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ADVISORY COMMITTEE ON RULES FOR CIVIL PROCEDURE

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TABLE OF CONTENTS

FRIDAY MORNING SESSION
March 11, 1955

Page

CONSIDERATION OF AMENDMENTS TO THE RULES

Rule 33. Interrogatories to Parties 414

Rule 34. Discovery and Production of Documents and Things for Inspection, Copying, or Photographing 414

Rule 41. Dismissal of Actions.

(b) Involuntary Dismissal: Effect Thereof 415

Rule 42. Consolidation; Separate Trials.

(b) Separate Trials 416

Rule 50. Motions for A Directed Verdict and for Judgment.

(b) Motion for Judgment Notwithstanding the Verdict 416

(c) Same; Conditional Rulings on Grant of Motion 416

Rule 52. Findings by the Court.

(a) Effect 452

Rule 54. Judgments; Costs.

(b) Judgment Upon Multiple Claims 453

Rule 20. Permissive Joinder of Parties.

(b) Separate Trials 468

Rule 42. Consolidation; Separate Trials.

(b) Separate Trials 468

FRIDAY MORNING SESSION
(Continued)

		Page
Rule 56.	Summary Judgment.	
(c)	Motion and Proceedings Thereon	469
(e)	Form of Affidavits; Further Testimony; Defense Required	479
Rule 58.	Entry of Judgment.....	507
Rule 60.	Relief from Judgment or Order.	
(b)	Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc.	512

FRIDAY AFTERNOON SESSION
March 11, 1955

Rule 60.	Relief from Judgment or Order. (Continued)	
(b)	Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc.	527
Rule 81.	Applicability in General.	
(f)	References to Officers of the United States	547
Rule 86.	Effective Date.	
(d)	Effective Date of Amendments	549
CONSIDERATION OF AMENDMENT OF FORMS		
Form 22.	Summons and Complaint Against Third-Party Defendant	549
Form 30.	Judgment on Jury Verdict	549
Form 31.	Judgment on Trial to the Court	549

FRIDAY AFTERNOON SESSION
(Continued)

Page

CONSIDERATION OF DEPARTMENT OF JUSTICE PROPOSALS.

Rule 4. Process.

(d) Summons: Personal Service.

(4) Upon the United States 551

Rule 5. Service and Filing of Pleadings and Other Papers.

(b) Same: How Made 552

Rule 6. Time.

(a) Computation 556

Rule 30. Depositions Upon Oral Examination.

(c) Record of Examination; Oath; Objections 558

Rule 56. Summary Judgment.

(a) For Claimant 559

Rule 71A. Condemnation of Property.

(h) Trial 559

Rule 79. Books and Records Kept by the Clerk and Entries Therein.

(a) Civil Docket 573

Rule 81. Applicability in General.

(c) Removed Actions 573

FRIDAY AFTERNOON SESSION
(Continued)

Page

CONSIDERATION OF SUGGESTED AMENDMENTS NOT PROPOSED BY THE COMMITTEE

Rule 81. Applicability in General.

(c) Removed Actions 573

(g) Rights and Privileges to be Granted to the Territory of Alaska . 575

Rule 44. Proof of Official Record 583

CONSIDERATION OF AMENDMENTS TO THE RULES

Rule 33. Interrogatories to Parties 587

Rule 34. Discovery and Production of Documents and Things for Inspection, Copying, or Photographing 587

ADJOURNMENT 593

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FRIDAY MORNING SESSION

March 11, 1955

The Advisory Committee on Rules for Civil Procedure for the United States District Courts reconvened at 9:35 a.m., William D. Mitchell, Chairman of the Committee, presiding.

JUDGE CLARK: Shall we assemble, gentlemen.

There have been distributed, I think, drafts of the changes in Rules 33 and 34. I should think that those carry out what we wanted to do and are usable. There is certain roughness of language that I think probably could be improved. Unless you want to spend time on it, Mr. Wright and I will try to iron out some of the as's, and so forth.

MR. DODGE: It seems to me they are entirely in accordance with our vote.

JUDGE CLARK: Yes. Does anybody want to do anything about these drafts? You have seen them, have you, Monte?

MR. LEMANN: No, I haven't. Shall we stop to read them now?

CHAIRMAN MITCHELL: I suggest that the Reporter make up a complete draft of the new formula that we have, and then send it to each member and give you a couple of days in which to write in to him any suggestions you have to make. He doesn't have to follow your suggestions, but he ought to have them and polish up his draft if necessary. I don't think a body as large as this can gain much by trying to work out the exact verbiage

of the draft very well in a town meeting. If he gets out a draft as soon as reasonably convenient and mails it to each one of you, anybody who wants to can look it over and write in to him any suggestions, and he can handle that in his own way. He doesn't need to adopt them or take a vote on them or anything of that kind, but at least he would have the benefit of your suggestions. How would that work?

JUDGE CLARK: Of course, I would do that in any event. We have to follow some course of that kind. We would have to see the easiest way to do it. We may be able to do it by interlining this draft.

MR. PRYOR: These drafts are substantially what we agreed upon yesterday.

JUDGE DRIVER: Yes, they seem to me to be.

CHAIRMAN MITCHELL: So much the better. Still I think that method would give a little further check.

JUDGE DRIVER: Polishing up the language and diction really doesn't lend itself well to group work. I think it would be better for one or two to do it.

JUDGE CLARK: All right, we will proceed on that basis.

The next rule in order is Rule 41(b). I should think that ought to be approved. There isn't very much change. The amendment provides for the addition of "or for lack of an indispensable party," and makes this conform to the amendment to

Rule 12(h) which we passed in 1948. Is there any objection or exception to that?

DEAN MORGAN: I move it be approved.

JUDGE CLARK: Unless somebody wants to call for a vote, we will consider that adopted.

Rule 42(b) is the next one, and that is the addition at the end of the rule of this direction for final judgment in accordance with the provisions of Rule 54(b). This, too, may not be strictly necessary, but it has seemed to me right along that this was desirable as carrying through to its logical conclusion this important provision for separate trial.

MR. TOLMAN: We held a similar one over for action when we reach Rule 54(b).

JUDGE CLARK: Yes. We approved one, 14(a). We held over 20(b). We can hold this over. All right, let's hold this over for a few minutes, because it gets attention in 54(b).

Next we come to Rule 50, and there are two parts to this: Rule 50(b) proper, and then there is the additional subsection (c) which we developed from some of the state practices, notably Kentucky, which carries the idea somewhat further.

The whole general purpose of this is not merely to clarify the practice, but in part it is to provide for avoiding, if possible, where the matter has been settled and the appellate court and the trial court know what is to be done, the

necessity of another trial if there is not a jury question involved. Of course if there is a jury question, it will need to go to another jury if the matter is reversed; but if there is not such a question, then these are various steps which make it possible to settle and end the matter at once.

