead of court.

JUDGE CLARK: Yes. He has resisted that, you see, and that is the main reason he hasn't gone to the Department.

MR. DODGE: Why does it destroy the rule in any vital

respect?

JUDGE CLARK: It destroys it as far as the trial goes. I mean it destroys uniformity.

THE CHAIRMAN: In one narrow respect.

MR. DODGE: One narrow respect. That is all.

THE CHAIRMAN: Gentlemen, it is hard to reconcile yourself to the fact that we haven't a proposal that means a uniform rule all the way through, but the question is whether these rules should prescribe a uniform tribunal--to wit, a jury--to award damages in all these cases. The TVA has an unassailable position on that on the facts, on the record. There is no possible chance of making a reasonable argument before Congress, for instance, against their opposition, that they ought to be saddled with jury trial. Their assistant general counsel came up and spent a whole day in my office going over what they were doing. He wrote a long memorandum about it. He demonstrated that this present statutory system with the TVA, with their great areas of condemnation (it isn't just a case of picking out a city block, but whole areas), is invulnerable.

Their statute prescribes, as you remember, that the TVA has, first, a commission of three men who **can** act. They can act in great areas and use uniformity of treatment of all the people. Then it goes to a three-judge district court, of which I believe one has to be a circuit court judge. Then,

the statute also provides that on appeal to the circuit court of appeals, the C.C.A. may act de novo, may take additional evidence.

To make things short, he demonstrated that they had had wonderful success with it. As a result of the uniformity of treatment, as a result of havint the same tribunal handle great areas, they have gotten settlements with people who felt that they didn't need to gamble with a jury because they were getting equal treatment with everybody else. Having a jury for every tract in two or three counties wouldn't work. I made up my mind, after hearing what they had to say, that we couldn't make a case to justify a jury provision in the TVA.

MR. DODGE: Did they accept our act in other particulars?

THE CHAIRMAN: You heard what their position was here. They had a whole lot of points about it before. I have never heard from them since they came before us a year or so ago. They were inclined not to raise much objection to some of it. They gagged a whole lot about anything that looked as if they had to get an abstract of title and know every defendant before a proceeding was brought, and we met that by a provision that initially when they brought a suit and wanted to be in a hurry to get an order for the taking, they had to name only the defendants whom they knew at that time, but then they would have to continue their investigation of the title

and supplement the proceeding later by adding the additional owners as they were discovered, which seemed to satisfy them.

You remember also that the Lands Division tried twice to get a bill through Congress to prescribe jury trials in all these cases, and it has been twice beaten. The fellows in Congress wanted conformity. The fellows who had jury trials provided by state law objected to the jury trial clause as much as the representatives of the states that had other means, because they took the position that this was a matter that ought to be settled by state law, and even though they had jury trial provided by their own state law, they sympathized with the other states that didn't have and voted against a law that imposed a jury trial in states that provided for commissions or whatnot.

As a result of that, it seemed to those of us who were working on it that if you wanted to get anything through at all, that would pass Congress, and that would not be busted there or by the TVA, it would be a procedural rule that prescribed all procedure, a uniform, simplified procedure, with the single exception of the question of the constitution and powers of the tribunals that passed on compensation, that they should be as fixed by federal statute if there be one, and, if not, according to the local practice. That puts the Department of Justice right up to the question of whether they will oppose or support a rule that does not grant them a jury

trial in all these cases.

MR. DODGE: Is it the idea to suppress our rule completely if the Lands Division won't agree to it?

THE CHAIRMAN: That hasn't been decided, but the difficulty is this: I don't know whether we can force or ought to try to force, before the Court and before the Congress, a condemnation rule on the Department of Justice, which handles the bulk of these cases, against their will and against their opposition. I suppose if the Attorney General went up and opposed it either before the Court or the Congress--

MR. DODGE [Interposing]: Couldn't we report it as a supplementary rule to the Court?

THE CHAIRMAN: You mean in the face of their opposition?

MR. DODGE: To be dealt with independently.

THE CHAIRMAN: That is what we propose to do. We agreed at the last meeting that we would go ahead at this meeting and get up our final report to the Court on all the amendments to the old rules, and that the condemnation rule, whatever we did with it at this meeting, had to go back to the bar for further consideration, because there has been violent opposition to the old draft by the bar and they ought to see the new one. So, the things will be handled separately anyway, but, of course, what we do with the rules if the Department of Justice is opposed to the view that is adopted by the Committee

(I mean about the jury trial business) remains to be decided. If you want to, you can report to the Court a supplementary report after the bar has seen the thing, that the bar generally favors it, the Committee favors it, and the TVA and the District of Columbia favor it, but the Department of Justice is against it because it doesn't provide for jury trials, give them a note explaining the whole situation, and let the Court decide whether in the face of the Department's opposition they will promulgate it.

MR. LEMANN: Mr. Mitchell, this rule, as I understand it, in present form would provide conformity in every proceeding in a federal court under a state statute.

THE CHAIRMAN: Oh, no. The rule, as we have drafted it, provides for uniform procedure according to the federal rules. You mean the case where the condemnation is authorized by a state law, in a diversity of citizenship case?

MR. LEMANN: That is right. I note that you and Judge Donworth both agree that conformity should continue in condemnations which arise under the condemnation statutes of the states. Judge Donworth says federal judges and lawyers are entirely familiar with and satisfied with state practice in condemnation cases. This makes me wonder somewhat whether the Department of Justice is justified in pressing so strongly for a uniform federal rule. We have a good many condemnation cases by public utilities, and so on, who are proceeding

in the federal court under the diversity clause but who want to condemn in accordance with state practice.

THE CHAIRMAN: You raise another question.

MR. LEMANN: I had not quite visualized, until I got it in this correspondence that I had with Major Tolman, that here we really are not going to have an abandonment of conformity anyhow if we present this in the way in which I understand it presently stands when Mr. Moore and Judge Clark got through with it. It will not provide for a complete federal system even apart from this jury proposition.

THE CHAIRMAN: The Committee has never O.K.'d that clause that said that there should be conformity with state law in cases arising under state statutes.

MR. LEMANN: Judge Donworth and Major Tolman, I understand, have both reached the conclusion in their minds that if we didn't keep conformity in those cases, we were going to run into more objections because the federal judges and practitioners had all preferred to use the state procedure in condemnation cases even when the cases were in the federal courts. I just want to bring that out in the open, Mr. Chairman, because if that is the considered opinion of these two gentlemen and the Committee as a whole should acquiesce in that, it would leave me, as I said here, with added doubt as to whether we should try to do anything with this rule.

THE CHAIRMAN: That is true. I remember that. It

seems to me that the opposition of those who want conformity to state law in cases arising under state statutes in diversity of citizenship cases, which is probably a relatively small part of the condemnation cases in the federal court, is the same opposition that came up against the adoption of any federal rules at all. It is just a revival of the old idea that every bar in each state is familiar with its own practice and doesn't like to have a new system foisted on it, which it has to learn. They prefer to continue in their own way. That was the same opposition we got to the whole idea. That is why the bill for a uniform system was fought for twenty years in Congress.

SENATOR PEPPER: Mr. Chairman, I don't like to interrupt Mr. Lemann, but I happen to know that he is not indifferent to lunch.

THE CHAIRMAN: Let's adjourn, then.

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

WEDNESDAY AFTERNOON SESSION

March 27, 1946

The meeting reconvened at two o'clock, George Wharton Pepper, Vice Chairman of the Committee, presiding.

SENATOR PEPPER: Gentlemen, the Chairman asked me to call you to order at two o'clock. He was called out of the room for a few minutes. I hesitate to go on with the Condemnation Rule until the Chairman gets back, because he is so much concerned. I suggest that in the meantime we give our attention to the rewrite of 54(b), which has been supplied to us by the Reporter.

JUDGE CLARK: And also Rule 30(b) on discovery. You will find both of those.

SENATOR PEPPER: Then, let's take them up in their numerical order. First, 30(b). I will read it aloud. Eliminate proposed amendment in lines 14-17, p. 38 of draft, and add at the end of present Rule 30(b) the following:

"The production or inspection of the contents of any writing which came into existence subsequent to the transaction or occurrence that is the subject matter of the claim sued upon and which is in the possession of an adverse party, his attorney, surety, indemnitor, or agent, shall not be required unless the examining party shall show that [he will be prejudiced in preparing his claim or defense] [prejudice will result to him or to the preparation of his case for trial] if such pro-

duction or inspection is not ordered. Before ordering production or inspection, the court shall first examine such writing to determine whether such prejudice will result but in no event may the court order the production or inspection of any writing reflecting an attorney's mental impressions, conclusions, opinions, or legal theories, or the conclusions of expert witnesses retained by the adverse party."

Mr. Chairman, I had just called the Committee to order in your absence and, thinking that we had better not take up Rule 71 until you returned, we were filling in time by taking up the first rewrite of the Reporter, which is of 30(b), and then we were going to take up the rewrite of 54(b). I have just read the proposed rewrite of 30(b). Will you take over now?

[Mr. Mitchell took the chair.]

JUDGE CLARK: As Senator Pepper indicated, we put two different formulae in lines 6 and 7. Use one or the other or, of course, suggest something else.

DEAN MORGAN: First, Charles, may I call your attention to lines 2 and 3, "transaction or occurrence that is the subject matter of the claim". Haven't you got words in there that just invite all kinds of construction, "transaction", "occurrence", and "subject matter"? What about a contract?

JUDGE CLARK: Let me go back over that a little. The suggestion in the form that it came to us from the insurance

lawyers was the "accrual of the cause of action". We haven't yet brought back in "cause of action".

DEAN MORGAN: Not "cause of action". It is "accrual of the action", isn't it?

JUDGE CLARK: We thought some of using the term "accrual of the claim", and that is an alternative, if you wish, "the accrual of the claim for relief". However, it seemed that what you wanted more was the accrual of the general subject matter, so to speak, and we took these words because they have been used so often in the rules. It is true that there are possibilities of debate about them, but I should think there are fewer possibilities here. I should think they were somewhat clearer here than where they already appear in the rules. For example, they appear in the counterclaim section very prominently, and they also appear in this Rule 54(b).

DEAN MORGAN: Would the transaction or occurrence be the breach of the contract or the contract itself, for example, in a contract case?

JUDGE CLARK: What we want is the breach. I should suppose this would be the breach.

DEAN MORGAN: I don't know whether it would be. That is the trouble.

JUDGE DOBIE: "transaction or occurrence" is a little broader than "transaction", isn't it? "transaction" is used in the old code on the counterclaims, and a lot of the

courts have given what I think is a hideously narrow interpretation to it. I suppose if you get run over by a street car, it is more an occurrence than it is a transaction. If it is a contract, you know that there is something of that kind. I would like to get away from "cause of action", if we can. We have never used it before.

DEAN MORGAN: I don't want that in, if we can help it.

MR. LEMANN: What other changes have you made in the language of the Insurance Counsel?

THE CHAIRMAN: It appears on page 14 of the Reporter's supplementary report of March 20, under Rule 30. The wording of the Insurance Counsel is set forth verbatim.

MR. LEMANN: Yes, I see it.

THE CHAIRMAN: One thing that struck me is that this is a reproduction of that in this respect, but I am wondering whether this is too broad. "The production or inspection of the contents of any writing which came into existence subsequent to the transaction or occurrence ... and which is in the possession of an adverse party". The idea in my head is something which came into his possession in connection with the preparation for the trial. I wonder if you can see documents which have been in his possession after the event, important documentary evidence in connection with the case, which may not be the statements of witnesses at all, but a letter which some fellow has written to somebody else making statements

about the occurrence. This fellow got hold of it in some way, and it came into his possession. The thought I had was that this restriction is intended to cover things that he brought into existence by way of preparation for trial, by way of going to people and getting their statements and whatnot. That is the idea that I have had in my head about it.

DEAN MORGAN: That is what I had, too.

THE CHAIRMAN: The stuff that he had procured from people, statements of witnesses, and whatnot.

MR. DODGE: Suppose the defendant sets up a release executed after the suit was brought.

THE CHAIRMAN: That is a document in the hands of the plaintiff, isn't it?

MR. DODGE: In the hands of the defendant.

THE CHAIRMAN: Yes, that is right.

MR. DODGE: The plaintiff wants to see it because he claims it is forged.

THE CHAIRMAN: That came into existence after the event on which the claim is based, and the fellow can't inspect it.

DEAN MORGAN: That isn't the thing we are trying to hit at all.

THE CHAIRMAN: My point is on this broad language. In the decisions they always talk about stuff that is procured in preparation for a case, procured by a party in the

preparation of his defense. You don't procure a release in preparation for defense.

DEAN MORGAN: Not at all.

THE CHAIRMAN: The idea is something that he has gotten. He gets busy and goes out and interviews witnesses and gets their statements. That is the thing you are guarding here really. To broaden it out and say anything that just happened to come into existence after the day the cause of action is sued on, without saying that it is something he has gone out with his agents, investigators, and lawyers, and dug up for the purpose of the trial or brought into existence, is not what we wish to have represented in this draft. I don't know how you could phrase.

MR. LEMANN: Perhaps you could use language similar to the Reporter's original draft on page 38, lines 14 and following, and say, "The production or inspection of the contents of any writing prepared or obtained by the adverse party".

THE CHAIRMAN: "in the preparation of the case for trial". That expresses the idea. It certainly satisfies the bar.

MR. LEMANN: How about substituting that language? It would read then: "The production or inspection of the contents of any writing prepared or obtained by the adverse party his attorney, surety, indemnitor, or agent, in the preparation of the case for trial shall not be required".

THE CHAIRMAN: You can add there "and which came into existence after".

MR. LEMANN: Would you need that?

THE CHAIRMAN: I don't know. The Senator had that idea.

MR. DODGE: How can you produce the contents of a writing?

DEAN MORGAN: That is what I say.

MR. DODGE: It is "The production or inspection of any writing".

DEAN MORGAN: Yes, that is the usual phrase.

MR. LEMANN: Or "papers, documents or other writing".

JUDGE CLARK: I think if you put that in, if you took "preparation for trial", you wouldn't need to stress when it came into existence, would you?

DEAN MORGAN: I don't think you need that, either.

JUDGE CLARK: How would this do? "The production or inspection of any writing obtained or prepared by the adverse party, his attorney, surety, indemnitor, or agent, upon investigation in preparation for trial".

MR. LEMANN: "shall not be required".

JUDGE CLARK: "upon investigation or in preparation for trial" is the language we used.

THE CHAIRMAN: Why do you have to say "upon investigation"?

MR. LEMANN: You haven't "upon investigation" here.

JUDGE DOBIE: Because you don't know whether there is going to be trial at all. You might settle it. As soon as the accident happens, one of the claim agents goes out and gets all the statements he can.

JUDGE CLARK: I will leave it out.

JUDGE DOBIE: The case may never be tried.

PROFESSOR MOORE: He may get it before a suit is even commenced.

JUDGE DOBIE: Or even thought of.

SENATOR PEPPER: That is the reason I had tried to use the general language, a thing coming into existence after the event giving rise to the action, but this would be equally good, wouldn't it?

JUDGE CLARK: Then you would go on as in line 5.

THE CHAIRMAN: You could say, "in apprehension of a case or in preparation of a case for trial". That is the language the British use and that some of the American courts use.

MR. LEMANN: In anticipation.

DEAN MORGAN: In anticipation of the litigation or in preparation of the case for trial.

MR. DODGE: Where does that language occur?

THE CHAIRMAN: It occurs in all the English cases, and in a great many of the American district court cases under

the present rule they use the words, "under an apprehension or fear of litigation or in actual preparation for trial".

JUDGE DOBIE: This says, "the examining party shall show". He might not be the examining party if he doesn't get it.

SENATOR PEPPER: How would that read, then, Mr. Reporter?

JUDGE CLARK: "The production or inspection of any writing [I have left out "of the contents"] obtained or prepared by the adverse party, his attorney, surety, indemnitor, or agent".

SENATOR PEPPER: "in anticipation of or in preparation for".

THE CHAIRMAN: "in anticipation of the litigation or in preparation for trial".

JUDGE CLARK: That is it. "shall not be required unless the examining party shall show that".

JUDGE DOBIE: Is "examining party" a good term, do you think? He may not be permitted the examination. It is the party seeking the examination, really. You say, "unless the examining party shall show that".

THE CHAIRMAN: "the party applying therefor".

SENATOR PEPPER: I like the first alternative better than the second here in line 6.

JUDGE CLARK: I think I do myself. "shall show that he will be prejudiced in preparing his claim or defense if such

production or inspection is not ordered."

SENATOR PEPPER: May I suggest that in these district court opinions a considerable number of them seem to show that the judges without much analogy are influenced by a variety of considerations, not merely prejudice to claim or defense, but in some instances it is a fairly obvious case in which the moving party has taken it easy and is now trying to appropriate the benefit of some other matter or is trying to save money by making the other fellow pay the cost of this and that, and then he will reap the benefit of it. I wonder if it is necessary to specify what he has to show in precise terms, whether it would not be sufficient to say, "unless the examining party shall satisfy the court that a failure to grant his motion will result in injustice", or some phrase of that sort.

THE CHAIRMAN: "or unfairly prejudice his claim". I think unfairness is the idea back of it. A fellow can say it is going to be a great advantage to him in the preparation of his case if he can see all the statements made by the witnesses the other fellow has interviewed, but it has to be something a little bit more than that.

JUDGE DOBIE: I don't think you can spell out, though, every extraneous circumstance that a judge would take into consideration, do you, Senator?

SENATOR PEPPER: I don't. We can't escape judicial discretion here, even if it were desirable to do so.

JUDGE DOBIE: Certainly not.

THE CHAIRMAN: What you mean is that the party is required to satisfy the judge that in justice and fairness he is reasonably entitled to the stuff in the preparation of his case. I also had the idea that the court should be satisfied that abuse would not result. For instance, a fellow comes in and wants to see the statement of a witness for some reason. I don't know why he should want to see it in the early stages of the case unless he wants to get some testimony to rebut it; that is, he wants to fake something up. If the witness is a friendly one, willing to talk, he can go to him himself and get the statement. The reason he wants to see the statement is to see how far the fellow is tied up to a certain theory. That may be one thing. I think that back of it all is the feeling that so many of these demands are for the purpose of framing the case, knowing what certain people are claiming or are going to claim.

JUDGE DOBIE: I think that the granting of one of these motions may in a number of instances bring on a settlement. The attorney for the plaintiff sees these things and says, "I haven't nearly so good a case as I thought, and I had better accept this settlement, which I think is pretty fair in the light of what the other side has got."

MR. LEMANN: This dumps it right back onto the discretion of the trial judge. It will be open to remark and

debate; some judges will permit it and some won't. In the same district, one judge will permit it, and another judge won't. One just will say that it always unfairly prejudices, and another will say, "I don't think it does." I don't know how you are going to avoid it.

JUDGE DOBIE: You can't.

MR. LEMANN: Without an absolute rule, either absolutely forbidding it or absolutely permitting it. At least, we have a limitation in the next sentence. After all, the clause we are using is propounded by the Insurance Counsel, and we are adopting it practically as they put it forward, with some relatively minor changes.

MR. DODGE: May we have the language suggested by Senator Pepper read again?

DEAN MORGAN: Injustice or undue hardship.

SENATOR PEPPER: That was it.

DEAN MORGAN: "would cause injustice or undue hardship to the moving party." Why isn't that all right?

MR. LEMANN: "will unfairly prejudice".

DEAN MORGAN: "will unfairly prejudice or cause injustice or undue hardship".

MR. LEMANN: Use both?

DEAN MORGAN: Yes, both, either one.

JUDGE DOBIE: I like "hardship" there.

MR. LEMANN: The Insurance Counsel used the words

"manifest prejudice".

JUDGE DOBIE: We left that out.

MR. LEMANN: We have toned that down to "unfairly prejudice", and I guess they would like "injustice or undue hardship" better.

DEAN MORGAN: Wouldn't you?

MR. LEMANN: If I were they, yes.

JUDGE CLARK: If you are going to leave it in, I take it that it will be "prejudiced in preparing his case or subjected to undue hardship"?

SENATOR PEPPER: I don't like that "prejudiced in preparing his claim or defense", because in nine cases out of ten this is going greatly to facilitate his preparation. So, he will always be able to say, "It is a choice between my having to do this thing myself or prejudicing me by preventing me from getting the benefit of the other fellow's investigation."

THE CHAIRMAN: Could you cure it by saying, "unfairly prejudiced"?

SENATOR PEPPER: I think so.

THE CHAIRMAN: Let's go on with the rest of it and see what we want to do with that.

SENATOR PEPPER: I like Mr. Morgan's idea, "undue hardship", and just let it go at that. The court is going to have his own reasons for what he does. We are just suggesting

a line of thought to him. That is all.

JUDGE DOBIE: No language that you can possibly use, Senator, is going to make them decide it the same way. They have to determine it.

MR. LEMANN: I think it is not a bad idea perhaps to use both expressions: "will show that he will be unfairly prejudiced in preparing his claim or defense or that undue hardship or injustice will result if such production or inspection is not ordered."

SENATOR PEPPER: How about that?

DEAN MORGAN: That is all right with me.

SENATOR PEPPER: It is all right with me.

MR. LEMANN: I suggest that the Senator dictate over again now the first eight lines of this as it will stand with the other changes made.

THE CHAIRMAN: Do you want the court to be compelled to examine the writing, or should it be "may first examine"? The idea they want is that the court may look at it without showing it to the other fellow, the applicant.

JUDGE CLARK: I wonder if "may" wouldn't do. It is true that the Insurance Committee said "shall", but I don't know that we should compel it.

THE CHAIRMAN: I think they used the word "shall" because they had in the back of their heads the idea that he should look at it first before the applicant saw it. That is

what they meant. They wanted to make it compulsory that he not expose it to the other fellow, but have a chance to look at it alone. That is why they used "shall".

SENATOR PEPPER: It may be that or it may be a desire to impress upon the court that this is a ruling that he ought not to make until he has seen the document.

DEAN MORGAN: That is what I think.

SENATOR PEPPER: It seems to me that is the important phase of it. The court ought not just to say, "I will take your word for it," and do thus-and-so.

DEAN MORGAN: I think that is quite true.

MR. LEMANN: We would have to make a corresponding change in language in line 10. We would have to put in "whether such prejudice, hardship, or injustice will result", if we are going to use those words up above in lines 6 and 8.

JUDGE DOBIE: In other words, you have to have him apply the same standard down here that you prescribe up above.

MR. LEMANN: I think the last three lines would create great happiness on the part of the Insurance Counsel .

THE CHAIRMAN: Do you need to say anything about the privilege of an attorney?

DEAN MORGAN: I don't think so. That is covered elsewhere by privilege.

MR. LEMANN: We have a general reference to privilege, which Judge Goodrich seized and ran away with in Hickman v.

Taylor.

SENATOR PEPPER: Mr. Reporter, as I recollect it, one of the many contributions to our work made by Dr. Velde was the persistent elimination of the word "such".

JUDGE CLARK: Yes, it was, but we haven't got--

SENATOR PEPPER [Interposing]: We have "such" in every two or three lines here. "the court shall first examine such writing to determine whether such prejudice". Oughtn't we just to say, "examine the writing to determine whether hardship or injustice will result"?

JUDGE CLARK: That is all right.

"The production or inspection of any writing obtained or prepared by the adverse party, his attorney, surety, indemnitor, or agent, shall not be required unless the examining party shall show".

MR. LEMANN: Wait a moment.

THE CHAIRMAN: You left out "preparation".

JUDGE CLARK: Oh, dear!

SENATOR PEPPER: It is really the moving party, too. That is what we want.

JUDGE CLARK: That is fine. "or agent, in anticipation of litigation or".

DEAN MORGAN: "or in preparation of the case for trial". I don't know whether you need "the case". "or in preparation for trial".

JUDGE CLARK: "or in preparation for trial shall not be required unless the moving party". No, it isn't the moving party.

THE CHAIRMAN: "unless the court shall be satisfied".

JUDGE CLARK: That is better. It isn't the moving party. "unless the court shall be satisfied that".

SENATOR PEPPER: "unless the court is satisfied". It shall not be unless he is.

JUDGE CLARK: "unless the court is satisfied".

MR. LEMANN: "that the moving party".

JUDGE CLARK: No. This is a protective order.

DEAN MORGAN: "that the party seeking production or inspection".

JUDGE CLARK: "that the party seeking production or inspection will be unfairly prejudiced in preparing his claim or defense or that undue hardship or injustice will result to him if such production or inspection is not ordered. Before ordering production or inspection, the court shall". Is it to remain "shall"?

JUDGE DOBIE: Yes.

JUDGE CLARK: I was going to leave out the intermediate words. "the court shall first examine the writing and in no event may order the production or inspection", and so on.

PROFESSOR SUNDERLAND: You don't need the last four

or five words there, do you? "retained by the adverse party." All we are talking about are those that are retained by the adverse party.

THE CHAIRMAN: "retained by the adverse party" can be stricken. We are talking about getting it from the adverse party.

JUDGE CLARK: I shouldn't think it very necessary. It is certainly understood. You will see that in line 10 I left out all that, "determine whether such prejudice will result". That is what he is acting for. I thought that was just repetitious.

SENATOR PEPPER: Oh, yes. He is not just looking at it to see the handwriting.

THE CHAIRMAN: I thought that was a good draft.

MR. LEMANN: Mr. Cherry suggests that you omit the "but" or "and" in line 10 and start a new sentence.

JUDGE CLARK: Do you have some question?

MR. LEMANN: I put forward Mr. Cherry's suggestion.

JUDGE CLARK: What was that?

THE CHAIRMAN: To strike out "but".

MR. LEMANN: To make a new sentence beginning with "In".

JUDGE DOBIE: Cut out "but", put a period after "result", and begin a new sentence. I believe that is better.

MR. LEMANN: He says it is a new thought.

JUDGE CLARK: "the court shall first examine the writing".

MR. LEMANN: Period.

JUDGE DOBIE: "prejudice will result." Cut out the "but" and start a new sentence, "In no event may the court order the production of".

MR. LEMANN: Put the period after "writing". He is going to omit the words, "to determine whether such prejudice will result".

JUDGE CLARK: I wonder whether you want that circumlocution there, which is fine writing. Just say, "the court shall not order production."

SENATOR PEPPER: That is better.

JUDGE CLARK: I want to raise something right there. "shall not order the production or inspection of". Shouldn't that be this: "so much of any writing as reflects".

PROFESSOR SUNDERLAND: That is better.

THE CHAIRMAN: It shouldn't be "attorney". It has to be the attorney for one of the parties. This might mean a witness who happened to be a lawyer.

MR. LEMANN: I shouldn't think you would have to gild the lily to that extent. The judge could use his judgment about that.

JUDGE CLARK: I am just asking.

PROFESSOR CHERRY: I prefer that amended form. I

think this is better.

SENATOR PEPPER: I think that is a kind of refinement, don't you?

PROFESSOR CHERRY: He may have his marginal notes on something, and what is there ought to be inspected, but not his notes.

MR. LEMANN: The judge could do that under the language that we have, because it simply says he can't order the production of a writing reflecting the attorney's mental impressions. He can say to himself, "I will just cut out these marginal notes. The rest of it doesn't reflect his impressions." I think, as Senator Pepper said, it is a little refinement in expression which is not needed.

THE CHAIRMAN: You have something else in mind, but before I forget it, I just wonder whether we haven't a rule about the conclusion of an expert witness with which this might be in conflict.

PROFESSOR CHERRY: I don't think it is, General, because that calls for delivering something from one party to the other. Are you thinking of the physical examination of a party?

THE CHAIRMAN: Yes.

PROFESSOR CHERRY: This is production or inspection. You deliver him a copy of the report of your medical expert.

THE CHAIRMAN: Suppose you fail to deliver, and you

are asked to have the report produced so he can have it.

PROFESSOR CHERRY: There, if he fails to deliver it, then he can't use it.

DEAN MORGAN: Then he can't use it. That is all.

MR. DODGE: What rule is that?

PROFESSOR CHERRY: Rule 35.

DEAN MORGAN: That is what you order an examination. It is only when you order an examination.

THE CHAIRMAN: I see.

DEAN MORGAN: You can say, "subject to Rule 35", if you want to fix that.

THE CHAIRMAN: Suppose it is an examination of an order. I am not sure there is anything in this, but I am just wondering. "If requested by the person examined, the party causing the examination to be made shall deliver". That is 35(b).

DEAN MORGAN: Do you want to put, "or, except as provided in Rule 35, the conclusions of expert witnesses retained by the adverse party"?

THE CHAIRMAN: "If the party examined refuses to deliver such report the court on motion and notice may make an order requiring delivery on such terms as are just". This comes along and says that in no case is he to produce it.

DEAN MORGAN: Don't you want to insert in line 13, "except as stated in Rule 35, the conclusions of expert

witnesses"?

THE CHAIRMAN: That meets the point.

MR. LEMANN: With a parenthesis after the "or".

MR. DODGE: "or, except as provided in Rule 35,"

DEAN MORGAN: Mr. Chairman, I move the adoption as amended.

SENATOR PEPPER: I second the motion.

JUDGE CLARK: I take it that Cherry's suggestion of "such part of any writing," and so on, was not accepted.

MR. DODGE: It was concluded that that was open anyway to the court by the document.

THE CHAIRMAN: Are you sure about that? It is a bar against the production or inspection of any writing. Do you think the court can make the split under that and order the production of a part?

MR. DODGE: Tear off page 2, which contains the opinion.

DEAN MORGAN: Or cover up the marginal writings, I suppose.

JUDGE CLARK: It doesn't do any harm to make it clear, though.

DEAN MORGAN: If you don't put in Charlie's amendment, I wonder if a lot of these fellows won't write their conclusions down so that they are inseparable.

JUDGE CLARK: "inspection of such part of any writing

as reflects the mental impressions, conclusions, opinions, or legal theories of an attorney for the adverse party."

THE CHAIRMAN: I think you want to make sure that you are talking about a counsel in the case and not about a witness who happens to be a lawyer.

JUDGE DOBIE: You think that some lawyer would give up his practice, do you, General, and go into the business of being an expert witness? He could say, "Boys, I am a lawyer, and anything I do cannot be produced."

THE CHAIRMAN: He may have been a witness to the accident and may have made a statement giving his impressions as to what happened, and his conclusions.

MR. LEMANN: Then, change it to read, "so much of any writing as reflects the mental impressions, conclusions, opinions, or legal theories of an attorney for the adverse party or, except as provided in Rule 35, the conclusions of expert witnesses retained by such party."

THE CHAIRMAN: We don't like "such".

MR. LEMANN: "retained by the adverse party"; "retained by that party."

THE CHAIRMAN: "expert witnesses for the adverse party."

MR. DODGE: You have referred to his attorney before, so you might say "the attorney", referring back to the one mentioned above.

MR. LEMANN: Wouldn't you also have to say, "the attorney for the adverse party, his surety, indemnitor, or agent," to make it consistent?"

DEAN MORGAN: You don't care about the indemnitor's mental impressions, do you?

MR. DODGE: The expert isn't a witness yet. Why not say, "conclusions of experts retained by the adverse party"?

DEAN MORGAN: Yes, experts. That is right.

MR. LEMANN: I was talking about the attorney. You have tied it down to the mental impressions---

MR. DODGE: --of the attorney referred to before.

MR. LEMANN: I see.

THE CHAIRMAN: The surety company may have a lawyer who conducts an investigation and makes notes of his impressions, and yet he isn't the attorney who is stuck up by the insurance company to appear for the actual defendant. That is your point.

MR. LEMANN: That is right. If you said "the attorney", it wouldn't cover it.

DEAN MORGAN: Why not?

MR. LEMANN: Because the reference is to the party's attorney in line 4, "of an adverse party, his attorney". If you use the word "the attorney", you mean the adverse party's attorney, which would not include the surety's attorney, which I think you ought to do.

MR. DODGE: Suppose it is an outside attorney who has given an opinion in another similar case, and they have it in their files. Why not exclude any attorney?

MR. LEMANN: On this point raised by the Chairman, I have no objection to the draft as it stood.

THE CHAIRMAN: I withdraw it. I can see the possibility. I think the court knows it means an attorney connected with the case and not a fellow who is a witness who happens to be a lawyer. I give him credit for that much sense and withdraw my objection.

MR. LEMANN: If I were a witness, you might not permit me to express my impressions.

SENATOR PEPPER: That is what I was going to say. Suppose an attorney was a witness, and he indulged in our favorite indoor sport of noting down his mental impressions, conclusions, opinions, and theories. They wouldn't be evidence, anyway.

THE CHAIRMAN: That is pretty good. There is a motion to adopt it as dictated.

[The question was called for, and the motion was put to a vote and carried.]

MR. DODGE: I understand that change is made in line 13, "the conclusions of experts employed by the adverse party."

DEAN MORGAN: Yes.

JUDGE CLARK: That is the way it reads, "or, except

as stated in Rule 35, the conclusions of experts employed by the adverse party."

MR. LEMANN: Suppose he is employed by the surety company, are you willing to exclude that? You have very broad language up above in line 4. Do you want to cut that down? Suppose the surety is not a party, but it has employed an expert. Could they look at the report of his expert? Why shouldn't they? Why not stop with expert witnesses?

DEAN MORGAN: All right, the conclusion of experts.

SENATOR PEPPER: Why wouldn't that do, Mr. Reporter? Instead of limiting it to retained by the adverse party, just say, "or, except as stated in Rule 35, conclusions of expert witnesses."

THE CHAIRMAN: Strike out "witnesses", because the expert may never be called because it is a statement adverse to the fellow he reported to.

SENATOR PEPPER: Experts, I meant; Yes.