From the comments it appears this has had very considerable approval and there is quite a little enthusiasm. The most question, quite naturally, is as to the longer (c), and I think in general the questions there are mainly as to meaning and interpretation and whether it will happen often enough to justify the addition of this subsection. There is some criticism of what is being done there.

When we get to the point, I have two or three propositions I think would be a little clarifying, but I don't know that we should take those up until we know what we want to do.

As I say in my letter, pages 5 and 6, the criticisms going to the substance of 50(c) "urge that the rights given the party who originally secured the verdict are more than he should have and that the situation is so occasional as hardly to justify so extensive and perhaps difficult a provision." I am now speaking of the critics, not the support, of which there was quite a little.

The first point, I suggest, does not seem to me to be a very good one. I think as to the man who secured the verdict and who is now going to lose it, at least temporarily,

it is desirable to protect him if it is in the essence of the case that he should be protected.

The second is a question of judgment. I don't think it is going to happen often, over and over, in litigation. It is of course the occasional case. All this is going to be occasional. Nevertheless, this being a difficult matter, this being a matter we are attempting to work out, may it not be better to do a complete job, as I think we do here, even though there need not necessarily be resort to it repeatedly as the jury cases come up?

Mr. Wright, do you want to say anything. Is there anything particularly in the late comments?

PROFESSOR WRIGHT: There is one question which several people raised which I am bound to say completely baffles me and I don't understand. Among others, I think they are raising the same point which is raised by our friend Lon Hocker and our friend Judge Nordbye. Lon Hocker is very enthusiastic for the amendment. He says, "If properly applied by the District Courts this will cure the difficulty in the Federal practice of not permitting an appeal from an order sustaining a motion for a new trial", which I had not imagined that the amendment did.

Judge Nordbye's comments are somewhat more extensive. You will find them at pages 18 and 19 of his address. He says that this changes the former law in that, although we don't do

it in terms, this will now allow an appeal from an order granting or denying a motion for judgment notwithstanding the verdict, and it will not be necessary any more to appeal only from the original judgment.

I bring that forward, as I tell you, not understandingly, but thinking it sounds very strange to me.

JUDGE CLARK: I don't know where those two gentlemen get that. I don't know that we are making any appeal from anything but a final judgment, as is the usual federal rule.

DEAN MORGAN: What part of the rule does he say causes that, Mr. Wright? I just don't see it.

PROFESSOR WRIGHT: Let me see if I can find where it is here. Yes. At line 50, on page 43 of our printed draft, we say, "An appeal from a judgment granting or denying a motion for judgment notwithstanding the verdict". He says although we use the word "judgment" there, there is no such thing as a judgment granting or denying a motion for judgment n.o.v., and therefore it must be that we contemplate an appeal from the order.

DEAN MORGAN: He doesn't know that our rule requires an immediate entry of judgment, does he.

PROFESSOR WRIGHT: I would think Judge Nordbye would know that.

DEAN MORGAN: If the clerk doesn't enter the judgment, then there would be nothing to appeal from, I suppose.

You see, he is thinking of state practice, where you make that motion before judgment is entered. With us you have to make it afterwards if the rules are complied with. That is true in a number of states where they have the judgment entered immediately.

PROFESSOR MOORE: I suppose there is a technical point there. It seems to me there is not much to it. As I understand it, the appeal technically and literally is from the judgment.

DEAN MORGAN: That is right.

PROFESSOR MOORE: But in line 50 we seem to say that the appeal will be from the judgment granting or denying a motion for judgment n.o.v. What it is is an appeal from the judgment after the motion granting or denying has been acted upon.

JUDGE DRIVER: You wouldn't have a judgment denying a motion for judgment n.o.v.

PROFESSOR MOORE: No.

JUDGE DRIVER: You would have the original judgment based upon the verdict of the jury.

DEAN MORGAN: You just let the judgment already entered stand.

JUDGE DRIVER: The judgment on the verdict would stand.

DEAN MORGAN: I know, but our rule requires immediate

entry of judgment, and the judgment would be on the verdict, don't you see.

JUDGE DRIVER: But I think that language is a little misleading there.

PROFESSOR MOORE: Why couldn't you just strike out "granting or denying" and just say "appeal from a judgment".

MR. LEMANN: Would it make it even plainer to say "After an order has been entered granting or denying a motion appealing from the judgment"? "After an order has been entered granting or denying a motion for judgment notwithstanding the verdict, an appeal from the judgment n.o.v. presents".

JUDGE CLARK: This has brought forth comments from other people, I remember, not just on this same order, but as to what is the meaning of this, anyway. Some of these things that we go over may escape me, but I am wondering myself at the moment whether this adds or not. I am wondering if we would lose very much if we struck out that whole sentence. I cannot think back just how much we expected to accomplish. To put it another way, whenever a man gets to the appellate court on final judgment, you do consider all errors that anybody wants to bring up.

I remember now one of the other points here. Somebody wrote in and wanted to know if this compelled the appellate court to look up all errors that nobody was pressing. There have been details of that kind.

I must confess I cannot remember back to just where we thought this was important. Perhaps if we went back and looked at the transcript we would recall it.

DEAN MORGAN: We were talking about a cross appeal, Charlie.

PROFESSOR MOORE: And assignment of error.

DEAN MORGAN: And assignment of error, yes. How could a person assign error when he had won the case, and so on.

JUDGE CLARK: Of course he can. Sure he can.

DEAN MORGAN: Of course he can. That is what Roberts' opinion said.

JUDGE CLARK: Mr. Wright, you were going to give some history on this.

PROFESSOR WRIGHT: We had in mind what Roberts said in Montgomery Ward v. Duncan about cross-assigning error.

DEAN MORGAN: In the Montgomery Ward case, yes. Roberts covered this particular thing in that opinion.

JUDGE CLARK: It would seem now under the practice we have, we don't have assignment of errors.

DEAN MORGAN: I know, but you can raise the point.

PROFESSOR WRIGHT: What Roberts said in the Montgomery Ward case was:

> "This being so, we see no reason why the appellee may not, and should not, cross-assign error, in the appellant's appeal, to rulings of law at the trial . . ."

I think we had this in mind and wanted to do something other than talking about cross-assigning error.

DEAN MORGAN: Yes, sure, because we don't have assignment of error, but you have to make your point.

JUDGE CLARK: Again I raise the question that since that is so clear on all appeals, of course you can do all the things that have been mentioned, I suppose nobody ought to be appealing in the United States courts unless he knows he can, and I wonder if it would not be just as well to leave out this sentence.

DEAN MORGAN: You remind me of what my brother said to the Supreme Court here once when Justice Black asked him, "Do you think you ought to have certiorari on every one of these divorce cases?" He said, "No, but I had assumed that this Honorable Court wouldn't grant certiorari unless there was some debatable question." Upon that, Justice Frankfurter said, "That is an assumption without foundation in fact."

You are assuming, Charles, that these fellows know how to plead. You ought to come down in my country for a while.