JUDGE CLARK: That is all right; "the conclusions of experts." Is that the way it is now?

THE CHAIRMAN: The reason the other fellow wants to get the expert's statement is that it hits the defendant in the nose, and the defendant doesn't intend to produce him. As so changed, the clause is agreed to. How about the part at the end?

DEAN MORGAN: Charles, your footnote should include

Rule 45 also, shouldn't it, with reference to subpoena duces tecum?

JUDGE CLARK: No, I shouldn't think so.

DEAN MORGAN: Surely you are not going to require these fellows to produce these things, if you just take a deposition and require these things to be produced without subpoena duces tecum.

JUDGE CLARK: In Rule 45, subpoena duces tecum, we are not saying what the law is. We are saying simply that is the method you use to get the papers. Then the ruling the court makes afterward is whatever the ruling may be.

DEAN MORGAN: I know, but you get a subpoena duces tecum without any order of the court.

MR. OGLEBAY: In the amendment we have now to 45(d) you notice that we refer to the protective orders set forth in Rule 45(b). So, we have to change that first. You might look at 45(d)(1) in the draft as amended.

MR. LEMANN: Page 52, lines 27 to 33, subdivision (d). Now we have to go back to subdivision (b), which is in the original.

DEAN MORGAN: "the court, upon motion made promptly, and in any event at or before the time specified in the subpoena for compliance therewith, may (1) quash or modify the subpoena if it is unreasonable and oppressive or (2) condition denial of the motion upon the advancement".

MR. LEMANN: That would cover this, would it?

DEAN MORGAN: I don't know.

MR. LEMANN: Don't you think we had better put in 45(b) the same limitations that we put in--

JUDGE CLARK [Interposing]: I didn't suppose we were trying to say anything about the admissibility of evidence brought in by supoena.

DEAN MORGAN: That is a good way to get a look at it.

MR. LEMANN: It is an order for the production of it, Charlie.

JUDGE CLARK: I had supposed that the possibility of use at the trial might be a lot broader than examination. It might be broader. You can't tell.

MR. LEMANN: You are not going to let a guy bring it up by subpoena if you could get it on the trial.

JUDGE CLARK: I take it you are assuming, if we don't say anything, it is ipso facto admissible. I should say it was subject to any existing rules of law about admissibility, and I should think it would be quite strange if you started limiting the operation of the subpoena.

DEAN MORGAN: But 45(d) is a subpoena when you take your deposition. If you are going to make them produce it at the deposition, the examining party is going to get a look at it then, isn't he?

THE CHAIRMAN: There ought to be a provision in the

rule that the subpoena to produce his investigation file for a deposition is subject to the protective orders provided in Rule 30. There is no doubt about that.

DEAN MORGAN: I should think that 45(d) ought to go in there.

JUDGE CLARK: Do you want to put both in this rule?

DEAN MORGAN: I wasn't so worried about it because when you produce them at the trial, the judge can rule on them in the same way, but when you go to produce them before a notary or anybody who is taking a deposition, that is quite a different proposition.

MR. LEMANN: Couldn't you accomplish it by amendment to the language on page 52 of the printed draft, which is 45(d), the language you were looking at a moment ago in line 27 and following? It reads now:

"The subpoena may command the person to whom it is directed to produce designated books, papers, documents, or tangible things which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 26(b), but in such event will be subject to the protective orders set forth in subdivision (b) of this Rule 45."

Then add, "and shall be subject to the restrictions provided by Rule 30(b)."

SENATOR PEPPER: That is a good idea.

JUDGE CLARK: Would it do to say, "but in such

event will be subject to the protective orders set forth in 30(b) and 45(b)." Wouldn't that cover it?

THE CHAIRMAN: If the court is making an order under 30(b).

MR. LEMANN: I think that would cover it.

SENATOR PEPPER: How does that work? Rule 30(b), as we have drafted it, doesn't necessarily call for protective orders, does it?

JUDGE CLARK: Yes, that is the way it comes up. Rule 30(b) is in the section on protective orders.

THE CHAIRMAN: Orders for the Protection of Parties and Deponents.

MR. LEMANN: You could say, "protective orders and restrictions".

DEAN MORGAN: You had better say "restrictions".

MR. LEMANN: "the protective orders and restrictions set forth in Rule 30(b) and 45(b)."

SENATOR PEPPER: That is all I wanted to do, to get the word "restrictions".

JUDGE CLARK: "the protective orders and restrictions of Rules 30(b)", and so on.

DEAN MORGAN: That is all right.

THE CHAIRMAN: I understand that is agreed to. We will take up the substitute for Rule 54(b).

JUDGE CLARK: Let me explain what you have before you

on 54(b). You really have three documents. Let me tell what they are. The longest one of the three is our plan of following out Mr. Lemann's suggestion, and it is supposed to clarify and explain what we have been doing when you have a judgment at separate stages. The other two shorter ones are two attempts of mine to state a shorter rule. They should come to the same thing. I think that the later one, with the heading "Judgment upon Multiple Claims", is the better one of the two. That is the one that I think you would like, if you are going to follow that, to read first.

Let me suggest what the difference is. The shorter one is a simple rule which cuts down the number of final judgments. It is really in one sense going back to the rule before our uniform rules here, the older rule of the Supreme Court, which was quite strict, that unless all claims were decided you couldn't have a final judgment and couldn't appeal. This carries out that idea to our broader cause of action but ameliorates the possible harshness of it by the provision that the district court can definitely find that a part should be disposed of. That is all there is to that rule.

SENATOR PEPPER: Isn't it really true that it is through a study of the minute analysis contemplated by Mr. Lemann that you have come to the conclusion that you can abridge in the way that you have done?

JUDGE CLARK: I certainly wish we had started on the

shorter rule. I think it must be said now that this admits less in the way of final judgment than has been done under our rules to day. For example, the Supreme Court case of Reeves v. Berdahl, which allowed separate judgments under 54(b) would not be done under this rule unless the district court had taken affirmative action. Have I made clear what I have been up to?

SENATOR PEPPER: Mr. Chairman, might we ask the Reporter to read the preferred draft, "Judgment upon Multiple Claims"?

JUDGE CLARK: This would be a substitute for 54(b), which you will recall now is headed, "Judgment at Various Stages". I thought it would be better to head this "Judgment upon Multiple Claims."

"When more than one claim for relief is presented in an action, whether as claim, counterclaim, cross-claim or third-party claim, the court may render a final judgment upon one or more but less than all of such claims only upon an express determination that there is no just reason for delay and upon an express order for such judgment. In the absence of such determination and order, any order or other form of decision, however designated, which adjudicates less than all such claims shall not terminate the action as to any of the claims, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all such claims."

You will note that I left out any reference to a stay I thought that that would be so rarely necessary that we could leave it out. It is conceivable that a district court judge might say to himself, "I really would like to enter judgment," and then stay it, but the simpler way would be for him just to say, "I won't enter judgment."

DEAN MORGAN: There would be nothing to prevent him from staying judgment, if he wanted to, would there?

JUDGE CLARK: I should think he would have that general power anyway.

MR. LEMANN: The only advantage of entering the judgment would be to say that it would permit an appeal while the stay was in force.

JUDGE CLARK: That is true, but I think, as Eddie Morgan says, he could do it anyway, although he probably wouldn't think of it if you didn't say anything about it.

MR. LEMANN: Of course, you could add as a separate paragraph here what you have on that subject.

JUDGE CLARK: Yes, we could.

MR. LEMANN: So, we are not forced to a final choice leaving it out. We can take your shorter form and add the stay part of your longer form, if we want to.

JUDGE CLARK: That is true. You can add a stay, if you wish.

MR. LEMANN: What is this other 54?

JUDGE CLARK: The other short one is my first draft, and I think the one I have just read to you is a better one.

THE CHAIRMAN: Let me ask this question. Cases often arise in a federal court and a state court where the action arises from the same controversy, and there is a race to get one court or the other to make an earlier settlement of the judgment. The federal courts usually have the advantage in that because under the rules they enter judgment forthwith, whereas in most state practices the judgment may not be entered promptly on the verdict. I am wondering just what effect this has. Suppose you enter a judgment on one of the claims, and by the terms of this rule it is not a final determination. It is open to revision and, therefore, is not final and subject to appeal. Then, later on, it becomes absolute. How does that work when it comes to the question of which court enters the first judgment?

JUDGE CLARK: I think the intent now would be rather clear that unless the district court made the determination spoken of, whatever he called it, it was not a final judgment.

THE CHAIRMAN: If he wants to give his judgment priority over the state court and the lawyers want him to do it, he could make that express determination.

JUDGE CLARK: Yes.

THE CHAIRMAN: All right, that is all. What is your pleasure about 54(b)?

JUDGE CLARK: Do you want to look at the longer one of Mr. Lemann? Of course, in a way it isn't fair to unload it on Mr. Lemann. It is the idea that we were following before, made with the different stages of clarification that Mr. Lemann suggested. You haven't looked at Mr. Lemann's yet. Those are two versions of the same thing.

SENATOR PEPPER: Maybe Mr. Lemann is satisfied with the shorter form.

MR. LEMANN: I took a first quick look at this, and I didn't recognize my child entirely on first reading.

JUDGE CLARK: You mean the long one?

MR. LEMANN: The long form. I haven't read it fully yet.

SENATOR PEPPER: I recognized the shorter one as Charlie's, because there are five "suches" in it.

THE CHAIRMAN: I notice that Charlie says in subdivision (1) that "when all claims have been decided final judgment shall be entered". I think that is surprising. What else could the court do? He is through. That seems rather odd. I know why you put it in there. It was to classify the thing. That is what a court will do. When he has decided every claim involved in an action, final judgment shall be entered.

JUDGE CLARK: I guess you've got me there.

THE CHAIRMAN: He will do it anyway. He won't just

sit back and switch his tail.

JUDGE CLARK: We will have to take out some of the "suches". "Such" is such a nice word.

THE CHAIRMAN: You can use "the" instead of "such" all the way through there.

Gentlemen, do you want to consider the long draft, or do you want to adopt the short one?

MR. DODGE: I move the adoption of the short form.

DEAN MORGAN: I second the motion.

THE CHAIRMAN: Is there any objection? If there is no objection, that is agreed to.

JUDGE CLARK: Then, we don't need to consider the long one.

MR. LEMANN: The best argument for the short one is to start reading the long one.

THE CHAIRMAN: That is what happened to me when I read it.

JUDGE DOBIE: So, we are adopting this one marked "Substitute for Rule 54(b)."

MR. LEMANN: Are you going to leave in the unnecessary part of this short form which you just pointed out?

JUDGE CLARK: Yes. You now want to decide whether or not you want to add a provision for stay.

DEAN MORGAN: For stay of execution, you mean.

JUDGE CLARK: Yes.

THE CHAIRMAN: The court enters a judgment which by his order is absolute and final, and he can't revise it. Therefore, the judgment is subject to being enforced at once. The question arises whether by inference here, having entered a judgment and said it is absolute and final, unless you say something to the contrary, he hasn't lost his right to hold it up. You are relying on an implied authority to stay when there is no provision in our rules about stay of judgment.

PROFESSOR CHERRY: We are taking it out of the existing rule. The existing rule says that there is power to stay.

THE CHAIRMAN: Where is that?

PROFESSOR CHERRY: In 54(b).

THE CHAIRMAN: Oh, yes.

PROFESSOR CHERRY: It is the rule now in force. That would make it even worse, you see.

THE CHAIRMAN: The inference right on the face of it is that you have lost the right to stay, I think, so we had better put it in here.

JUDGE CLARK: That can be made shorter, I am pretty sure, than in the longer form.

DEAN MORGAN: You have it in the original rule, Charles, page 61 of the blue book, lines 11 to 17. It is the sentence stricken out just before the italics. "In case a separate judgment is entered ..."

THE CHAIRMAN: Is that the same case as separate

judgment entered which terminates the action?

JUDGE CLARK: As to any of the claims.

THE CHAIRMAN: I should say, "In case the judgment entered is determinative of the action as to any claim, the court may".

MR. DODGE: Are you dealing with the stay?

DEAN MORGAN: You are dealing with a stay there, aren't you?

MR. DODGE: A stay where the court has already determined there is no just reason for delay.

JUDGE CLARK: That is what they are suggesting. I thought it was a little unnecessary, but they are a little worried about it.

MR. LEMANN: That is to give a fellow a right to appeal.

THE CHAIRMAN: The court does not want to delay and may want the appeal to go up, and yet he may not want to have execution issued because there is a counterclaim that he wants to make a set-off against.

JUDGE CLARK: Mr. Moore says 62 covers it. Rule 62 grants various stays. I don't know that it covers just this. In 62 there is a provision for the various forms of stay, stay on appeal.

PROFESSOR CHERRY: But here we have a rule that makes the specific provision, and we are now going to cut it

out. If there is any inference, it is that he should not stay it, by cutting it out.

MR. DODGE: Cutting what out?

DEAN MORGAN: If you cut out this provision.

MR. DODGE: In the amendment?

DEAN MORGAN: Yes. If you do cut it out, they will think there is some significance in it.

MR. DODGE: We have a provision that when an appeal is taken, the judgment may be stayed.

JUDGE DONWORTH: We want to provide now for a stay even in the discretion of the court.

THE CHAIRMAN: If there is no appeal.

JUDGE DONWORTH: Yes. For instance, I suppose the suggestion now being considered is whether we should reinstate the eliminated portion of printed page 61 of the blue pamphlet in lines 11 to 17. Isn't that so?

JUDGE CLARK: That is it, yes.

JUDGE DONWORTH: To get it before the meeting, I move that we reinstate lines 11 to 17 on page 61.

MR. LEMANN: Should we stop a minute to look at Rule 62, to which Mr. Moore has referred?

THE CHAIRMAN: I have glanced over it. Each one of the provisions for stay there is under special circumstances, appeals and whatnot.

MR. LEMANN: That is right, but it just raises a

question in my mind if that isn't the right place to put anything we want to say about stay. It is headed Stay of Proceedings to Enforce a Judgment, and that is where one would expect to find anything on that subject. It has a lot of stay provisions there. It isn't new. It is an original sin committed when we promulgated the rules originally. Mr. Cherry says we sinned when we promulgated the original Rule 54. I think we did, clearly. Shall we correct that sin or shall we permit it to stand? Did we sin originally?

THE CHAIRMAN: My thought is that from one point of view, strict consistency would say to put it in 62, which deals with stay, but here is a special situation and if we put it in 62, we have to put a whole lot of rigmarole there and say that if a judgment is entered under rule so-and-so that is a final judgment under the court's designation that it be such; then he may stay. As a matter of fact, he would get over to the bar a great deal better if you put it in this rule.

SENATOR PEPPER: Mr. Chairman, while that is undoubtedly true, there is something inconsistent, isn't there, in titling Rule 62 Stay of Proceedings to Enforce a Judgment, and then have a case in which you are providing in another rule for the stay of the enforcement of a judgment? While I don't overlook the importance of what you have just said, it seems to me that the advantage of having under a single caption the provision for all the stays of the enforcement of

judgment that there are, is something that is quite desirable.

THE CHAIRMAN: Suppose you word a clause now to put in 62 that relates back and allows a stay in the particular case that we are dealing with.

SENATOR PEPPER: There is a general (a) under 62. Then this would be a new (b), I should say.

"(b) In case of a separate judgment entered under the terms of Rule 54(b), the court by order may stay its enforcement until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered."

In other words, I would reinstate the matter which is blocked out on page 61 of the blue book and conform it in style to the subdivisions of Rule 62.

THE CHAIRMAN: You shift all the lettering then. Why not put it in a new letter at the end?

SENATOR PEPPER: Stay on motion for new trial, pending appeal, upon appeal, in favor of the United States, according to state law, power of appellate court, and then one for multiple claims. That is all right.

THE CHAIRMAN: It would be (h), Stay for Multiple Claims.

SENATOR PEPPER: That would be all right.

THE CHAIRMAN: You have to put one more qualificatio

in your notation. It isn't merely a judgment entered under Rule 54, but it is a judgment entered under Rule 54 after determination by the court that it shall be a final judgment. You see, a judgment can be entered under 54 which is not a final judgment.

SENATOR PEPPER: A final judgment entered under 54.

JUDGE CLARK: That will be 62(h).

MR. LEMANN: You couldn't tie it up with 62(b).

THE CHAIRMAN: The point I make is that you have to reiterate about half of Rule 54 to know what you are talking about.

MR. LEMANN: Mr. Hammond calls my attention to the index of which he and Major Tolman are the authors, and it has under stay a reference to several other rules than 62, which suggests that perhaps we sinned in other cases. I am not sure that is so, Mr. Hammond. On a quick look at these other cases of stay which you have indexed, most of them seem to be stay of proceedings other than proceedings to enforce a judgment. You put them under stay.

MR. HAMMOND: That is true.

MR. LEMANN: I am not sure, on a quick look, whether you have turned up any other stays of proceedings to enforce a judgment omitted from Rule 62.

JUDGE CLARK: Of course, this proposition of judgment on multiple claims comes up and is referred to in the

counterclaim section, but the counterclaim section is definitely tied to this now, if you will look back there. It is 13(i), I think. So, I think that is all right. It is on pages 18 and 19 of the blue book.

SENATOR PEPPER: I move, Mr. Chairman, that Rule 62 be amended by the addition at the end thereof of a new sub-section to be called sub-section (h), which shall embody the appropriate provisions for stay under Rule 54(b). I am not attempting to phrase it. The Reporter has that in mind. Whatever is necessary to describe the judgment which is thus being stayed will have to be repeated here, but I think it can be done quite briefly.

JUDGE DONWORTH: If I understood the Chairman, he expressed the view that perhaps a lengthy matter would have to be repeated there.

THE CHAIRMAN: I think the dictation that the Senator gave shows that you have to say a good deal about 54 in order to know what you are talking about. That is all right. I don't care one way or the other, but I have a feeling that while it is logical and orderly and in pure style, if you have a section, Rule 62, that talks about stay, maybe from one point of view we ought to embody in there all the provisions for stay. I can see that point, but here is a special case where the whole idea of the thing is derived by reading Rule 54. We had in that rule before a provision for stay, and we

are striking it out. While it may be good form to put all stays under 62, I have the feeling that as a practical matter it is more sensible to leave it where we have it, where the lawyers dealing with multiple claims would be hit in the face with it.

MR. DODGE: You still feel that the judge before whom there is presented the question of whether there is any just reason for delay can't act there upon exactly the same issue that would be raised by a request to him to stay the execution? Why doesn't he simply delay the entry of judgment?

THE CHAIRMAN: Because he wants to allow appeal.

MR. DODGE: If there is an appeal, then there is another provision for stay pending an appeal. If you go to a judge and argue before him the contention that there is just reason for delay, he overrules you, and then you ask him for a stay, what do you get?

THE CHAIRMAN: My idea is that there may be reasons why he wants to get the thing closed and off the book, not subject to revision, and end it, so the litigation reaches a close on that claim. Yet, he may not want to have the fellow issue a writ of execution and collect his money, because the fellow may be later subjected to a counterclaim which has not yet been tried. He wants to secure the holder of that claim.

MR. DODGE: The case isn't closed if he has stayed the enforcement of the judgment.

THE CHAIRMAN: As Rule 54 now provides, if he directs that final judgment be entered, it does terminate the litigation and it is entered, and the time for appeal goes by and the time for motion for new trial goes by, you can't re-open just because he stayed the execution of it. So, there may be some cases where he would want to enter a judgment.

JUDGE DONWORTH: It seems to me there is a thought in this eliminated portion that I desire to reinstate that is not found in the other rules, namely, in the second half of this beginning in line 14, "and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered."

As the Chairman pointed out, one reason for holding the thing up is that another party may get a judgment which should be set off against the first judgment. It seems to me that you have a new idea in here that is not applicable to the general stay of judgments. So, I am inclined to think that the thought we worked out here in 1938 covers it better than what is now suggested.

JUDGE CLARK: Let me read a suggestion of the way this would go, and it can go in 62(h). I will give you a form for that.

"(h) Stay of Judgment upon Multiple Claims. When a court has ordered a final judgment under the conditions stated in Rule 54(b), the court may stay enforcement of that

judgment until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered."

JUDGE DONWORTH: That meets my point.

JUDGE CLARK: "a final judgment under the conditions stated".

THE CHAIRMAN: What are the conditions stated?

JUDGE CLARK: That he has, first, to make an express determination of justice, or whatever we have said, and, second, an express order. The two are pretty nearly together, but there are two.

THE CHAIRMAN: I am not so sure about this. Ought you not to have another qualification in (h) that it is a final judgment in litigation in which there are some undisposed of claims?

JUDGE CLARK: I could add that. I thought that saying "under the conditions stated" would do it, but I will add that.

THE CHAIRMAN: Maybe it is all right the way you have it, but it seems to me there is no point about giving the court a right to stay a judgment unless it is in a case where there are other claims in the same action undetermined. You have to repeat almost verbatim that provision of 54 over in 62.

SENATOR PEPPER: But it is implicit in what he has

said, because he said until the entry of the other judgments. That indicates, doesn't it, that we are talking about a case of multiple claims?

JUDGE CLARK: We could add that, which is not very much. "When a court has entered a final judgment of some but not all the claims in an action under the conditions stated in Rule 54(b), the court may".

THE CHAIRMAN: All right, are we agreed, then, that that provision for stay shall be left out of 54 and included as (h) in 62?

MR. LEMANN: I wonder whether it would be better to have it in both places. I wonder, if you put it in 62, whether it might not still be helpful to leave it in 54.

JUDGE CLARK: I would agree with Mr. Dodge. It seems to me to be almost the rarest occurrence covered by our rules, and then to recognize it twice when it never will happen--

MR. LEMANN [Interposing]: Has anybody ever invoked this?

PROFESSOR MOORE: I don't recall. I can see where a court might do it. It might enter a judgment to operate as a lien.

MR. LEMANN: No case has arisen that you recall?

PROFESSOR MOORE: I can check up in a moment.

MR. LEMANN: I was just sticking to the Chairman's point, which I thought had some force in it, that when you read

54(b) is when you would want to know about this. You might forget entirely to look at 62. In fact, I was weighing in my own mind, if I were lined up with a gun at my head and told to vote to put it in one place or the other, whether I would follow practicality or consistency;

JUDGE CLARK: I don't care which place it is, but I think really it is quite a concession by Mr. Dodge and myself to have it in once, and when you put it in twice, that is 100 per cent as bad or perhaps more.

JUDGE DOBIE: Are we going to refer to it in the other?

JUDGE DONWORTH: I would prefer to have it in 54, but I am satisfied with the compromise suggested by the Reporter to put it in the other one.

JUDGE CLARK: I really don't care which it is. I think it was Senator Pepper who wanted it over here.

SENATOR PEPPER: I am afraid I am responsible. I was trying to think of it in practical use. I have a question about a stay of judgment, and I look it up in the rules and find Stay of Proceedings to Enforce a Judgment, Rule 62, page 74. I turn to that and go all the way through it and come sorrowfully to the conclusion that my case isn't covered. There is nothing to show that if I knew about Rule 54(b), I would find a provision there on that subject. That was the only thought I had. It is just convenient in consulting the

rules.

THE CHAIRMAN: If you had a case where a stay was allowable at all, it would be because of the operation of 54, where the court made a special determination and noted it on the record in a multiple claim case. You would be studying that rule in connection with his right to enter the judgment, and naturally you would stumble on to the stay provision in the very rule that you were worrying about.

However, the motion is to add it to 62. It has been seconded, has it? You wanted it, but you didn't second this motion.

DEAN MORGAN: I second the motion.

THE CHAIRMAN: All in favor of adding to 62 what has been prepared by the Reporter say "aye." It is agreed to.

MR. LEMANN: I move that we put after 54(b) in a note, "For the possibility of staying the execution where not all claims have been disposed of, see 62(h)."

THE CHAIRMAN: A note to 54.

JUDGE CLARK: I think it is a good idea to have it in a note, but lots of times they publish them separately, so we can't claim that that really covers everybody.

MR. LEMANN: I suppose, Mr. Reporter, that you have concluded that the profession has intelligence enough to make it unnecessary to perpetuate the language that you have now on page 61, lines 10 and 11, "and the action shall proceed

as to the remaining claims." That is now omitted in the redraft. I presume the profession would have sense enough to know that.

THE CHAIRMAN: When it says it terminates as to the claim on which judgment is rendered, the necessary implication is that it doesn't terminate in any others.

JUDGE CLARK: Yes, I should suppose so.

MR. LEMANN: Have you any corresponding language in this short form? I was just checking your short form to see what you have left out that was in the original long draft.

JUDGE CLARK: I don't know. I should think we would not need to say affirmatively that you proceed as to the rest. What does happen to the rest?

MR. LEMANN: I think it is reasonably clear. I just thought I ought to raise the point.

JUDGE DONWORTH: "upon one or more but less than all claims". That is in this new draft.

JUDGE CLARK: Mr. Lemann wants to know if we should say that as to the rest of them the action proceeds. I should say, what happens to it?

MR. LEMANN: It is bound to proceed. I think so.

JUDGE CLARK: It seems to me it is gilding the lily.

SENATOR PEPPER: Because of your absence for the moment, Mr. Chairman, we didn't want to take up 71A. We had gone that far.

THE CHAIRMAN: Have we heard from the Department at all in response to your inquiry?

JUDGE CLARK: We haven't heard. I really would like to know what the Committee think of this particular provision. Shouldn't we get the Committee's judgment sometime?

THE CHAIRMAN: All right, let's ask for it now.

JUDGE CLARK: Look at the supplementary statement, page 30. That is the way we have revised the form of trial, which brings up the most important feature of the thing.

SENATOR PEPPER: At the risk of rudeness, I am going to ask this question. We have pending several re-writes, one of which was 30 and one of which was 54, which we have discussed. Another was 60, about relief against the effects of the judgment. You remember we asked the reporter during the lunch hour to write that out, and he has now done it. Here are the various copies. I don't know whether you want to dispose of 60 the way we have of 30 and 54 before taking up 71A or to wait until after we have disposed of 71A.

THE CHAIRMAN: What is your pleasure? What do you suggest?

SENATOR PEPPER: As long as 60 comes before 71A, I thought we might get that out of our systems.

THE CHAIRMAN: All right, let's have it.

[The members of the Committee read the proposed redraft of Rule 60(b).]

THE CHAIRMAN: Did we agree to have the abolition of the forms of writs in this rule, or did we want to transfer it to 81? I have forgotten.

SENATOR PEPPER: I think, in deference to your judgment, we decided to leave it here and to leave open the question of whether we would amplify 81 when we came to it. Am I right, Judge Donworth?

JUDGE DONWORTH: I think you are.

THE CHAIRMAN: If you have read it over, you see that we start out in one way and then change it.

SENATOR PEPPER: Oh, yes, we will have to change the grammar of it.

MR. DODGE: (4) and (5) are not grounds, but objects.

DEAN MORGAN: You have to say the judgment is void, if you are going to put it that way.

JUDGE CLARK: Yes, "or that appropriate relief should be granted".

DEAN MORGAN: You don't need to say that, do you, "or that appropriate relief should be granted", because--

JUDGE CLARK [Interposing]: Yes.

DEAN MORGAN: Or you can say, "or that the judgment has been satisfied, released, or discharged, or that a prior judgment upon which it has been based hasbeen reversed", and then, "(6) or that it should be set aside within one year as provided".

SENATOR PEPPER: (4) would be "or that a judgment is void".

DEAN MORGAN: "that the judgment is void".

JUDGE CLARK: In the next sentence in all cases you have to go back to grounds, I guess.

DEAN MORGAN: Yes.

JUDGE DOBIE: Substitute "grounds" for "cases".

JUDGE CLARK: No, that wouldn't quite do it. You can say, "In all instances other than that of ground (6)".

MR. LEMANN: Would it help to change the words "following grounds" in line 3 to say "in the following cases"?

SENATOR PEPPER: Even then you would have to change it, because some of them begin with nouns and others with an infinitive.

JUDGE DOBIE: Would "instances" catch it?

MR. LEMANN: "cases" would be better.

PROFESSOR SUNDERLAND: You use "cases" three times in two lines. "In all cases ..., but in cases (1), (2), and (3) in no case ..."

JUDGE CLARK: Those are all grounds.

MR. LEMANN: You have "cases" down in the middle of the page already.

DEAN MORGAN: That is what Charles is objecting to.

JUDGE CLARK: They are not cases; they are grounds.

MR. LEMANN: Unless you make grounds cases.

PROFESSOR SUNDERLAND: They are partly grounds and partly purposes.

MR. LEMANN: They are sort of balled up.

DEAN MORGAN: They are all grounds for setting aside the judgment.

PROFESSOR SUNDERLAND: (5) isn't a ground for setting aside. It is a purpose.

DEAN MORGAN: You don't need to put it in the form of purpose, Edson. You can say, "on the ground that the judgment is void."

PROFESSOR SUNDERLAND: The way it is stated here, they are purposes to be accomplished.

JUDGE CLARK: It just needs to be reframed, that is all.

MR. LEMANN: Under (7) as an independent heading, I would suggest substituting for the words, "recognized as appropriate for the granting of", the word "justifying", so (7) would read: "(7) on any other ground justifying relief from the operation of the judgment."

MR. LEMANN: I don't much care for that "recognized as appropriate".

SENATOR PEPPER: That would shorten it very much. "on any other ground justifying relief from the operation of the judgment."

MR. LEMANN: Yes.

JUDGE DOBIE: Charlie, can you get rid of that "case" after (3)? "but in cases (1), (2), and (3) in no case".

SENATOR PEPPER: Yes, I think we can.

JUDGE DOBIE: That is awkward.

MR. LEMANN: It seems a little strange when you first read it. "In all cases other than (6) a motion shall be made within a reasonable time". The implication is plain that the answer is, "Yes, as long as you do it within a year, it can be unreasonable."

DEAN MORGAN: (6) fixes the time.

MR. LEMANN: It is sort of a reflection on Congress. It has been one year, as Congress has set it, and that is unreasonable.

DEAN MORGAN: It might be unreasonable in a particular case.

JUDGE DONWORTH: In the second line from the end, I suggest that "judgments" be stricken out and that there be substituted "judgment".

THE CHAIRMAN: It was plural in our original form.

JUDGE DONWORTH: It is singular in the beginning of this draft, and I don't know the reason for changing to the plural down there.

MR. LEMANN: I am wondering whether we would not do better to put that U. S. Code separate, down under "This rule does not limit the power of the court (1) to entertain an

independent action to relieve a party from a judgment, order, or proceeding; (2) by motion to set aside within one year as prescribed in Section 57 ... or by independent action". Couldn't you do that either way, by either method? Couldn't you do that by bringing an independent action, if you preferred?

PROFESSOR MOORE: I don't think so.

MR. LEMANN: Can't you do that by motion under the Judicial Code?

THE CHAIRMAN: Are you talking about the statute? It is a lien statute, and it expressly says that if the party who has not been personally served enters an appearance within one year from the date of the judgment, the court shall thereupon grant him leave to answer and litigate.

DEAN MORGAN: Does he have to put in an appearance or to put in an answer?

MR. LEMANN: He has to come in, Mr. Mitchell.

THE CHAIRMAN: I will read you the wording of it. "Any defendant or defendants not actually personally notified as above provided may at any time within one year after final judgment in any suit mentioned in this section enter his appearance in said district court [he doesn't have to make any showing at all, except that he hasn't been personally notified] and thereupon the court shall make an order setting aside the judgment therein and permitting said defendant or defendants to plead therein on payment by him or them of such

costs as the court shall deem just, and thereupon the suit shall be proceeded with to final judgment according to law."

MR. LEMANN: I think it would be much better to put that under a separate heading in this second sentence, to say, "This rule does not limit the power of a court to grant relief under Section 57 of the Judicial Code in cases where judgment has been obtained against a defendant not actually personally notified."

DEAN MORGAN: You don't have to put all that in, do you?

MR. LEMANN: No, just refer to the section, and take it out of the above enumeration. That would get away from the awkwardness that in all cases other than (6) the motion shall be made within a reasonable time. That would cut out the "other than (6)".

Shall we take up these suggestions one by one?

SENATOR PEPPER: As I followed the discussion and tried to amend this, I have reached the following result. May I read it, Mr. Chairman?

THE CHAIRMAN: I wish you would, yes.

SENATOR PEPPER: "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; or (2) newly discovered evidence which by

due diligence could not have been discovered in time to move for a new trial under Rule 59(b); or (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; or (4) that the judgment is void; or (5) because the judgment has been satisfied, released, or discharged, or because a prior judgment upon which it is based has been reversed or otherwise vacated, or because it is no longer equitable that the judgment should have prospective application; I am leaving out (6) in deference to Mr. Lemann's suggestion, and am making a new (6), "or (6) or any other ground justifying relief from the operation of the judgment."

DEAN MORGAN: You want your "because that" in each case.

SENATOR PEPPER: Do you think that would be better?

DEAN MORGAN: "on the ground because"?

SENATOR PEPPER: I changed "grounds" at the beginning to "proceeding for the following reasons".

DEAN MORGAN: Oh, I see.

SENATOR PEPPER: It seems to me they fitted in better than if you said "grounds".

JUDGE DONWORTH: Wouldn't you change "ground" to "reason" halfway down here, where we come upon "ground"?

DEAN MORGAN: "for any other reason".

SENATOR PEPPER: "or any other reason justifying

relief from the operation of the judgment."

"In all cases the motion shall be made within a reasonable time, but in cases (1), (2), and (3)".

MR. LEMANN: "and" instead of "but".

SENATOR PEPPER: Yes. "and in cases (1), (2), and (3) not more than one year".

JUDGE DONWORTH: You wouldn't say "in no event more than"?