MR. PRYOR: If you leave it in, could you meet the criticism by saying, "An appeal from a judgment where the court has granted or denied a motion for judgment notwithstanding"?

JUDGE CLARK: I should think if one were going to do it, one would try to make a distinction between the appeal

itself and the questions raised on appeal. An appeal from a judgment bringing into issue the question of granting or denying, something of that type.

DEAN MORGAN: Mr. Moore's statement seems to me to cover that, "An appeal from a judgment after granting or denying a motion for judgment notwithstanding".

JUDGE CLARK: What is that?

DEAN MORGAN: He suggested that after the word "judgment" in line 50, just insert the word "after".

MR. LEMANN: I think that would be confusing. I would prefer transferring it to make it plain. "After a motion for judgment notwithstanding the verdict has been granted or denied, an appeal from the judgment presents for review".

JUDGE CLARK: Yes, I should think that is the better form which Mr. Lemann gives.

DEAN MORGAN: It is expressed the other way around.

JUDGE DRIVER: A judgment n.o.v. is after granting the motion. If the motion is denied, the judgment is before the motion.

MR. PRYOR: Yes.

JUDGE DRIVER: You have the judgment first, and then there is a motion to set it aside, to grant judgment for the other party n.o.v. If the motion is denied, your original judgment stands. If it is granted, a new judgment is entered for the other party.

MR. PRYOR: That is why I suggested that we change it to "An appeal from a judgment where the court has granted or denied a motion for judgment notwithstanding the verdict".

JUDGE DRIVER: This amendment is long enough and involved enough anyway. I think unless it clearly serves some useful purpose it would be advantageous to strike it out entirely. We have enough in there. It is heavily loaded as it is.

JUDGE CLARK: Just what is your suggestion, Judge Driver; to strike this out or to strike out more?

JUDGE DRIVER: You suggested a while ago leaving out the entire sentence beginning in line 49 with "An appeal from".

JUDGE CLARK: As at present advised, that is the way I feel about it. I really wonder if this adds enough to take care of the questions that seem to have developed in persons' minds.

JUDGE DRIVER: I am suggesting that on the assumption it doesn't serve any useful or vital purpose. I don't know. If it does, I would be happy to have somebody point it out. Unless it is important, I think it should be left out.

JUDGE CLARK: It was hoped that it would be clarifying to people taking appeals.

JUDGE DRIVER: Yes. I see.

JUDGE CLARK: The question is whether it clarifies as much as the other problems that it might suggest.

JUDGE DRIVER: It is a clarification rather than a grant, then, isn't it? It doesn't grant anything that they don't already have in other rules.

JUDGE CLARK: Judge Driver moves that this sentence be left out, lines 49 to 53. All those in favor of leaving it out, raise their hands. Five. All those opposed --

DEAN MORGAN: What are you leaving out now?

JUDGE CLARK: The sentence.

DEAN MORGAN: Just that sentence, or the whole section?

JUDGE CLARK: Just the sentence.

JUDGE DRIVER: Just the sentence.

DEAN MORGAN: If you are leaving that out, I don't see why you don't leave the whole section out, because the material in that last sentence is the thing that puzzles every lawyer, as a matter of fact. In the earlier part of this you have just the decision of the Montgomery Ward case, and you are leaving out the thing which seems important to most lawyers who are not used to having the person who has won make points in favor of a new trial conditionally. It is very unusual.

MR. LEMANN: How does this section compare with the Kentucky rule, which you say our rule closely follows?

DEAN MORGAN: The reason we get into all this is because we require a judgment to be entered immediately after verdict. In most of the states where you have this kind of

motion, it is made before judgment is entered. You don't enter your judgment until after the motion for new trial is denied or until after your motion for judgment notwithstanding is denied. It is perfectly clear you are not going to get an appeal from that order.

MR. LEMANN: Based on the assumption that that is the federal practice also.

DEAN MORGAN: Dean, you had better speak up. This sentence is yours. It is the one you suggested. At the last conference we had a devil of a time trying to draw this.

DEAN PIRSIG: The one I suggested was in 50(b). I don't think I am responsible for this.

MR. DODGE: Does this allow an appeal from an order granting or denying a motion for new trial on account of the weight of the evidence?

DEAN MORGAN: No, it doesn't.

JUDGE CLARK: It should not.

JUDGE DRIVER: Critics have assumed so, though, I understand.

JUDGE CLARK: It should not. It was not intended to. Our discussion at the moment comes up because some readers have thought that that was the conclusion.

MR. DODGE: That is the way I read it.

DEAN MORGAN: You don't enter a judgment in Massachusetts until after your motion is disposed of, do you?

MR. DODGE: No.

DEAN MORGAN: Under our rule here, you have to.

DEAN PIRSIG: This whole subsection (c) I understand is designed merely to help lawyers understand what they can already do under the Montgomery Ward case. If we strike out the last sentence of subdivision (1) on the ground that they already know what the law is, then that reasoning would apply to the whole subsection.

JUDGE DRIVER: I have no strong feeling about it. If it stays in there, I think certainly the language should be clarified because there is basis for the assumption that "appeal from a judgment granting a motion" could very well be construed as an appeal from an order. You do not have judgments granting motions, so far as I know. So a reader would be justified in saying, "Well, the Committee just used the wrong word there. They intended 'order granting new trial or denying new trial' so there is a right of appeal from an order."

DEAN PIRSIG: I would be inclined to think if we have subdivision (1) at all, we ought to include that last sentence for clarification to indicate what we intend.

PROFESSOR MOORE: Would it not be all right if we just said, "An appeal from a judgment presents for review all reviewable error against either the appellant or appellee."

MR. PRYOR: Leaving out "granting or denying a motion for judgment notwithstanding the verdict".

JUDGE DRIVER: I think that would be sufficient. Everything we are talking about here is addressed to the judgment n.o.v., and it would have to be the original judgment if it was judgment n.o.v. It couldn't be anything else. I think it would be simpler to use the language Professor Moore has suggested.

CHAIRMAN MITCHELL: My recollection is that the Minnesota practice in this situation was very clear before Roberts handed down that opinion, and his opinion muddled the whole thing up in a way that I could not understand. Isn't that so?

JUDGE CLARK: I think that is true. The Minnesota rules are very similar in form. There is the Minnesota rule (indicating). That opinion was not too clarifying, although it was intended to be.

How would it do to say, in line with what Mr. Moore has suggested, "An appeal from any final judgment presents for review". Somebody has objected to that form "presents".

CHAIRMAN MITCHELL: May present, may raise.

JUDGE CLARK: "An appeal from any final judgment" -- what did Youngquist suggest for "presents"?

PROFESSOR WRIGHT: He suggests that the phrase "reviewable error against either the appellant or appellee" at lines 52-53 should be stricken, and "errors occurring in the course of the proceeding" inserted instead.

JUDGE CLARK: "presents for review all errors occurring in the course of the proceeding". How is that?