SENATOR PEPPER: How would that read, sir?

JUDGE DOBIE: Change "case" to "event". "in no event".

MR. LEMANN: "in cases (1), (2), and (3) in no event more than one year".

SENATOR PEPPER: I see. "in no event" would be better.

DEAN MORGAN: Is that any better than "not"?

SENATOR PEPPER: Apparently they think so. "in cases (1), (2), and (3) in no event more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision".

THE CHAIRMAN: I suggest that be "this subdivision (b)". There are a whole lot of subdivisions.

SENATOR PEPPER: Yes. "A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation." What would you say, Mr. Lemann?

MR. LEMANN: I would say, "This rule does not limit the power of the court (1) to entertain an independent action to relieve a party from a judgment, order, or proceeding, or (2) to grant relief to a defendant not actually personally served as provided in Section 57 of the Judicial Code, or (3)".

SENATOR PEPPER: "or (3) to set aside a judgment for fraud upon the court."

MR. LEMANN: That is right.

SENATOR PEPPER: I think that clears it up in good style.

THE CHAIRMAN: The last paragraph is all right, is it?

SENATOR PEPPER: I think that was agreed to.

THE CHAIRMAN: All right.

JUDGE CLARK: Mr. Moore had one suggestion about wording. What was that you had?

PROFESSOR MOORE: In your second sentence, instead of starting it "In all cases", can't you just start, "The motion shall be made"?

THE CHAIRMAN: I think that is so, as long as you have transposed (6).

SENATOR PEPPER: What is it that you said?

PROFESSOR MOORE: The second sentence could start with "The motion shall be made within a reasonable time, and in cases (1), (2), and (3)".

SENATOR PEPPER: Oh, yes, that is all right. I

guess we all agree to that. "The motion shall be made within a reasonable time, and in cases". Then you would have "not" instead of "in no event".

DEAN MORGAN: "not more than".

SENATOR PEPPER: Yes, "not more than". "and in cases (1), (2), and (3) not more than one year after judgment". Wouldn't that be better, Mr. Moore?

PROFESSOR MOORE: Yes, I think so.

SENATOR PEPPER: Mr. Chairman, that is a rather sloppy presentation.

THE CHAIRMAN: I think it went clearly into the record.

SENATOR PEPPER: I think it went clearly into the record, and I move Rule 60(b) in accordance with what has now been entered in the record.

PROFESSOR SUNDERLAND: I second the motion.

THE CHAIRMAN: Is there any further suggestion? If there is no objection, that is agreed to.

PROFESSOR CHERRY: Is there anything to the idea, Mr. Chairman, that we now have two numerical enumerations in Rule 60(b), one running from (1) to (6), and another in the next sentence using the same numerals, and that there may be a simple way to avoid that?

JUDGE DOBIE: A, B, and C?

THE CHAIRMAN: There is a (b) already.

PROFESSOR CHERRY: We already have that. I was just suggesting that.

THE CHAIRMAN: Suppose we strike the numbers out and simply say, "This rule does not limit the power of the court to grant relief under the Judicial Code," and so forth, "or to entertain an independent action ..., or to set aside a judgment for fraud." You don't need to number them.

JUDGE DOBIE: I think that would be better. Eliminate the numbers in the sentence beginning "This rule does not limit".

SENATOR PEPPER: I see. I thought he was suggesting the Greek alphabet. This is to cut out some. Yes, I see.

MR. LEMANN: The only criticism I can think of, reflecting about it, of our grab-all phrase is that some member of the bar might ask what other grounds we think there may be, and our answer would be, "We don't know. We just wanted to be sure we were not excluding anything."

SENATOR PEPPER: As I understand it, what is now proposed is merely to leave out the "(1), (2), and (3)" in the sentence beginning "This rule does not limit".

MR. LEMANN: Yes.

THE CHAIRMAN: He has gone back to the catch-all phrase.

MR. LEMANN: I was just thinking aloud, going back to our grab-all clause, of which I was the father. Somebody

may ask, "What do you mean by that?" and we will say, "We couldn't think of any other case, but we thought some might turn up and we didn't want to shut them out."

SENATOR PEPPER: Isn't that a good answer? I guess that clears the way.

THE CHAIRMAN: You could say, "on any grounds which are recognized in actions at law or suits in equity in the courts of the United States." That is what we used in the motion for new trial in the rule. I don't see why this isn't all right. What do you mean by "recognized"? You mean recognized by the court and the established law, don't you?

SENATOR PEPPER: The way we finally put it, it read, "or (6) any other reason justifying relief from the operation of the judgment." So, that overcame some of the objections which were made to the other phraseology.

THE CHAIRMAN: We have adopted it. Now let's pass on. Do we have anything else in here?

SENATOR PEPPER: I think we are ready for 71A now.

THE CHAIRMAN: We are up to a motion to get the sense of the Committee regarding this one provision in Rule 71A dispensing with uniformity in the constitution and powers of the tribunal which fixes compensation. The draft provides:

"(i) TRIAL. The tribunal before which and the method by which compensation is determined shall be as fixed by Act of Congress, where an Act of Congress prescribes them

and in the absence such a statute shall conform, as near as may be, to that prescribed by the law of the state where the property sought to be condemned is situated. Where a state statute provides alternative tribunals and methods, the provisions followed shall be those more nearly conforming to the kind of taking involved."

I don't know what that means, but it isn't a question of verbiage here. We had better not bother with that now. The principle that is involved here is whether we should attempt in 71A to prescribe a uniform tribunal in all cases or whether we should depart from uniformity and operate under this, the other provisions of Rule 71A covering procedure being uniform in all cases, the only lack of uniformity being in the constitution and powers of the tribunal.

MR. DODGE: Are you referring to this on page 30?

JUDGE CLARK: Yes, on the supplemental statement.

MR. DODGE: Including the words "and the method by which"?

THE CHAIRMAN: Let's not argue. I object to the words "and the method by which" because I think that goes further than the constitution of the tribunal and its power and implies a lot of procedure that they shall follow. I objected to the original draft on that ground.

DEAN MORGAN: I object to that.

THE CHAIRMAN: But let us assume that it is drafted

property and pin it right down simply to what kind of tribunal shall do it. Shall it be a commission appointed by the court, three or five or six? Shall it be a jury? Shall it be a finding by the district court?

SENATOR PEPPER: And your proposal, Mr. Chairman, is definitely what?

THE CHAIRMAN: This [indicating]. That is to say, that we not establish a uniform system as far as the tribunal is concerned, that we leave it as this draft would leave it. The District of Columbia would have their three-man jury which works so well here. The TVA would have a three-man commission reviewed by a district court of three judges, one of whom is a circuit judge, with appeal to the C.C.A., which has de novo power to hear evidence and make its own findings, which isn't bound by the lower court's findings. If any other federal statute sets up a special tribunal to handle particular condemnation cases for any department (I don't know that there is any such), it will apply. If there is no federal statute, you look to the state law to see what kind of tribunal there shall be. Does the judge appoint real estate men and review their findings, or is it a jury finding, or whatnot?

SENATOR PEPPER: To bring the matter before the Committee, I move that the statement just made by the Chairman stand as the sense of the Committee for the purpose of determining how the rule should be formulated.

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SENATOR PEPPER: To bring the matter before the Committee, I move that the statement just made by the Chairman stand as the sense of the Committee for the purpose of determining how the rule should be formulated.

DEAN MORGAN: I will second the motion, and then I would like---

MR. LEMANN: To argue against it.

DEAN MORGAN: ---to ask a question about the state law where a condemnation is under a state statute.

THE CHAIRMAN: That is another question, now. Let's not get into that.

DEAN MORGAN: Isn't that involved in this?

THE CHAIRMAN: Not at all.

JUDGE CLARK: No. That is a different part of the rule.

THE CHAIRMAN: That is quite independent. There is another section which the Major has in here where the condemnation takes place under a state statute, which is done ordinarily by a private corporation on diversity grounds.

DEAN MORGAN: I am sorry. I thought it came right under this because it is a related subject.

JUDGE CLARK: This is (i), you see, and (k) is down at the end.

DEAN MORGAN: All right.

JUDGE DONWORTH: Is there any place where one can now read the proposed Rule 71A?

JUDGE CLARK: Yes. You have all had it sent to you. This is a substitute. This is the only thing that is changed in 71A.

JUDGE DONWORTH: I would like to read the rule. I don't know where it is. Possibly I received it. I would like to know who is now calling for such a rule. I understand that nobody representing the United States wants a rule on the subject. Am I wrong about that?

JUDGE CLARK: Yes, you are quite wrong.

THE CHAIRMAN: Judge, the point we are trying to settle now is not whether we have a rule or we won't have a rule, whether we want to drop it or not. It is a question of whether, if we do have a rule, we draft it along this line, because that is the crux of the thing that the Department of Justice has been disturbed about. For instance, if we adopt this view and put it up to the Department and they say "no," then we probably won't have to bother much with the rule after that. If they object to it, there isn't much use of our going on.

JUDGE DONWORTH: Of course, that is approaching the subject piecemeal. I don't know whether the United States wants a rule or, if it does, what kind of rule it wants. The matter just mentioned by Professor Morgan is one that I have given considerable attention to. When I was a United States District Judge, the Northern Pacific Railway Company, which is a Wisconsin corporation, brought about fifty suits in my district to secure a new right-of-way through the city of Tacoma. Their right-of-way was roundabout, and they made a

new railroad approach through the city. I presided at all the cases that were tried. Most of them were settled. I presume that, by rough guess, I presided at about fifteen trials. Those were suits of original jurisdiction, not removed. The Northern Pacific preferred to proceed in the federal court and did so and secured decrees of condemnation.

The only law applicable at that time, of course, was the Conformity Act. So, the cases were heard under the Constitution and laws of the state. One reason that the practice in such cases as that is better in conforming to state law is that the provision of the Constitution and laws of the state of Washington relating to eminent domain and the power of eminent domain are dovetailed in together between procedure and substance. There is nothing in the statement that has been made by some that a lawyer coming into the state of Washington would be prejudiced by being required to submit to the state law. He must study the state law and be familiar with it, and so must the judges before they can hear the case at all, and it is no hardship to conform to the established procedure.

We have in the state of Washington a large number of what are called briefly PUD's, public utility districts. They are municipal corporations formed by act of the legislature, and where the act is adopted locally, after certain preliminaries, these public corporations have the power to acquire by condemnation or to purchase any public utility. The act

of the legislature superseded the usual requirement or provision that property already subject to public use is not subject to another condemnation for another public use. These acts of the legislature negative that clause and expressly provide that these PUD's may acquire property already devoted to public use.

The result is that there have been in the state of Washington a good number of condemnations by the PUD's, and I think the great majority of them have been removed to the federal courts by the owners of the existing utilities, because of diverse citizenship. The privately owned public utilities are owned and operated by corporations incorporated, say, in New Jersey, Delaware, Maine, and so on. A number of those cases have gone to the circuit court of appeals. A number of them are pending now.

There has been no difficulty whatever in regard to procedure in the federal courts. I think every one of those cases, certainly every one of importance, has been tried in the federal court or is now pending there, and I do not know of anyone who is calling for the intervention of any new method in those cases.

The statement that we must get rid of conformity and substitute uniformity is an abstract proposition which of course fails where the reason for it fails.

In the draft that we put before the members of the bar sometime ago, there was a subdivision (k), was it?

JUDGE CLARK: It was (k), yes; now (l).

Judge Donworth, let me interrupt just to say that what you are saying is not connected with this. It is a later subdivision which we have not taken up yet.

JUDGE DONWORTH: I am quite familiar with that point, but the way this is stated, that we must get rid of all conformity, runs into the parallel question that I have been raising. I don't know what the provision of the proposed rule is regarding the commencement of the suit. We know that there was a great deal of opposition developed when the draft first came out, on the ground that the property owner was not sufficiently protected by the initial proceedings called for by the rule. I understand, although I am not at all clear on the subject, that it is now proposed that the general rules that we are adopting, the new federal rules as they will be amended, will make the general proceeding conform to the ordinary civil suit in the federal courts. Am I right about that?

JUDGE CLARK: You are not quite right, no. There is a special rule on that, and there is a special provision as to the complaint. As a matter of fact, one of the last things about which the Major and I seemed to be contesting by correspondence was that he wanted to take over the material on the complaint from the regular rule, and I told him that I thought we would never get by with that and we shouldn't do it.

I wonder, Mr. Hammond, if when we adjourn you could not get copies of this draft. I will tell you what it is.

THE CHAIRMAN: Gentlemen, I want to say this. The proposal here, that the Senator suggested and that I brought up, was to deal with one particular point right now in order to get it to the Department of Justice. If they say they are against us on it, we won't bother with Rule 71A. At least I won't be interested in it. It doesn't seem possible to confine it to this one point. These other points are being brought up which have no relation to it at all. We get into a broad discussion about 71A and the other provisions in it. I am going to leave at one o'clock tomorrow (I have to leave, and I am going to leave), and I don't want to run out with Rule 73, Rule 75, and others not dealt with. As long as it doesn't seem to be agreeable to take this one point on 71A and deal with that alone right now, I am asking you as a personal favor to drop 71A and let us go through 73, and so on, and I hope that we will get through all the rest of these rules that have to be reported to the Court before I leave. Then, if there is any further time after you get through with these rules to go back to 71A and my time for departure hasn't arrived, I shall be very glad to stick around and do what I can. I am getting restless about whether we are going to get through by one o'clock tomorrow if we are going to take up all of 71A and talk about the state law and everything else.

SENATOR PEPPER: Mr. Chairman, I am quite sure that when Judge Donworth realizes the narrowness of the point which you have raised, he will not object to having that disposed of. He is addressing himself to other features of the rule.

JUDGE DONWORTH: I didn't understand the emergency that faces the Chairman in regard to his going away.

SENATOR PEPPER: That is what I thought.

JUDGE DONWORTH: So, I withdraw my general observations.

SENATOR PEPPER: I thought the Judge didn't understand.

THE CHAIRMAN: The thing he raises is a very important and difficult question. I don't deny that at all.

SENATOR PEPPER: Oh, no, but your proposition is, if we can settle the question that is now before us by motion, then if the Department of Justice says thumbs down on that---

THE CHAIRMAN: We won't worry.

SENATOR PEPPER: ---we won't worry about the others. If the Department of Justice says, "That is all right with us," then we must face the various questions, including those that Judge Donworth brings up.

MR. LEMANN: I don't know that it is quite so simple, because, speaking for myself, I am a little dubious if we accept this proceeding under the state statute, whether the rule is worth monkeying with even if the Department of Justice

goes along with us. I would like to move that we pass 71A for the time being and discuss it in the time that is left after we finish the other rules.

JUDGE DONWORTH: In view of the Chairman's personal statement, I would very much prefer to go along the line of his suggestion at this time, Mr. Lemann, leaving the broader questions to be determined later.

THE CHAIRMAN: The Department already have this draft before them and, whether the Committee has adopted it or not, we can at least get an answer from them as to whether they are with us or against us. If they don't respond before we leave, we will just leave and let them take it up later, because the very best that we can do to 71A is to re-submit the draft to the bar. It won't go to the Court now. I am anxious to get through these other rules and get our report drawn and our notes all clear and shove that up. Then we can take as much time as we need for 71A. We may never do anything more with it; we may work it out and promulgate it.

SENATOR PEPPER: Then, Mr. Lemann's motion is acceptable to you, which is that we pass it for the moment.

THE CHAIRMAN: That is what I want to do, because I am afraid we won't get through with the work we have to do.

MR. LEMANN: Let's finish everything else, and in what time there is left we will consider that.

[Brief recess.]

THE CHAIRMAN: We have next Rule 73. Mr. Reporter, what have you?

JUDGE CLARK: There are some changes that we need to make, as we thought we would. We had two important questions that we knew of in our changed rule, but we thought we would follow the lead of the Conference of Senior Circuit Judges and then put it up to them as to clarifying these two matters. The first was whether their provision for 60 days in the case of the United States as a party applied to all parties when the United States was a party or only to the United States. The second was whether they had not forgotten about the United States agencies.

I was at the Conference of Senior Circuit Judges when I was down on another matter and, as they saw I was there, they asked to have that brought up. They voted very definitely on both of those. They seemed to have very clear ideas on them: on the first, that the 60-day period should apply to all parties when the United States was a party, and, on the other, that there should be a provision covering the administrative agencies.

Then I raised the question which is raised here by Mr. Leesman, of Chicago, and one or two others, as to our power.

THE CHAIRMAN: Power to alter the time for appeal?

JUDGE CLARK: That is it. I listened to a very

interesting discussion on that. I raised the question and asked if they wanted to give us any light on it or not. I didn't definitely ask them to take any action. Whereupon, Judge Learned Hand immediately ruled that it was the sense of this group that it has the power. It was going through, and apparently nobody was inclined to question it, until the Chief Justice said, "Just a minute. I don't think that we ought to do that. I am not questioning the power, but it seems to me that the judges shouldn't take any definite action on a question that is going to come up." Then Judge Learned Hand in particular and some of the others got into quite a little discussion with the Chief Justice as to whether the rules might still be invalid. Judge Learned Hand asked, "How can they be invalid when the Supreme Court has adopted them?" The Chief Justice said, "Oh, we are not passing necessarily on their validity," and so on.