MR. LEMANN: Does that take us any further into appellate practice and procedure than we have gone in other rules? It certainly is an attempt to say what the situation on appeal is. The other day it was suggested that may be true of some of the other things we have said. I am not sure. It speaks in terms of what happens on appeal. That is not true as to the preceding portions of the rules. On a quick reading they all relate to what happens in the district court, but this sentence tells what happens in the appellate court.

JUDGE DRIVER: I think it was General Mitchell's suggestion to use the word "may", or something to show that that might happen. If you put it too positively, I am a little apprehensive that it might be construed as dispensing with some of the requirements on appeal, such as the specification of points and the specification of errors in the brief, and so on.

In other words, I do not think we should put in language which would be capable of the construction that there was an automatic review of all errors without compliance with the appellate requirements.

JUDGE CLARK: Then we would have again, "An appeal from any final judgment may present for review all errors occurring in the course of the proceeding."

JUDGE DRIVER: Is that your idea, General?

CHAIRMAN MITCHELL: I used the word "may" instead of "shall" to get rid of that automatic business.

JUDGE DRIVER: That is what I think should be done.

JUDGE CLARK: This would be a substitute for that sentence in lines 49 to 53: "An appeal from any final judgment may present for review all errors occuring in the course of the proceeding."

MR. DODGE: All errors affecting the correctness of the judgment.

MR. LEMANN: You may present it and the appellate court may take it or not.

JUDGE CLARK: Yes.

MR. LEMANN: Then you don't mean that in effect the appellate court must take it. If it means they must take it, then it cuts into the powers of the appellate court, which I should not think would be very helpful to the profession. I can see new controversies raised about it if it ever came up.

MR. DODGE: What is that supposed to add to the natural conclusion that an appeal from a judgment presents for review all reviewable error affecting the correctness of the judgment?

JUDGE CLARK: It is supposed to overbear the language of Justice Roberts which seemed to require something more formal. I was suggesting myself that I thought we had gotten

far enough to know that one didn't have to have those formalities to which he referred. Mr. Morgan I think thought that the grass-roots lawyers didn't know any better.

DEAN MORGAN: You see, the next paragraph gives the option to the person who has had his judgment set aside.

JUDGE CLARK: What this really means is an appeal in this case without any other formality. If we were going to be quite frank, I suppose that is what we would say, that an appeal from any final judgment presents for review, without any further formality, all errors occurring in the course of the proceedings. That is what we would say if we were being frank.

MR. DODGE: You do not propose by this paragraph to give a right of appeal from the ordinary action of the court on a motion for a new trial.

JUDGE CLARK: No.

DEAN MORGAN: No.

MR. DODGE: The judgment referred to, of course, is the judgment which the party has moved to set aside.

JUDGE CLARK: No, it is beyond that. It would have to be a final judgment. Suppose that there is a setting aside of the judgment and the case has gone back and is being retried. This does not give appeal at once, then. You would have to wait until the end.

In other words, this is not supposed to add to the

ordinary federal rule as to final judgments.

DEAN PIRSIG: How many comments were there in favor of subsection (1)?

PROFESSOR WRIGHT: I would say everybody was in favor of it. In fact, I don't think I totaled up the number because there was such unanimity. The only questions were whether it was unduly complex. It received universal approval. It is my recollection there was nobody opposed to it.

MR. TOLMAN: But there were some complaints that it was pretty complex.

PROFESSOR WRIGHT: That is correct.

MR. LEMANN: Professor Joiner criticized it.

JUDGE DRIVER: When you have a motion for judgment n.o.v. and the possibility of a new trial, you have a complex situation, and it isn't capable of simplification unless you oversimplify it. There are a lot of possibilities there which have to be taken into consideration.

MR. DODGE: The language suggests that the appellate court has the power to deal with that motion for new trial. If the motion is conditionally denied, subsequent proceedings shall be had as the appellate court orders. If the motion for judgment notwithstanding the verdict "is reversed on appeal, the new trial shall proceed unless the appellate court shall have otherwise ordered", unless the appellate court reverses the order on new trial. "In case the motion . . . has been

conditionally denied and the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court."

DEAN MORGAN: This allows the party whose judgment notwithstanding the verdict has been set aside to assign errors which have been made against him at the trial in the admission of evidence, the charge to the jury, and things of that sort.

MR. DODGE: Insofar as the motion for new trial involves questions of law, it is subject to the jurisdiction of the appellate court.

DEAN MORGAN: That is right. You don't have to take advantage of this second paragraph. If you cut out this sentence and have the second paragraph in here, it looks as if you were saying that the second paragraph gave the remedy for the person whose judgment notwithstanding the verdict had been set aside.

JUDGE CLARK: Would this be possible? Put it as a part of the previous sentence in line 49. "shall be in accordance with the order of the appellate court and upon consideration of all errors occurring in the course of the proceeding."

MR. DODGE: Should there be in line 35 the words "if any" after "new trial"?

JUDGE CLARK: Yes, there should be. That is one of the suggestions which I was making.

DEAN PIRSIG: Do you think the Illinois rule is

adequate for our purposes?

JUDGE CLARK: There again it is a question of choice. I don't understand that Illinois claims to cover all possibilities. According to Professor Cleary, in Illinois it covers a case where the trial court was making conditional rulings which would sustain the result originally reached, rather than to assume that the original ruling was in error.

MR. DODGE: Suppose the judge ordered a new trial conditionally on the ground that the verdict was manifestly against the weight of the evidence, what right has the appellate court to otherwise order, that is, to order that there shall or shall not be a new trial?

DEAN MORGAN: If he has granted the new trial, particularly.

MR. DODGE: If he granted it.

DEAN MORGAN: Of course, there is some authority. I would suppose it was never true, but there is some authority to the effect that the motion for new trial is an appeal for abuse of discretion on that point, isn't there?

JUDGE CLARK: Yes. I was going to say there is a good deal of thought there that that is not appealable. How does that issue come in here? That isn't here. If a new trial is granted, we go ahead and have the new trial.

DEAN MORGAN: Yes, but you appeal from the second judgment then. Suppose you get a new trial ordered and then

the winner of the first trial loses on the second trial and says the granting of a new trial was an abuse of discretion. When you appeal from the judgment, is that question reviewable?

JUDGE CLARK: I don't think it is then.

DEAN MORGAN: For abuse.

JUDGE CLARK: I don't think then you can go back. If there was an error in the original grant, I don't think the appellate court could reverse on that. They could reverse on what occurred at the second trial.

DEAN MORGAN: I think that is true, too, but then what do they mean when they say they won't consider the ruling on a motion for a new trial unless there is abuse of discretion?

JUDGE CLARK: That is putting it the other way -- denial.

DEAN MORGAN: Where they deny it?

JUDGE CLARK: There is denial and that goes up. Even there they won't do anything except for abuse of discretion.

In the other situation there has been a new trial, and I don't think there is any way of preserving the rule there.

I must say that on this I come back to my same suggestion. It does seem to me that this is too bromidic to put in. I still think there is quite a little left. I don't believe this is the most important point. It may have troubled

Roberts.

MR. DODGE: Isn't the implication there plainly that the appellate court has full power to affirm or reverse the decision on any motion for a new trial, no matter what the ground of it is? So that is an appealable question.

JUDGE CLARK: I should think lines 48 and 49 would certainly so imply. "subsequent proceedings shall be in accordance with the order of the appellate court."

MR. DODGE: Yes. That indicates the appellate court can exercise complete power over the judge's action on a motion for a new trial.

JUDGE CLARK: Everything you put in, you could put in something else: "in accordance with the order of the appellate court upon a consideration of the entire record." All those things seem almost like stating the obvious. Of course it should be.

MR. DODGE: You mean it is subject to the control of the appellate court if it finds that any error of law has been made?

JUDGE CLARK: Yes. I think I would renew my suggestion to leave out this sentence, only this sentence.

MR. DODGE: The last sentence?

JUDGE CLARK: Yes.

DEAN MORGAN: We might as well vote on it, Charlie.

JUDGE CLARK: All right. All those in favor of

leaving out this sentence in lines 49 to 53 will raise their hands. Seven. All those opposed. Two. Seven to two.

I want to make one or two other suggestions. I think as Mr. Dodge suggests and as I suggested, too, there should be a change in line 35. He suggests after the words "new trial" inserting the words "if any". I had suggested "if one has been made". I guess "if any" is enough.

MR. PRYOR: Judge Clark, would it do the same thing if you changed the word "the" in that line to "any", "any motion"?

MR. LEMANN: You mean in line 35?

MR. PRYOR: Line 35, yes, "shall rule on any motion".

DEAN MORGAN: This supposes the alternative motion being made.

JUDGE CLARK: I should think it would still be "the", although we could say, if necessary, "on the alternative motion".

MR. PRYOR: That is all right.

DEAN MORGAN: If you put that in, you are all right.

JUDGE CLARK: "shall rule on the alternative motion for new trial, if any".

MR. LEMANN: Mr. Pryor's idea was that his change in line 35 would eliminate the necessity for changing line 36, but it would not if you used the formula you last suggested.

MR. PRYOR: My thought was to say, "shall rule on any

motion for new trial".

MR. DODGE: I am going to make it very plain that the motion for judgment notwithstanding the verdict didn't necessarily have to include the alternative motion. When I first read those words in lines 21 to 23 they were not quite clear, and I was afraid that we had not gotten rid of that compulsory inclusion of the motion, which of course the moving party may not want to make and ordinarily would not make, I should think.

MR. PRYOR: The use of the word "the" is wrong. There is no doubt about that.

MR. LEMANN: You could cover it by saying in line 35, "shall rule on any alternative motion for new trial which may be presented".

JUDGE CLARK: Yes, that covers it, at least.

MR. DODGE: It is not quite clear as to what "this motion" is in line 23.

MR. LEMANN: We are talking about page 43, Bob, lines 35 to 36. Are you going back to the earlier page?

MR. DODGE: "A motion for a new trial may be joined with this motion," and of course "this motion" in line 23, I see on close reading, refers back to that first "this motion," that is, the motion for judgment notwithstanding the verdict.

DEAN MORGAN: Under the language you have in the italicized portion of lines 21 and 22, you would always treat

it as if there were a motion for new trial included, would you not? "a motion to set aside or otherwise nullify a verdict or for a new trial shall be deemed to include this motion as an alternative."

PROFESSOR WRIGHT: "this motion" refers to judgment n.o.v.

DEAN MORGAN: It refers to judgment notwithstanding the verdict.

MR. DODGE: What do the words "otherwise nullify" mean?

DEAN MORGAN: It is to take care of a case such as in New York where the practice was just to move to set aside the verdict.

MR. DODGE: That is already covered.

DEAN MORGAN: That wouldn't do, under this amendment.

MR. DODGE: "motion to set aside" is all right, but what is covered by "otherwise nullify"?

DEAN MORGAN: I suppose it was put in so Mr. Justice Black wouldn't have a chance to interpret what "set aside" was. If you said "set aside", then it wouldn't do.

MR. DODGE: All we have dealt with in Rule 50(b) up to this point is a motion to set aside the verdict. Then when we come to line 21, for the first time we add "or otherwise nullify".

JUDGE CLARK: I take it this was an attempt to make

clear that under the Johnson case, where you were supposed to have to get up and use a special form of words, any form of words would do. It was, I suppose, to be sure that it was broad enough to cover the Johnson ruling. That was a five to four case in which it was said that this was not available because the counsel hadn't gotten up and said in so many words that this was what he asked for.

JUDGE DRIVER: He hadn't said the right words.

JUDGE CLARK: That is right.

DEAN PIRSIG: I believe he used a form of motion which was generally recognized in New York.

JUDGE CLARK: Yes.

DEAN PIRSIG: There may be variations in other states where lawyers use particular types of words which are not exactly a motion to set aside the verdict. This was to avoid any complication on that. You might also have, I suppose, a motion to reduce the damages without completely setting aside the verdict, which might involve this question.

PROFESSOR MOORE: I certainly don't want to hold any brief for the Johnson case. I think the substance of 50(b) is good, but I believe it is impolitic at this time to send an amendment to 50(b) up to hit flatly in the face of five Justices; and Black, as you probably know, is all hepped on jury trials. We sent up a proposed amendment to Rule 50(b) once, and for some reason or other it wasn't promulgated. I agree with Judge Clark

that it is a hard proposition to outguess the Supreme Court, but here is one where I would guess it wouldn't be warmly received.

MR. LEMANN: Of course they could throw it out again. We wouldn't be any worse off than if we had not done it. Since it has been so generally approved, it is a little difficult to withdraw it now. I think your suggestion would have been more impressive if we had debated it before we sent this out. But having sent it out, and on the whole it having been generally approved, it seems to me rather difficult for us to withdraw it.

Suppose we send it in and suppose Justice Black opposes it and the Court knocks it out, we would be in no worse position than if we didn't send it in.

MR. DODGE: Was the motion in the Johnson case just a motion for a new trial?

PROFESSOR MOORE: It was an ambiguous motion. Nobody knew quite what it was.

DEAN MORGAN: What he did was to get up and use the New York formula. He moved to set aside the verdict immediately when it came in. That is what he did. Then the judge reserved decision until later. He said, "Now I take up the motion," and so on.

MR. DODGE: It was a motion for judgment notwithstanding the verdict.

DEAN MORGAN: Yes. It was no good.

MR. DODGE: So you think these words, "or otherwise

nullify" --

DEAN MORGAN: Are hard to define.

MR. LEMANN: Mr. Tolman suggests that it would be helpful to include a note to this rule saying this amendment has received the unanimous endorsement of the members of the bar when it was circulated, and that might be helpful to the Supreme Court.