As a result of that, finally they gave up their motion covering the question of power. So, I would say that nobody there raised any question, and there were several suggestions of a view that we did have the power. They finally decided, however, not to go on record on that.

To cover this point or to put in the clarifying language in accordance with what they voted and what I think we would agree, we have suggested the language which appears in our summary, the first one at the top of page 88.

SENATOR PEPPER: "except that in any action in which the United States or an officer or agency thereof is a party the time as to all parties shall be 60 days from such entry." Is that it?

THE CHAIRMAN: That is right. That is in lieu of the similar provision that is in the draft today. Is there any objection to that?

JUDGE DOBIE: What was the idea of it? I thought the idea was that the United States had so many cases, they needed the time and the other parties didn't.

THE CHAIRMAN: The Conference took the view that if the United States was allowed 60 days in any case, it wasn't fair to the other fellow not to put him on the same basis. That is all there is to that.

JUDGE DOBIE: I don't think it is vital. It is all right with me. I just wondered.

THE CHAIRMAN: I communicated with Circuit Judge Stone, of Missouri, about this.

JUDGE DOBIE: I don't object to it, General. It is all right with me.

THE CHAIRMAN: After the original Conference meeting in which they passed the buck to us to reduce the time for appeal, and so on, I put it up to him by correspondence. I asked, "Did the Conference ever consider whether there was power or not?" and he wrote back and said, "We didn't think

about it. We didn't discuss it. It never occurred to us to have any discussion about the power." They made a flat recommendation to this Committee, mind you, to consider the 30-day limit, but they never raised the point or apparently thought about the power question. That was all right. Then I asked him about the 60-day business, whether he thought everybody should have it.

JUDGE DOBIE: The reason I asked the question, General, is that we have had a little trouble in our court--and I imagine Charlie has, too--with the United States on the score that they couldn't get briefs printed in time.

JUDGE CLARK: Oh, yes.

THE CHAIRMAN: I asked him the question, not whether it ought to be 60 days for the Government, but whether other parties in the same case should have 60. He just came back flatly with the statement that they were definitely of the opinion that all the parties should have 60 if the United States had 60 in a case in which the United States was a party. He thought they ought to be on the same basis. There is no logic in that, but still that is their feeling.

SENATOR PEPPER: Then, how does this question of power come up? Suppose we recommend a rule with 30 days for ordinary litigants and 60 days where the United States is in the game, and the Supreme Court approves and promulgates the rules.

THE CHAIRMAN: It comes up this way. In a case involving an order for a physical examination, they held away back that the mere fact that they promulgate a rule doesn't prevent a litigant from raising the question of its validity in a litigated case, and they have to consider the question de novo, if they can, and they do.

SENATOR PEPPER: You mean they would promulgate a rule and then knock it out?

THE CHAIRMAN: And knock it out afterward.

JUDGE DOBIE: They could declare it unconstitutional or beyond their powers.

MR. LEMANN: That is the only thing they can do, because otherwise they would hardly be justified in promulgating these rules without the most prayerful consideration and going into all the discussions we have.

THE CHAIRMAN: They do it, anyway. That is the fact.

JUDGE CLARK: Yes.

THE CHAIRMAN: This is the way it would come up: If we limit the time to 30 days and some fellow forgets to appeal in 30 days, appeals in 45 days, and then he is thrown out by the circuit court of appeals because he hasn't appealed within 30 days, he takes a certiorari to the Supreme Court and says, "The 30-day limit is void. I have three months, and I am within the time."

SENATOR PEPPER: What possible ground can he give?

THE CHAIRMAN: I am not arguing the merits of it. You asked me how it would come up. It would come up that way, and then the court would decide whether the time limit by statute for appeal is a matter of substantive right or mere procedure.

MR. LEMANN: Wouldn't they also say that the power to regulate practice in the district courts would not extend the power to prescribe the time for appeal? I should suppose they would argue that. We had a study made, and we came to the conclusion that we did have a good deal of authority to deal with matters which were tied up with the appellate courts.

DEAN MORGAN: At any rate, the Supreme Court had the power, because they had power to prescribe rules for the appellate courts as well as for the district courts.

MR. LEMANN: We are committed to trying it, and if a fellow upsets it and the Supreme Court upsets it, it is just upset and plenty of people will have appealed in 30 days who need not have done so.

THE CHAIRMAN: But they would not have lost a right. That is the beauty of it. If we enlarged the time and a fellow took the enlarged time and then was told that he was out of court, that would be cruel, but nobody is going to be hurt if the rule is invalid. So, that is comforting.

MR. LEMANN: All it means is that he has speeded up when he need not have speeded up.

THE CHAIRMAN: He can growl because he has been pushed from behind.

MR. LEMANN: That is all.

THE CHAIRMAN: Does anybody object to the language which has just been read as a substitute for what appears about the United States in lines 7 to 9? Is it agreeable? If there is no objection, we will adopt it. It is so ordered.

What else have you, Charlie?

JUDGE CLARK: I have two or three other things. I don't know whether you want to consider the question of power any more or not, not only power but, I suppose, also policy. There are quite a few objections, as might be expected. Any time that you tell the lawyers to move, of course they are going to object. You will notice that we have here summarized the comments of various people who say they can't possibly move in that time. We also have cited there various state statutes in which the time is much shorter than 30 days. Do you want to discuss that any more? If not, I will pass on.

THE CHAIRMAN: All you have to do is to file a notice in 30 days, and you get all this other time for getting up your record.

DEAN MORGAN: Surely. If he doesn't know whether or not he wants to appeal, he can just appeal and then dismiss his appeal, can't he?

JUDGE DOBIE: The only complaint we ever have down

there is about getting briefs printed.

THE CHAIRMAN: That isn't limited by the time for appeal.

JUDGE DOBIE: Not at all.

THE CHAIRMAN: It starts the time running, maybe. What is your pleasure? Do you want to discuss the question of policy?

SENATOR PEPPER: May I ask one question in connection with appeals from a district court. They have a cumbrous old practice called a petition for appeal.

THE CHAIRMAN: To the Supreme Court?

SENATOR PEPPER: To the Supreme Court.

THE CHAIRMAN: We have never touched the Supreme Court.

JUDGE CLARK: They do have. They have a citation, you know.

SENATOR PEPPER: It is a most elaborate thing, with a long history of the case and every other darned thing. I have just been through it. The only possible reason for it is in order that the court below may express an opinion as to whether the order is an appealable one, but the court goes all through the rigmarole of this citation for appeal and petition for appeal and then says, "We will not pass upon the appealability, because that is for the Supreme Court." It seems to me that sometime or other a district court ought to

consider whether it is going to give the upper court the benefit of its opinion to the effect that the order in question is or is not appealable, and that that is the justification for preserving this elaborate machinery; but if the court is not going to exercise any judicial function, but merely an administrative one, and rubberstamp the appeal as a matter of course, then all that is a waste of time and money and everything else.

THE CHAIRMAN: The theory, of course, is that we have never tampered with the matter of direct appeal to the Supreme Court.

SENATOR PEPPER: You see, this has nothing to do with the Supreme Court, really. It is purely a question of district court procedure.

THE CHAIRMAN: You are talking about direct appeals to the Supreme Court?

SENATOR PEPPER: Yes, sir.

THE CHAIRMAN: We don't regulate that by these rules.

JUDGE DOBIE: They told us they didn't want us to.

THE CHAIRMAN: We hinted that we would like to make the same simple system that we have on appeals to the C.C.A. and suggested that we would like to do it, and they have never encouraged us in it at all. So, they are content to have merely the existing practice that you describe.

SENATOR PEPPER: The only reason I brought it up was that recently in this Pullman case, Judge Biggs, Judge

Maris, and Judge Goodrich expressed from the bench the most profound dissatisfaction with all this rigmarole business and expressed the wish that the procedure might be simplified.

JUDGE DOBIE: I understand we took it up with the Court once, didn't we, General, and intimated to them that we would be very glad to simplify it, and they were cold as a mother-in-law's kiss.

THE CHAIRMAN: I took it up informally and talked to the judges of that day about it and hinted around that we would like to tamper with their practice, too. Of course, it involves a revision of all their rules, too. They have a lot of rules that relate to direct appeals. Whether it was inertia and they shrank from the job of recasting all their rules to fit the new appellate procedure, or what it was, they didn't give us any encouragement at all.

DEAN MORGAN: I remember that the person who was clerk of the Court at that time begged you not to do it.

THE CHAIRMAN: The fellow you are thinking about was clerk in the Fourth Circuit. What is his name?

MR. LEMANN: Claude M. Dean.

THE CHAIRMAN: He protested vigorously and went around delivering addresses saying it was unconstitutional to get a case up to the circuit court of appeals unless you filed a petition and got an order of allowance. He was so imbedded in the old practice that he couldn't believe otherwise. Some

of the justices in the day when we were considering it expressed to me the idea that you just spoke about, that the one reason for asking a lawyer to go to a district court judge or to some judge and get an order of allowance of appeal was that the lawyers made so many mistakes as to whether the appeal ought to be to the Supreme Court or to the C.C.A. Often, if he went to the lower court or to a justice for an order allowing him to appeal to the wrong court, they would set him right and save the Supreme Court the trouble. They have passed a statute, finally, that if you appeal to the wrong court, it can be shifted to the right one. That reason has disappeared largely. I don't know what we can do about this now, unless we give them another hint that we would like to recast it.

JUDGE DOBIE: I think we had better leave it alone. It is a messy procedure. Don't they have the old summons and severance where one appeals?

THE CHAIRMAN: That is abolished.

JUDGE CLARK: That is abolished in the Supreme Court.

JUDGE DOBIE: I am glad to hear that.

JUDGE CLARK: They didn't take this. I was under the impression that one reason they didn't was that appeals for review from the state courts come up, and they didn't want to make a difference, and there was some reason that they had to be allowed there.

THE CHAIRMAN: The point is that the procedure on appeals from the highest court of a state which has entered a judgment to the Supreme Court is regulated by statute, and they had no power in this law to tamper with it. They weren't going to get uniformity by providing for our present system of direct appeals from the federal courts, because they were still confronted with this business of petition and order of allowance, and so on, on appeals from the highest court of a state, you see. I think you are right. I think if it had not been for that, if they could have changed the system for appeal from state courts safely, they would have done the whole thing.

There, again, the question of whether you take a writ of certiorari or appeal from a state court to the Supreme Court of the United States has its difficulty, and lawyers make a lot of mistakes about it. If they guessed wrong, after a while they were in trouble. The Court's theory was that when it came to direct appeal from the highest court of a state to the Supreme Court of the United States, it was better to make them go to a court and get an order of allowance, because they might be taking an appeal when they ought to apply for certiorari or something, and they might be straightened out before it was too late. It was a combination of all these troubles, I think, that prevented them from asking us to go the whole way on it.

JUDGE DOBIE: That whole business of appeals in the

states is in a terrible situation, as you know. In some cases you must decide it one way, and in others another way, and then you can have certiorari. It is a hideous mess, but we can't bother with that, of course.

THE CHAIRMAN: Not under this statute.

JUDGE DOBIE: No.

JUDGE CLARK: Of course, there is a bad situation as to admiralty appeals. Those still have to be allowed by the district court. Calvin Magruder wrote to me and said, "We have had a local court rule for some years providing for notice of appeal. Is that valid?" I said that I didn't suppose it was under the Alaska Steamship case. More recently there was a decision by the Supreme Court which says that you have to have an allowance, but that if a party in good faith has filed a notice, they can treat it as an application for allowance. So, we have now drawn a local rule for our court, and we direct our clerk, whenever he gets an admiralty appeal without the endorsement of the district judge, to send it down and get it endorsed. I think we have practically the system now. It is a nuisance because, you see, you can't make rules that change statutes in admiralty.

I have two or three things more. First, there was the question as to whether there would be any case of a shorter time allowed by rule. This is still Rule 73(a), lines 6 and 7, "unless a shorter time is provided by law". We were asked to

look up and see if any statutes gave a shorter time than 30 days. We found one, an appeal from a judgment on an award of a board of arbitration under the Railway Labor Act, which allows an appeal time of 10 days. So, I guess the provision is justified.

THE CHAIRMAN: Is that an appeal from a district court on an order of a board?

JUDGE CLARK: Yes, it is an appeal from a judgment of a district court.

THE CHAIRMAN: You said a board.

JUDGE CLARK: A board of arbitration.

THE CHAIRMAN: You have to leave that clause in, then.

JUDGE CLARK: Yes.

MR. LEMANN: You have something about the Bankruptcy Act. Do you want to change lines 16 and 17 on page 81? I am a little muddy about that. Can you straighten us out?

SENATOR PEPPER: There is one thing to be said, if we may say just a word before we leave line 6. In line with the Chairman's objection to dumping things back at the bar, here is a case in which we seem to imply that there may be a lot of cases where a shorter time is provided by law, without specifying them. Would it be possible, either in a note or otherwise, to indicate that this exception or this "unless" clause is a highly specialized one?

THE CHAIRMAN: I think in the note we should say

that the only incident of that we have yet uncovered is the one he mentioned.

SENATOR PEPPER: That is what I mean. I think that would be a great help to a lawyer.

THE CHAIRMAN: Can you add that in a note?

JUDGE CLARK: All right.

SENATOR PEPPER: Otherwise, it starts doubts in your mind as to how many legal provisions there may be for shorter terms.

THE CHAIRMAN: Say we haven't found any others.

JUDGE DONWORTH: The italicized portion on page 81, about not learning of the entry of the judgment, is to meet that District of Columbia case, isn't it?

JUDGE DONWORTH: Is it clear that we have a right to enact this clause?

MR. LEMANN: Just as clear as any of the rest of it, isn't it?

THE CHAIRMAN: If we can cut it to 30, we can allow the District Court to make it 60.

SENATOR PEPPER: Because if you don't do this, they will do what the court did in the District case, and that is vacate the judgment and enter a new one so as to start the time for appeal running again.

THE CHAIRMAN: Of course, what we have done now is to compromise, but the trouble with that case was that they

left it so that they could do it any time within the next twenty-five years.

SENATOR PEPPER: Yes.

THE CHAIRMAN: We have cut them down now; we have limited the length of extension, and that cures the trouble that arose under that other District case.

MR. LEMANN: The practice now is pretty well established by the clerks to notify. I don't think there would be many cases of the clerk's slipping up now.

JUDGE CLARK: Shall I pass on?

DEAN MORGAN: Which one are you going to?

JUDGE CLARK: I am going to take up the bankruptcy matter.

DEAN MORGAN: You have passed to 15 to 17.

JUDGE CLARK: That is the one.

MR. LEMANN: That comes up with bankruptcy, and he is going to tell us why.

DEAN MORGAN: Let me suggest that you could avoid the whole thing if you wanted to, I should think, by just rephrasing the thing, by saying, "When an appeal is permitted by law from a district court to the circuit court of appeals, a party may appeal by filing with the district court a notice of appeal within 30 days from the entry of the judgment appealed from, unless a shorter time is provided by law, except that in any action in which the United States is a party the

notice shall be filed within 60 days from such entry."

In line 13, instead of saying "for appeal", say "for filing the appeal".

JUDGE CLARK: I don't know that that would quite cover it. The question was raised as to how far these rules would cover the time in bankruptcy. We don't want to cover the time in bankruptcy, which is a different time and which is in one respect longer. Your provision won't work, because the bankruptcy time is longer.

MR. LEMANN: How many appeals are there? When you speak of a permissive appeal, is there a compulsory and permissive appeal?

JUDGE DOBIE: Yes.

JUDGE CLARK: Yes. There are two types of appeals that have to be allowed in bankruptcy. One is matters of $500 or under. That is stated in the Act. The other is what the Supreme Court construed into the Act, and that is allowances to counsel. On both of those you have to get permission.

JUDGE DOBIE: From the C.C.A.

JUDGE CLARK: In the general appeals, Eddie, you know there is that provision that if you have had notice, you get 30 days; if you haven't had notice, you get 40 days.

JUDGE DOBIE: What do you want to do, Charlie, just put something in to show that this does not apply to appeals in bankruptcy, which are governed by that Act?

civil actions, they can take care of it by a bankruptcy order, can't they?

JUDGE CLARK: I am sorry, I am afraid I haven't made myself clear. It isn't the idea that we ever think we are attempting to amend the bankruptcy law. It is a question of whether our form of expression is confusing to the reader and particularly to the reader who wants to appeal in bankruptcy, whether we seem to have said something that we have no intention of doing. It is just a question of expression. If the bankruptcy lawyers should reason just as we think they ought to reason (but, of course, they never reason at all; none of the bankruptcy lawyers do), of course these rules don't change the time; but here they are likely to say to us, "Here, the rules apply as near as may be in bankruptcy. That is how I get authority to file a notice of appeal and not to get an allowance, and all that thing, anyway, and it says here that notice of appeal is to be filed within a certain time."