Wasn't the reason they didn't approve the original proposal that they had one of these cases under advisement at the time? That is what happened in the Hickman v. Taylor situation. We proposed an amendment which really would have brought about the same result as they themselves brought about in Hickman v. Taylor, but they had Hickman v. Taylor under advisement at that time and for that reason, as I understood, they withheld approval of our amendment, and then in effect adopted the amendment in their opinion.

It is my recollection there was a somewhat corresponding situation in regard to this rule.

MR. TOLMAN: That is correct. I remember when the Chief Justice told me what they did on those amendments, he said there were three situations where they did not act. Those three situations were where there were cases under advisement in the Court at that time dealing with them. One was the substitution rule, one was this rule, and one was Hickman v. Taylor. They refused to make the amendments to those three

rules. They distinctly said the reason for it was that they were considering cases which involved questions under those rules.

MR. DODGE: That was the reason.

MR. TOLMAN: That was the reason. I remember it very well.

JUDGE CLARK: I still feel rather strongly that we ought not to govern our activities by guessing as to the potential vote of the Supreme Court. It seems to me that is a very questionable way of proceeding. We cannot tell. We are therefore limiting our judgments not as we are supposed to, by what we think is the desirable thing to do, but by guesses as to what may happen.

In this very situation, I submit that we cannot get a clear course of conduct by that form of trying to foresee the future. We may well lose some constituents in the Supreme Court that we would otherwise get, without gaining a thing.

Personally, if I were to guess, I think that Justice Black, having taken so decided a view, as Justice Frankfurter has pointed out quite informally, so far as not to approve of any rules, I think, if we are guessing, that a vote which probably will pretty surely be against the whole group anyway, may be changed by what we do here when what we do in that sense is likely to prove desirable not only to all the bar but also to various members of the Supreme Court itself.

In Justice Frankfurter's warm if not to say vigorous dissent, he called for action in this regard, so much so that a former law clerk of mine who was then Mr. Justice Reed's law clerk, talked to him and wrote to me at the time. I then had some correspondence with Justice Frankfurter about it, and said that I had understood he was suggesting some action. I must say he then somewhat retreated. He then answered that, "You must remember that I don't suggest any rule-making power. I just called attention in my dissent to a very serious situation."

So he didn't want to be tagged with calling for an amendment, although I really think he did in the course of his informal remarks at the very time. But let that go. I am just making the point that he and his three colleagues felt warm enough that I think they would feel this situation was not faced if we didn't face it.

I am saying that, not that we should guess what Justice Frankfurter and his colleagues would do, necessarily, but just that we cannot go on such a shifting sand. I think we ought to do what we can be proud of with the profession, and if we lose with the Supreme Court, we lose. I think we gain stature all around by just going ahead that way.

DEAN MORGAN: We have done that in a number of cases. Especially a case on the time for appeal, as you remember, when the District of Columbia court allowed an amendment, wasn't it,

or a reinstatement in order to allow an appeal from a judgment, and the Supreme Court approved that. Then the very next session we had we changed it by rule.

JUDGE CLARK: That is right.

MR. DODGE: Coming back to line 35, you went so far as to suggest the words "if any". I thought you had some later suggestion you were going to make there.

JUDGE CLARK: I want to come back to this. As I look at it, I think the simplest way and what I think I would like to do is to say "shall rule on the motion for new trial, if any". It seems to me that is clear and covers it.

Then we have taken out this provision in lines 49 to 53.

In line 59, substitute the word "paragraph" for "section", which is what we should do. In line 59 we have used the word "section", which is not what we use in other rules. It should be "paragraph".

In lines 62 and 63, we should say "this rule" instead of "sections (1) and (2) of this subdivision".

In line 64, substitute for the word "apply" the word "move".

These last, you see, are small textual changes, but I think they are desirable ones.

With those changes and with what we have done already in striking out lines 49 to 53, I think it would be a good thing

to approve both 50(b) and 50(c).

JUDGE DRIVER: I noticed in reading line 35 you this time left out the word "alternative" which I thought had been put in there, "shall rule on the alternative motion". Or is it just "shall rule on the motion for new trial, if any"?

JUDGE CLARK: I don't object particularly, but I was leaving it out because it seems to me --

JUDGE DRIVER: I just wondered whether you intended to leave it out, or if it was inadvertent. I have no feeling about it.

JUDGE CLARK: It seemed to me that the simpler way did it. Mr. Wright disagrees with me on that. I am not objecting to that, but it seems to me we are dressing this up to make it a little tautological, and so forth.

JUDGE DRIVER: I had it written in here, and I just wondered if you intended to leave it out or had inadvertently overlooked it. That is all I wanted to know.

PROFESSOR WRIGHT: One other textual change, Judge. We were going to propose in 50(b) that the time for making motion be "not later than 10 days" rather than "within 10 days", in line 9.

JUDGE CLARK: Yes, that too would be desirable. In line 9, "not later than 10 days", the idea being that it may be earlier but not later.

MR. LEMANN: I am not sure I understand it.

PROFESSOR WRIGHT: The difference, Mr. Lemann, is that "within 10 days after the entry of judgment" would seem to indicate that you cannot make the motion prior to entry of judgment. The language "not later than 10 days after the entry of judgment" would let you make the motion at any time, even including prior to the entry of judgment.

MR. LEMANN: I would not have reached that distinction, but perhaps so.

PROFESSOR WRIGHT: In the Second Circuit, contrary to the rules, if you can hold off entering the judgment until this motion has been made, you have to allow for it.

PROFESSOR MOORE: I have a question on 50(c)(2). It seems to imply that the only thing the court can do is to conditionally grant or deny a new trial. I think there are situations where you ought to have the right to grant a new trial absolutely.

For example, the party who got the verdict and now his judgment on the verdict is set aside, might well say, "I am entitled to a new trial because of newly discovered evidence or because of error in the trial court in rejecting a line of testimony, in excluding testimony." I should think there would be situations where the court ought to have the power and should exercise it, not just conditionally grant or deny, but in effect to reconsider what he has done and give a new trial.

JUDGE CLARK: I am not quite sure of the point you

have in mind.

PROFESSOR MOORE: Suppose the plaintiff had a line of testimony which was excluded, but he nevertheless got a verdict, and the defendant now moves for judgment notwithstanding the verdict and gets it. It seems to me the plaintiff ought to have the right to say, "Well, Judge, granted that you are correct that I didn't have enough evidence in as it is, you were in error in excluding this line of testimony." And if the judge believes him, he ought to grant him a new trial.

DEAN MORGAN: Right there?

JUDGE DRIVER: Yes, an absolute grant, not a conditional one. That is Professor Moore's point.

MR. LEMANN: That means the judge withdraws his order granting a motion for judgment notwithstanding the verdict, doesn't it?