MR. LEMANN: The Bankruptcy Act gives him how long.

JUDGE CLARK: The bankruptcy provision is a kind of combination one, 30 days if you have been given notice of the order, or if not, you have an over-all period of 40 days.

MR. LEMANN: That would give him 30 and 40 days, and we would give him always 30 days.

JUDGE CLARK: That is it.

MR. LEMANN: So, the worst thing that could happen

to this poor fool who knows nothing but bankruptcy is that he would do it in 30 days when he might have had a case in which he could have done it in 40. Is that it?

JUDGE CLARK: That is it.

THE CHAIRMAN: Don't we have a clause somewhere that these rules don't apply to bankruptcy cases?

MR. LEMANN: Yes. Rule 81 says they don't apply to bankruptcy. Couldn't we put a footnote in for this poor benighted fool?

JUDGE CLARK: General Order 36 of the bankruptcy orders says that the rules of civil procedure shall apply.

MR. LEMANN: It is quoted in your notes on page 88. "Appeals shall be regulated ... by the rules governing appeals in civil actions". So, if the bankruptcy lawyer is on his toes, he will look at the bankruptcy rules and will find that appeals are regulated "except as otherwise provided in the Act" by our rules. Then he will hage to go to the Bankruptcy Act, won't he? Then he is O.K. isn't he?

JUDGE CLARK: Of course, this is a small point. What we suggested was that you take out of lines 16 and 17 "within the time provided".

MR. LEMANN: You have to do it, though. We are drawing these rules primarily for the non-bankruptcy man.

THE CHAIRMAN: I am afraid I am dumb. I can't quite see the point. The only thing I see in the case is this: The

Court has made a bankruptcy order based on the existing federal rules, which says that the federal rules shall apply in bankruptcy cases. Along comes an amendment to the federal rules. Does that old bankruptcy order making the federal rules applicable in a bankruptcy case operate effectively to embody in the bankruptcy practice any future amendment to the federal rules? I think that ought to be brought to the attention of the Court. If any of these amendments are such that they don't want them to apply in bankruptcy, they will have to make the bankruptcy order clear that what applies is the original rules and not the amendments.

MR. LEMANN: Otherwise, the order would mean the federal rules as they now exist or may hereafter exist. Do I understand from your note on page 88 that the Bankruptcy Act itself controls the time for appeal?

JUDGE CLARK: Yes.

MR. LEMANN: That disposes of the Chairman's question, it seems to me, because the Court need not worry on this phase of it, for the reason that our rules don't have anything to do with bankruptcy appeals because the bankruptcy statute regulates it.

THE CHAIRMAN: And the order in bankruptcy making the federal rules apply expressly says, "except as otherwise provided in the Act".

MR. LEMANN: That is right. Doesn't that cover your

point?

THE CHAIRMAN: I don't know what the Reporter's point is. I had an idea, but not a point.

JUDGE CLARK: I think it is no more than what is stated on page 88. One matter, however, may cause some confusion. I think that whenever you tear it to pieces, you come out just where you said. If you want to say that any fool of a lawyer who doesn't see this from the beginning should be properly stuck, that is that. The way this came up, I might say, is that Judge Swan in our circuit saw this and asked, "Are you changing the bankruptcy times?"

MR. DODGE: Why do you need those words, "within the time provided"? Do you suggest striking them out? They were not in the rules before. We deal with time in the preceding sentence and with method in this sentence.

DEAN MORGAN: That is what you suggested, isn't it, Charlie? Strike out this amendment, "within the time provided", and state the method of appeal. What you mean is that the method of appeal is by filing notice.

MR. LEMANN: I haven't any sympathy with the idea of taking it out to help this dumb bankruptcy lawyer, but if it doesn't belong in here otherwise, that is something different. But why did you put it in to begin with? What did your notes say?

DEAN MORGAN: He wasn't thinking of the Bankruptcy

Act there. He was thinking of the 30 and 60 days up above.

MR. LEMANN: We thought it ought to be put in---.

DEAN MORGAN: ---for that reason, without thinking about the bankruptcy at all.

MR. LEMANN: I don't think we ought to worry about the bankruptcy fellow. He is controlled by the bankruptcy statute.

DEAN MORGAN: I don't think you need it anyhow.

MR. LEMANN: Then I say, why did you put it in to begin with?

DEAN MORGAN: Because he didn't phrase the first sentence in terms of the party appealing within a certain time.

MR. LEMANN: Are you going to change the first sentence, then?

DEAN MORGAN: He isn't now. He is wiser than he knew he was in drafting that second sentence.

THE CHAIRMAN: You can handle it for the fool bankruptcy lawyer, if you want to do anything, by just putting a note in saying, "Attention is called to the fact that these rules do not apply in bankruptcy cases except to the extent that the Supreme Court has made them apply, and the order which makes them apply expressly provides that they shall not apply where a statute otherwise governs, and there is a statute stating the time for appeal in bankruptcy cases, so these rules have nothing to do with it." That would be a note, not

in the rule.

MR. LEMANN: How would it hurt this dumb bankruptcy guy, anyhow? If he doesn't read the rules and files notice of appeal within the time which we prescribe when he doesn't have to, he hasn't lost anything, has he?

DEAN MORGAN: Yes. Sometimes he has only 10 days. Isn't that right, Charles?

JUDGE CLARK: That isn't so, is it?

DEAN MORGAN: I thought he had 10 days and 40 days.

JUDGE CLARK: No, it is 30 and 40.

DEAN MORGAN: Oh, well, what's the use worrying about the guy?

PROFESSOR MOORE: The point is that there is no practice stated in the Bankruptcy Act or the general orders telling them how to take an appeal. All that is geared to the federal rules of practice by virtue of General Order 35. The appellant has a maximum of 40 days. If within, say, 35 days he tries to take an appeal, he can't use the federal rules, or someone could contend that he couldn't, because the only way he can perfect an appeal is to give notice of appeal within the time stated in this rule, which is 30 days.

THE CHAIRMAN: That is reasoning in a circle there.

JUDGE CLARK: Therefore, he would have to go and get an allowance of appeal. It is not reasoning in a circle. It is a quite possible thing.

MR. DODGE: You favor striking out those words, "within the time provided". I don't think they are necessary anyway. They weren't in. Shouldn't we strike them out?

THE CHAIRMAN: You want to strike those words out, and then you are happy? Is that it?

JUDGE CLARK: That is it.

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

SENATOR PEPPER: Mr. Chairman, how does it happen that we didn't exclude bankruptcy in our category of excluded proceedings in Rule 81?

THE CHAIRMAN: We do. If you will look at the full draft, Rule 81(a)(1) says: "They do not apply to proceedings in bankruptcy or proceedings in copyright ... except in so far as they may be made applicable thereto by rules promulgated by the Supreme Court of the United States." In other words, these rules don't apply in bankruptcy.

SENATOR PEPPER: Where is that?

THE CHAIRMAN: Rule 81(a)(1). It is not in our amendments because we didn't amend that section, but it is in the full set of the rules.

SENATOR PEPPER: I see. I was looking at the blue book.

JUDGE CLARK: I have one more suggestion, and that is that in lines 40 and 41 I would strike out the words, "in

more than purely formal or mechanical aspects".

THE CHAIRMAN: I have objected to that all along. I have also made the point that as this is worded, however you word it, you change the existing law, because nobody has yet been able to cite an opinion of the Supreme Court that held that a judgment loses its finality by a motion to make additional findings which do not in any way assail the judgment or call for a change. I have said that right along. The whole principle back of this court-made rule that the judgment loses its finality for purposes of appeal is that if a motion is made to alter or set aside the judgment, to change the judgment, it has that effect, a motion to grant a new trial, for instance, has that effect, and a motion to alter the findings and conclusions of the court so as to alter the judgment has that effect. The rule contemplates that if the judge makes a set of findings which he thinks covers everything material and renders judgment for me, if I am happy about that but am not so sure that he has taken the right ground for deciding in my favor, and if there is another ground that I have on the facts and the record which he has not made any finding on, I can go in and make a motion for additional findings, not to tamper with the judgment at all, simply to get another base for sustaining the judgment in the court of appeals.

Under this draft, the making of such a motion, which does not offer any alteration in the judgment, destroys the

judgment's finality until the order on the motion is made. There is no authority for that under the decisions. I asked the staff once about it, and they gave me a very good memorandum analyzing all the cases which apply that court-made rule about the effect of a motion on the finality of the judgment. There was not one of them in which they had held that the finality was disturbed by a motion of that kind. When they talked about a motion to amend the findings, and so on, they were in each case dealing with a case where the necessary effect was to alter the judgment or to call for judgment in favor of the opposite party.

The provision about purely formal or mechanical aspects didn't touch that, but the rule says that the finality is destroyed by "a motion under Rule 52(b) or Rule 59(e) to amend or make additional findings of fact or to alter or amend the judgment in more than purely formal or mechanical aspects".

JUDGE DONWORTH: What do you suggest, Mr. Chairman?

THE CHAIRMAN: I have suggested from the beginning an idea that I think is proved by the fact that we have made a slip on it. I said this is a court-made rule, and I would like to state it in general terms and simply say that this is subject to the established rule that the finality of the judgment for purposes of appeal may be destroyed or removed by certain motions, not stating what they are and leaving it just where the courts leave it. I think a proper criticism of

that proposal was that we think the lawyers ought to be told what the law is. So, we proceeded then to adopt that and to specify here that in particular kinds of motions it would have that effect. As a result, we got the kind of motion that, under the existing decisions, doesn't have that effect. Either you have to go back to my original proposition not to detail them, and I am not so sure that we ought to do that (we ought to tell the lawyers what the law is, maybe), or else you have to amend this by making it perfectly clear that the motions that have that effect are only motions that call for an alteration of the judgment.

JUDGE CLARK: Mr. Chairman, this is a proposition that produced quite a good deal of interest last time. I really don't think it is quite fair to say that we slipped on it. We didn't. I think I can say quite flatly we didn't slip on it. We have stated the existing cases right along.

THE CHAIRMAN: You took the position that you felt sure that these motions to amend findings which didn't alter the judgment, under the decisions, destroyed the finality, and I challenged it and called for a memorandum. Your memorandum came in and supported my view. I didn't mean to charge you with slipping, but it is a fact that I was afraid you would make a mistake in your list, and that is why I suggested the other system, and a mistake was made.

JUDGE CLARK: I am sorry, I am afraid I must disagree.

It seems to me that the statement as it is here is a statement of what the cases now say. The memorandum that we sent around to all of you support the statement as now made, the statement in the text. It is true--and I want to explain--I am suggesting making a slight change in the statement of the cases as now made. That is clear enough. But the statement that appears in italic form here is in accordance with the case law as we found it.

The way this was up was this: Quite a few of us here felt it would be helpful, instead of making a general statement that the running of the appeal time was suspended by a motion made, leaving it quite general, to enumerate just which motions operated and how they operated. The Chairman took the position, an arguable position, although I think it is a little against the stand in Rule 60 (of course, that is all right), that here was a case in which we should go to generalities rather than to tell the lawyers the details. We prevailed against him at that time. Monte Lemann made the motion. His position was that because of a certain amount of indefiniteness included in this rule, it wasn't worth while trying to do anything but the generality.

I should like to make what might be termed a two-pronged suggestion. First, that with the necessary bit of ambiguity, I still think it is desirable and a worth-while thing for the lawyers to put it in. Second, my particular

suggestion here was to raise the question of how important keeping the ambiguity was. When I speak of the ambiguity, I mean the little expression that I read you on lines 40 and 41, "to alter or amend the judgment in more than purely formal or mechanical aspects". On that, of course it is quite true that the Supreme Court cases do make that kind of apology. In all of them they hold that the time is suspended, but they say in an affirmative form, and since this is a motion which alters more than purely formal aspects, and so on, there is nothing we found that does directly state the negative. That is a case where it is something that the court will find in a purely formal manner.

Let me say that I think it is better to keep it as it is here with those few words in than not to make any listing, because it seems to me this is a helpful thing to the lawyers, but since that is a matter which tends somewhat to vagueness and since we have not been able to discover--and apprently the Supreme Court has not--any motion which is of that purely formal character, since it doesn't seem unreasonable to hold that a motion of this kind in general should be considered to suspend the running of the time, since a lawyer can make it so easily do so, it seems that the clearer way would be to take out that provision. That is the whole proposition.

THE CHAIRMAN: The proposition you are talking about

is something I had said nothing about. There are two propositions here. The rule says that any motion to amend or make additional findings of fact operates to destroy the finality. Then there is another provision, "or to alter or amend the judgment in more than purely formal or mechanical aspects". The sufficiency of that last clause, whether or not it is definite enough, is a thing that I was not addressing myself to at all. Maybe it is right or maybe it is wrong. The thing I was calling your attention to was the statement that "a motion under ... Rule 59(e) to amend or make additional findings of fact".

JUDGE CLARK: "in more than purely formal or mechanical aspects".

THE CHAIRMAN: No, sir. "or to alter or amend". They are not the same thing. The Reporter disagrees with me, but his own memorandum (at least the one his staff prepared) shows conclusively that there never has been a case in the Supreme Court of the United States where they held that a motion for additional findings that did not involve any alteration in the judgment had any effect upon the time for appeal. So, if as a result of the additional findings you are not altering the judgment at all, the statement in the rule that the motion for additional findings destroys the finality is not supported by the decisions, and I challenge the Reporter to produce a single case in which that occurs.

The Court has said that a motion to amend the findings has that effect, but if you examine the cases, you will find that it was a fellow who was dissatisfied with the judgment and with the findings and wanted some other findings made that would have the effect of altering the judgment.

DEAN MORGAN: May I suggest that that can be amended in this way? "under Rule 52(b) or to make alteration or amendment to the judgment in more than purely formal or mechanical aspects or to make such alterations or additions to the findings of fact as to require such alteration or amendment of the judgment".

THE CHAIRMAN: That is what I think the law is.

JUDGE DONWORTH: It seems to me that this is a moot point. If there are no decisions to the effect so-and-so, as the Chairman states, neither is there any decision about the United States' time for appeal. In other words, if we are voluntarily and knowingly extending the thing in the United States' cases, why can not we do it in other cases, as we are doing right here?

THE CHAIRMAN: I don't think I get it. Do you mean that you think the present court-made law will be altered by a rule that destroys the finality of the judgment?

JUDGE DONWORTH: We are altering it definitely in United States' cases by giving a private party an extension of time, and it seems to me that by the same rule we can give an

extension of time in every case and that this is a reasonable provision to put in.

THE CHAIRMAN: I gather, then, that you feel that even though the present decisions don't hold that finality of the judgment is affected at all by a motion for additional findings that doesn't call for an alteration of the judgment, as a matter of policy we ought to make that the law.

JUDGE DONWORTH: That is my idea.

THE CHAIRMAN: That can be done, but why should we do it?

JUDGE DONWORTH: To save time.

THE CHAIRMAN: There is some merit in the suggestion. It would remove all the question about it. I don't deny that.

MR. DODGE: Why don't we amend by inserting after the words, "additional findings of fact", the words, "except such as would not involve an alteration of the judgment"?

JUDGE CLARK: Of course, the main thing that I have in mind is really what Judge Donworth has in mind. I don't understand that I have made any claims for the decisions other than I have stated. The decisions do contain this qualifying language.

THE CHAIRMAN: What qualifying language?

JUDGE CLARK: The one that you have referred to and the one that I have referred to.

JUDGE DONWORTH: This language is within the spirit

of what we have been tackling in other respects.

JUDGE CLARK: We don't find decisions where they definitely extend the time. It is rather apologetic, rather than one that has any real action upon it.

THE CHAIRMAN: Are you talking about the "purely formal or mechanical aspects" provision?

JUDGE CLARK: Yes.

THE CHAIRMAN: I am not. It is in the alternative here, and it is a different thing from the motion to amend or make additional findings that don't alter the judgment in any respect, mechanical or otherwise. I am trying to make clear to you that there are two different things covered here. I am talking about one thing, and you are talking about another.

JUDGE CLARK: I know that, but I think it is only fair to state that you don't like the whole provision, and I am trying to suggest a way to doctor it up so that it will be agreeable. You want to knock out this whole rule.

THE CHAIRMAN: Oh, no, I don't want anything of the kind. I took the position in the first place that I thought a general reference to the decisions that have the effect of destroying finality ought to be made to warn lawyers and let them look at the decisions and see what the rule is. You overruled me about that, and I am content with that. I made that point because I was afraid you would not list all the things right, but now we have started to list them right, and I am

agreeable to that. Let's list them, but let's list them according to existing law or, if we choose, let's change the existing law, but let's not act on the assumption that the Reporter makes, that this states the law as it is today, because it isn't so.

SENATOR PEPPER: Doesn't Mr. Dodge's suggested amendment conform to your view as to what existing law is?

THE CHAIRMAN: You mean Judge Donworth's?

SENATOR PEPPER: No, Mr. Dodge's.

THE CHAIRMAN: Yes, it does in substance, but Judge Donworth made another suggestion that is open to you, if you want to adopt it, and that is to say that the finality of judgment is destroyed for purposes of appeal if a fellow walks in and makes a motion for additional findings to help support his judgment on appeal. You have power to do that.

MR. DODGE: That is leaving it as it is.

MR. LEMANN: That would be changing the law.

THE CHAIRMAN: You would be changing the law.

MR. LEMANN: Your point is that that would change the law. The Reporter claims it wouldn't change the law. Your point is, if you want to do it, do it, but don't kid yourself, you are changing the law.

THE CHAIRMAN: That is it.

MR. LEMANN: Assuming that we don't want to change the law, then Mr. Dodge's motion would cover the situation.

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THE CHAIRMAN: That is it.

MR. LEMANN: Assuming that we don't want to change the law, then Mr. Dodge's motion would cover the situation.

The Reporter might, then, I suppose, argue against Mr. Dodge's motion that we were not correctly stating the law, because he claims that, as I understand it.

JUDGE CLARK: No, I don't. I am sorry. So many things have been attributed to me that I thought I hadn't said. I don't know that that is very important. I will say that I am perfectly willing to admit that in the Supreme Court you will find statements that a motion to amend the findings tolls the time to appeal if it is not addressed to mere matters of form.

MR. LEMANN: If that involves basic consideration of the findings of fact and alteration of the conclusions of law. Doesn't that imply something more?

JUDGE CLARK: So far as I know, those are the statements. I will say also, which may or may not have any importance, that in all these cases in which they make alterations, the times that you find that the limitation does apply seem to be so infinitesimal that it is hardly worth mentioning.

THE CHAIRMAN: The rule we have gives a party the privilege to make motions to fortify his judgment by amendment or by additional findings, and that is a rule that probably will be frequently resorted to. If I have gone into court and won a case but think the finding doesn't cover some points that I ought to be able to raise, I go in and say, "I am satisfied with the judgment, but I would like some findings made on this point, so if the court takes a different view

above, I can still support your judgment." It isn't an infinitesimal thing. It is a common practice.

It is true that the Court has said repeatedly that the motion for additional findings suspends or destroys the finality of the judgment, but you have always got to read what a court says in the light of the facts of the case, and in every one of those cases the motion for amendment for additional findings was such that the inevitable result of granting the motion would have been to alter the judgment. So, what they say has to be construed in that light.

SENATOR PEPPER: Mr. Chairman, am I right in thinking that there are three possibilities? One is to rest content with the statement of generalities, such as Judge Donworth suggested. Another is to make a very specific statement which changes the law. The third is to make a statement which descends to particulars but is so phrased as to be consistent with existing law.

THE CHAIRMAN: That is right.

SENATOR PEPPER: If that is the third course, am I right or wrong in thinking that Mr. Dodge's proposal will leave the thing specific but at the same time conform to existing law?

MR. LEMANN: Let's have it read again, and let's have the Reporter tell us whether he thinks it is in accordance with existing law.

MR. DODGE: As it stands now, if a plaintiff has a judgment and wants to bolster it up by getting additional findings, he files a long motion for a great many additional findings, and the defendant is precluded from appealing until that is disposed of. I want to avoid the use of this motion to defer the entry of judgment where the motion does not involve any change in the judgment. I would suggest the addition at the end of the first clause, after the words "findings of fact", either the words "except such as would not affect the judgment", or "which will affect the judgment", stating it either negatively by way of exception or affirmatively.

MR. LEMANN: Better do it affirmatively. I notice in the last case which the Reporter cites in his memorandum, where there was a motion made for additional findings which were held to extend the time for appeal, the court said, "It is immaterial that petitioner did not specifically request the amendment of the judgment, and the distinction based on this failure to request by the court below is artificial and untenable." That certainly implies that he was trying to amend the judgment, which seems to support the Chairman's position.

THE CHAIRMAN: I read all those cases. I think Mr. Moore drew that memorandum.

MR. DODGE: What is the objection to such an amendment as that? Nobody wants the time for appeal deferred, I

take it, merely because the winning party has asked for additional findings.

JUDGE CLARK: Let me say again that I wouldn't pretebd to be very hesitant about this. I would at least take Senator Pepper's alternative No. 3, rather than the generality.

THE CHAIRMAN: I haven't urged it.

JUDGE CLARK: All I would say about taking the third is that probably it is simpler and a little more direct and probably it doesn't make a great difference. If you think it does make a difference and you don't want that degree of simplicity, I have nothing more to say. What you are suggesting is perfectly feasible, I think.

MR. DODGE: It changes the rule. It does not lead to the deferring of the entry of judgment by every motion under that rule.

MR. LEMANN: It is a different result from the one you propose at page 81 of your notes.

JUDGE DONWORTH: I disagree with Mr. Dodge's notion, because I think it is based on a misapprehension. He thinks it is only the successful party that moves for additional findings, which is an entirely erroneous assumption. The defeated party may often do that.

MR. DODGE: I didn't entertain any such view as that. I think the other party would ordinarily be the one, but the plaintiff might. We have instances here referred to of a man

trying to gild the lily by getting additional findings of fact to support his judgment.

DEAN MORGAN: He may think that, without additional ones, he won't have support.

THE CHAIRMAN: Of course, the whole test under the decisions as to the effect of a motion on the finality of judgment is whether the motion, if granted, carries with it an amendment of the judgment, and that is not always necessarily so, depending upon your view of the law. I am not asking you to go back to a general statement. I think it is rather a good thing to educate the bar about these rules. A good many lawyers don't know about these court-made rules that affect the time for appeal.

MR. DODGE: Do you think there is any difficulty in amending that fairly easily?

THE CHAIRMAN: None at all, but up to this time the Reporter has stood on the position that this takes the law as is.

JUDGE CLARK: I think there is probably one difficulty. I had construed the "alter or amend" to apply to the findings of fact, too.

THE CHAIRMAN: It doesn't say so. It says, "or to alter or amend".

JUDGE CLARK: Maybe there should have been commas in there. I wasn't asserting that a formal motion to amend the

findings would extend the time.

PROFESSOR SUNDERLAND: Mr. Chairman, in support of that third suggestion, to make it more specific and yet to follow the present law as it is, couldn't we handle it in this way? We are dealing with two things here. We are dealing with amendment of the judgment, and we are dealing with additional or amended findings of fact. After the word "judgment" put in this clause: "if the changes sought by the motion would necessarily require or constitute an amendment or alteration of the judgment in matters of substance". A mere alteration of the judgment won't be enough, if that doesn't go to the substance, and a change of findings of fact won't be enough unless they will result in a change in the judgment in a matter of substance. So, we have to get that matter of substance attached to both a change in the findings of fact and to the provision for altering or amendment the judgment.

MR. LEMANN: I would like to make this motion. Strike out the sentence beginning in line 29 and everything following, and substitute the following: "The running of the time for appeal as provided in this subdivision is terminated by a timely motion made pursuant to Rule 50(b), or a motion for additional findings of fact under Rule 52(b) where the effect of such findings would be to amend the judgment, or a motion under Rule 59(e), or a motion for a new trial under Rule 59(b). In any of such cases the time for appeal fixed

in this subdivision commences to run and is to be computed from the entry of an order granting or refusing the motion."

PROFESSOR MOORE: That isn't quite right.

MR. LEMANN: I wouldn't be surprised if it wasn't quite right.

PROFESSOR MOORE: Under 59(b), of course, the time for appeal doesn't run.

MR. LEMANN: What I am trying to do is to get away from the rather awkward arrangement it seems to me you have here and to shift the order and at the same time cover the points we have been discussing. I think there is certainly an undesirable reference in lines 38 and 39 where you have "a motion under Rule 52(b) or Rule 59(e) to amend or make additional findings of fact". There is no motion under 59(e) to amend or make additional findings of fact. That is under 52(b). The insertion of 59(e) at that point seems to me to be confusing.

MR. DODGE: That is the motion to alter or amend the judgment.

MR. LEMANN: He has it tucked in, slipped in between 52(b) and the reference to additional findings of fact, and 59(e) has nothing to do with additional findings of fact.

DEAN MORGAN: Say, "a motion under Rule 52(b) to amend or make additional findings of fact or under Rule 59(e) to alter or amend the judgment".

MR. DODGE: Shouldn't the 59(b) at the end be 59(a)? Rule 59(b) merely refers to the time; 59(a) is the general motion for a new trial.

JUDGE CLARK: I guess that is right, isn't it?

THE CHAIRMAN: The use of 59(e) as the Reporter uses it here is O.K. if he was right in his view that a motion to amend the findings stayed the appeal, even though it didn't affect the judgment. So, he very properly said that motion under 52(b) or 59(e), whichever it is, to amend the findings or to alter the judgment, will do the business. On the assumption that a motion to make additional findings doesn't affect the judgment, he is right about it.

MR. LEMANN: With the change that Mr. Dodge has suggested, it would be a confusing arrangement, wouldn't it?

JUDGE DONWORTH: I think that until the trial court gets through with stating the grounds of his decision, it is proper to say that the time for appeal doesn't run, and it is wrong to assume that these frivolous motions will be put in. If they are frivolous, the court will deal properly with that case. As long as somebody in good faith is moving to amend the findings, it seems to me it is entirely reasonable to give the matter that effect.

THE CHAIRMAN: Even though it doesn't alter the judgment.

JUDGE DONWORTH: Yes.

THE CHAIRMAN: I think there is a lot in that.

JUDGE DONWORTH: It will either support or weaken the judgment, one way or the other.

THE CHAIRMAN: I think Charlie had that idea a while ago. He would simplify the rule, and it would be better than if we did alter the law, by saying that a motion to make additional findings, whether it affects the judgment or not, does it. There is a lot in that. Suppose the winning party comes in 10 days after judgment and makes a motion to amend the findings to support his judgment. Suppose the motion is not acted on until after the time for appeal expires. It raises a question whether it would affect the judgment or whether it wouldn't, depending upon the differing views about the law. Why not get rid of complications like that? I thought Charlie made that point months ago.

The only thing I am quarreling about is this idea that we ought to make it one thing or the other, and not assume that a mere motion to amend findings does it unless it alters the judgment. I wouldn't object if Charlie made a provision to say, "a motion to amend or make additional findings, whether or not it calls for an alteration of the judgment, or a motion to alter the judgment under 59(e)".

MR. DODGE: That is what it says now in effect, isn't it? "to amend or make additional findings of fact".

THE CHAIRMAN: Maybe it does. There is an ambiguity

there, possibly, that ought to be cleared up. When the court came to construe this rule, it might look back at its own decisions and say, "We have never held that, so we won't construe the rule that way." If you want it that way, unquestionably that way, I think it would be well to say it.

DEAN MORGAN: Just omit the qualification, then.

JUDGE CLARK: The Chairman has stated just what I was trying to bring out. This qualifying material does add an element of vagueness. Is it important enough? Does it make enough change really to justify itself, to carry its own weight, so to speak?

MR. DODGE: I am not at all concerned about it. I was trying to get at some way of carrying out the idea.

THE CHAIRMAN: Let's have a vote on this. Do you want to stand on what I think is the law, to wit, that a motion to amend and make additional findings has no effect on the finality for purposes of appeal unless it calls for a change in the judgment, and make it read that way, or do you want to make it perfectly clear under this rule that in spite of the decisions of the Court, a motion for additional findings or to amend the judgment does postpone the time for appeal even though it doesn't call for a change of the judgment but is in support of it. Which do you like as a matter of policy?

JUDGE DOBIE: I am open-minded, but I am frank to say I am very much impressed by what Judge Donworth says, that

you ought to let the court below finish with it before you start to appeal and decide to appeal. It might very well be that Judge Donworth has decided a case against me and he has made no finding of fact, we will say, on F. I think that I have a good chance to appeal, but I say that there is substantial evidence in the record to support that and there is no sense in my appealing. It seems to me that there is a good deal of common sense in that idea that you ought to let the lower court finish with it before the period starts in which a man has to make his decision whether he will appeal.

MR. LEMANN: That argument is reinforced by the short time for appeal that we have now.

DEAN MORGAN: I move Judge Donworth's suggestion, Mr. Chairman.

JUDGE DOBIE: I second the motion.

MR. DODGE: I second the motion.

[The question was called for, and the motion was put to a vote and carried.]

THE CHAIRMAN: How would you word it? Don't you think you ought to say, "a motion under 52(b) to amend or make additional findings of fact, whether or not calling for an alteration of the judgment, or a motion under 59(e) to alter or amend the judgment"?

DEAN MORGAN: Why can't you do it all by just omitting "in more than purely formal or mechanical aspects"

and just let it go that way? Say, "to amend or make additional findings of fact".

THE CHAIRMAN: They are two different things, I think. I am willing to strike out the "in more than purely formal or mechanical aspects", if you want to.

DEAN MORGAN: I say just strike that out from the whole business.

MR. DODGE: I think that will cover it.

DEAN MORGAN: Leave the rest just as you have it.

MR. LEMANN: Wouldn't it be simpler to take out 59(e) in line 38 and put it back in in 40?

DEAN MORGAN: Don't put it anywhere.

MR. DODGE: It is stated correctly, I think.

THE CHAIRMAN: There is the question of the right of appeal involved. I agree that the thing as worded makes a motion for additional findings affect the finality, whether it affects the judgment at all or not. There is a chance for a court to say that is not the present law, that we certainly were not intending to change it, and they will construe this rule against what I think it means to say, that a motion of that kind doesn't affect finality because it doesn't call for alteration of the judgment. There you are. A fellow hasn't appealed, and he has lost his right.

JUDGE DONWORTH: How would it do for the Reporter to draft a suggestion and the Chairman to approve it?

THE CHAIRMAN: I dictated one that suits me. Any way you want to do it.

DEAN MORGAN: Don't you think you ought to separate that in 38 to 41, "denying a motion under Rule 52(b) to amend or make additional findings of fact or under Rule 59(e) to alter or amend the judgment"?

JUDGE CLARK: Yes.

JUDGE DOBIE: Separating the two rules and making each one applicable to its specific number.

THE CHAIRMAN: I suggested, "or granting or denying a motion under Rule 52(b) to amend or make additional findings of fact, whether or not the granting of the motion involves an amendment of the judgment, or a motion under 59(e) to alter or amend the judgment, or denying a motion for a new trial under Rule 59(b)."

JUDGE CLARK: Mr. Moore still thinks it is (b).

DEAN MORGAN: (b) is the time.

PROFESSOR MOORE: (a) just states the general grounds, and then down in (b)--

THE CHAIRMAN: Couldn't you just say Rule 59, without a subdivision? Would that do it?

JUDGE CLARK: We say 59(e). We have differentiated the alter or amend rule.

THE CHAIRMAN: Oh, yes.

MR. DODGE: Rule 59(b) relates only to time.

MR. LEMANN: Couldn't you just say 59 and cut out the special reference to 59(e) or 59(b), just let it go under 59?

MR. DODGE: Why is there any difficulty about it? Rule 59(b) is a three-line rule saying that the motion shall be filed within 10 days; and 59(a), which is left unamended, defines what the motion is.

JUDGE CLARK: Why don't you think it is (a)? What difference does it make? Won't (a) do?

MR. LEMANN: Why not put 59(b) and (e) together and make it under 59?

THE CHAIRMAN: Let's have it this way, then: "or granting or denying a motion under Rule 52(b) to amend or make additional findings of fact, whether or not the motion asks for an alteration in the judgment, or a motion under Rule 59 to alter or amend the judgment or for a new trial." That would do it, wouldn't it?

PROFESSOR MOORE: There is one trouble with that. We say up above that the time for appeal is to be computed from the entry of any of the following orders, and as far as new trial goes, it is limited just to a denial of the motion.

THE CHAIRMAN: That is right. Didn't I say that?

MR. LEMANN: You see, under 59(e) the time would run from judgment either granting or denying it, but under 59(a) or (b) it could be only from--

THE CHAIRMAN [Interposing]: I started out with

"or granting or denying". I don't care. I am confused about it. You fix it up any way you want to.

JUDGE CLARK: All right. That is all I have.

THE CHAIRMAN: We have an understanding of what we need to do, and the Reporter can work it up.

JUDGE CLARK: That is all I have under 73. That brings us to 75.

THE CHAIRMAN: It is six o'clock. We will suspend now, but how about asking someone from the Department of Justice to come over here tomorrow and talk to us and see what he has to say about 71A?

DEAN MORGAN: I hope you will do that.

JUDGE DONWORTH: I think that is wise.

JUDGE CLARK: I talked to Mr. Williams this afternoon, and he thinks that we are perhaps more fearful than we should be of the reaction and all that sort of thing. I finally put it to him. I said, "Would you take it all or would you take our trial section?" He said he would take it. I don't state that as a promise.

[The meeting adjourned at six o'clock.]