DEAN MORGAN: In that case the judgment notwithstanding the verdict is set aside.

JUDGE CLARK: I don't quite see it. If the trial judge grants a new trial, he has granted a new trial. Of course he has control over what he has been doing for quite a while.

I take it the case visualized is where he first thinks he is going to set aside the verdict, and then one of the parties pushes him a little further and he says, "No, I think I will grant a judgment notwithstanding the verdict." And the plaintiff comes in and says, "No, I want a new trial." So he

withdraws the first ruling and grants a new trial. When he grants a new trial, he has done it.

DEAN MORGAN: In lines 36 and 37, "if the judgment is thereafter vacated or reversed", that is the judgment notwithstanding the verdict. That is what you mean by conditionally granting.

JUDGE CLARK: Yes, conditioned on that event.

MR. LEMANN: To be sure I understand the discussion, would it be covered by adding in line 58 after the word "trial" the words "which may be granted or denied or conditionally granted or denied"? Would that be your point?

PROFESSOR MOORE: Yes.

MR. LEMANN: One critic in Los Angeles says the whole thing should come out. He says he doesn't see where the party obtaining the verdict should have the right to present a motion for new trial. He has already had two bites at the cherry, one on motion for directed verdict and, second, on a motion for judgment n.o.v. You want to enlarge that somewhat.

PROFESSOR MOORE: Yes, sir.

JUDGE CLARK: I guess that is all right. How would you enlarge it in lines 58 and 59? What is the suggestion?

JUDGE DRIVER: Was this your suggestion, Monte, that in line 58 we insert "trial, which shall be granted or denied or conditionally granted or denied"?

MR. LEMANN: Perhaps "may" instead of "shall"; "may be

granted or denied or conditionally granted or denied".

JUDGE DRIVER: I think they want the "shall" in there with "conditionally" so it is mandatory that the court shall conditionally grant or deny.

MR. LEMANN: We could spell it out further, "which may be granted" --

CHAIRMAN MITCHELL: Conditionally or otherwise.

MR. LEMANN: -- "granted or denied, conditionally or otherwise, and if granted or denied conditionally the consequences shall be as stated in section (1) of this subsection."

JUDGE CLARK: All right. We will have to work that out. Is it desired to put in something which will cover that point?

JUDGE DRIVER: If you put "may" in there, the judge will say, "I don't know, I don't think I want to pass on this conditionally. I will just let it go as it is." I understand what you are trying to do is to provide that the trial judge shall in this situation conditionally grant or deny a motion for new trial. Perhaps it is getting a little technical, but I think it would carry out what you have in mind to say "new trial, which may be granted or denied or shall be conditionally granted or denied".

MR. LEMANN: I think that confuses it to say "may be granted or denied" but "shall be conditionally granted or denied". That confuses me on a quick hearing of it. I should think you

could work that out.

JUDGE CLARK: All right. That will be worked out.

MR. LEMANN: The idea is to give him the right to grant it unconditionally if he wants to. Is that your idea, Professor Moore, that if he wants to grant it unconditionally, he can do it?

PROFESSOR MOORE: Yes.

JUDGE CLARK: With these various changes, do you want to now approve the amendment? All right, it will stand approved.

PROFESSOR MOORE: I want the record to show that I think it is impolitic to amend Rule 50(b), and therefore I dissent from that.

JUDGE CLARK: All right. Does anyone else wish to add anything?

If not, we will pass now to Rule 52(a). Of course we have had a good deal of discussion on this at one time or another. I think this is helpful. I don't know whether this ends all question or not, but I think it is a clarifying thing.

I should like to go on with our approval of this. Does anybody wish to discuss this or go over it?

JUDGE DRIVER: I move the adoption of the amendment to Rule 52(a).

JUDGE CLARK: It is moved that it be adopted. All those in favor raise their right hands. Seven. All those opposed. One. All right, seven to one.

Does anyone want to say anything more about it?

If not, we will go to 54(b). On that I wish you would look at my last letter, pages 6, 7, and 8. I should say still that the over-all picture on this is good, but there have developed questions as to its extent, so I now definitely recommend clarifying the extent. It seems to me it is rather desirable, and clarifying it now based on the model we now have from Illinois, where they took our rule and went forward to make this clear.

The chief reason I suggest this is that a panel of the Ninth Circuit in a decision written, as it happens, by District Judge McLaughlin while he was sitting on the panel, has ruled in the Steiner v. 20th Century Fox case -- which was mailed to the Committee under date of February 10, 1955, and you all have it -- on allegations of antitrust conspiracy, that that was only a single claim against multiple defendants, and that therefore an order entered by the district court as to a part of those defendants was not sufficient to bring the case up under this.

I had always thought myself that that was a very restricted way of looking at what we did in 54(b). I think we are likely to rule to the contrary in a pending appeal which we have. I think you can make a considerable argument that that is a wooden and restricted attempt to make claims carry a single meaning that they do not carry.

If you like, I can go into that and argue it a good deal, but I know this other argument is quite possible which is made and followed in this case. It seems to me that instead of leaving it to us poor devils on the courts to work out, it is the kind of thing that we could easily make clear, and therefore my suggestion is that we do it.

If we were to do it, it could be done, I think, fairly simply, and I make the suggestion on page 7. I had to do this in a good deal of a hurry and under pressure, and I have not attempted to underline the certain parts that are inserted and not others, so the underlining is not too significant. It is not complete there. At any rate, this is what I would suggest:

> "(b) Judgment Upon Multiple Claims or Involving Multiple Parties. When multiple claims for relief or multiple parties are involved in an action, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates less than all the claims or the rights and liabilities of all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to

revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties."

If you look back to 54(b), about all this does is to insert multiple parties with multiple claims. In fact, that is the intent of it. If there is anything more, it is merely textual to carry out that idea. The whole intent is to make it clear that you may make the determination under 54(b) in the situation where you may have what is held to be only one claim affecting many parties. I say "what is held to be" because of course that is the question.

When we get back to the old cause of action, there were many decisions holding -- some of them I criticized, of course -- holding that a right against different persons made different causes of action. In this case there are separate tort-feasors. You can call them joint if you want to, but they are all separate tort-feasors, that is, you could sue these people, who happened to be joined, in separate suits if you wanted to. They are now being brought into one suit, but this would provide that a court could say as to certain of them -- let us suppose there are three tort-feasors, A, B, and C. The court could say, "There is nothing as to A and B, and there is no reason why they should not have final judgment at once." That is the idea.

MR. LEMANN: Do I understand what you are now saying

is that your note on page 48 should be reconsidered, because there you say we don't need an amendment, that the courts have reached the correct result. Now you are saying, "Thinking it over further, we cannot trust these guys, and we had better amend this rule."

JUDGE CLARK: It is more than that. It is much more than that. One of the most distinguished courts of the country, after considering this note, cited it directly and, after considering the other cases, said that there is no question about it, they are all wrong, and this does not apply under the wording of the rule.

MR. LEMANN: They considered our latest note? Which distinguished court could have done that?

JUDGE CLARK: The Ninth Circuit.

JUDGE DRIVER: Judge McLaughlin mailed a copy of the slip sheet opinion to the Committee, and on page 3 of the slip sheet opinion he says that:

> "Several circuits have held or appear to have held that Rule 54(b) is applicable to multiple parties as well as claims. Because of this, the Advisory Committee on Rules for Civil Procedure in the Preliminary Draft of Proposed Amendments to Rules of Civil Procedure for the United States District Courts (May 1954) does not presently recommend an amendment to Rule 54(b) to cure the observed defect."

He has taken the fact that we have not proposed an amendment as proof of wrong. I think the Ninth Circuit will stand by its decision certainly unless we clearly and specifically amend the rule.

MR. LEMANN: I agree. This is a red hot decision, February 7, 1955.

JUDGE DRIVER: February 7.

MR. LEMANN: And written by a district judge who knew what he was doing.

JUDGE CLARK: Written by a district judge who was sure he knew what he was saying.

MR. LEMANN: In view of this twisting of our tail, I support the Reporter's proposal.

MR. DODGE: It is curious that they took that position as to why we had not amended the rule, when we said the reason for not amending it was that all the courts were deciding it right anyway.

JUDGE DRIVER: I was rather amused at Judge McLaughlin's comment in the letter transmitting the slip sheet opinion. He said it was all right, he did not have any amendment to suggest unless it was referring to us as the Supreme Court's Advisory Committee, which we had not done and which some of the law book companies seem to do, the Supreme Court's Committee.

MR. LEMANN: In the Foreword to this book it is noted

that we are divided. The comment on page 48 indicates our reason for not amending the rule, so I should think the division would not apply.

JUDGE CLARK: I noticed that with a good deal of sorrow, almost as much sorrow as when I saw the foreword originally when I came out of the hospital. I really think that wasn't a good foreword. I didn't see it until it was all done. It was picked up more than I thought. My great hope when I came out of the hospital was that nobody would ever read the foreword. That hasn't worked out. This judge read the foreword, and the fellow who wrote that piece we had on Rule 4(e) read it. I think people are able to read much more than I wish they could.

MR. LEMANN: In view of this, and if the transcript bears out the observation, I wonder whether in presenting the final draft we should make the comment that all the recommendations now presented are supported by a majority of the Committee, something like that, to take away that idea. Judge Driver raised the point yesterday that unless we did have a majority he did not think we should go forward. If we adhere to that rule, then I think some such comment as I now suggest would be justified and might be helpful.

If we are going forward with the proposals, I think we want to give them all the weight we can. If we don't give them too much weight, it creates the impression that the

Committee itself is greatly divided.

JUDGE CLARK: It does seem to me that either that ought to be done or the statements ought to be specific. I certainly shall not object or raise any question if the exact facts are stated. By which I mean, for example, if the vote was so-and-so and it is desired to state it, I don't protest that.

I do think it is unfortunate to make a general blanket withdrawal of support where that would seem to apply to everything where there is support. I think that does not correctly represent it. I should think we ought to do something of that nature or state just the vote.

MR. LEMANN: Perhaps we ought to hear a little further from Professor Moore as to how he would feel about that, whether he would feel that he would have to go on record as saying, "I don't think we ought to make any amendments; I don't think we ought to make amendments to such-and-such rule." That would be something we ought to think about.

JUDGE CLARK: I just want a correct reflection of the facts, and so long as that is done that is all right.

MR. LEMANN: Professor Moore has expressed his doubts more on the Lemann idea of overtalking than on the Moore idea of undertalking.

PROFESSOR MOORE: I think there are too many amendments. Many of them I have no objection to in substance. For

instance, the amendment in Rule 4, the substance is all right but I don't think it is too important, and I would leave it out. That is true of Rule 15 and Rule 20, and a number of others where I have voiced that position.

Maybe I am overcautious on that, but I would take the attitude that unless a very strong case has been made why an amendment should be made to a rule, none should be recommended.

Some of the amendments which have been proposed, I suppose I am not in favor of. The one on class suits I think eventually was amended moderately well to meet my objections. I don't want to have my objections overplayed at all. I just want the record to show that when a certain action is taken, it is not necessarily unanimous.

MR. LEMANN: I think we should give some thought to how the Committee's position is to be stated.

DEAN PIRSIG: One of the difficulties I have is that particularly Mr. Moore has felt that he agrees with the substance and the rule itself is good, but he felt the amendment was not wise, either because it was a minor matter or because of the politics of the thing. If the vote is recorded only as a dissent, it will be construed, I think, as being a disagreement on the merits of the proposal rather than on the desirability of making the change. There may be some misconstruction involved by just recording a blanket dissent.

JUDGE CLARK: It would seem to me on the whole that probably this should be covered by an individual statement. I should think there would be danger of not accurately covering it otherwise.

MR. LEMANN: Should there be any individual statement? Perhaps it cannot be avoided in Professor Moore's case, but I myself had the same feeling, as I have indicated, that you have about the unimportance of some of these amendments, and so voted originally. That would not lead me to think it important to make a written record of it in connection with this report.

MR. DODGE: Particularly where all the courts have been deciding it correctly except for this decision in the Ninth Circuit.

MR. LEMANN: I am speaking generally, Bob, of some of the other less important amendments. I bring this up now -- and I think we ought to pass it for the time being and let Professor Moore be thinking about it -- because otherwise you are going to have to work this out by correspondence later, and it would be easier to reach a conclusion by debate, I think. You really must make the decision.

MR. DODGE: I understand that in three circuits the court of appeals has decided it rightly, isn't that so, Judge? In the Fifth Circuit they left it open, but otherwise there hasn't been any adverse decision until this one in the Ninth

Circuit.

JUDGE CLARK: That is true, but I think we must say, as the judge in the Ninth Circuit said, that these other cases do not discuss the exact point. In the other cases, in the main their discussion is on the question whether there is any doubt about the validity of the rule. They uphold the rule generally, but they do not go into the question of multiple claims as against multiple parties, and to that extent Judge McLaughlin is justified in what he says.

There has been a good deal of discussion about this. It has been a matter of court decision. It does seem to me that it is easy to clarify the thing in a very important segment of the law. So I should think it would be desirable.

May I rise to a point of personal privilege, too, on this point that Mr. Lemann brought up. I was going to say on this that while I am not at all sure I want to do it at the moment, particularly if there are individual statements, I might want to express regret myself that I think we have gone in the way of limiting discovery, and I do not like it very much. I am not sure whether I want to do it or not, but I think I ought to mention that because I think we are going to have all the NACCA on our necks because we certainly have gone very far the other way, farther than I myself would go, I believe. We have taken the opposing point of view. If there is some need of clarifying it, I might find the need myself.

I don't know yet.

MR. LEMANN: With separate statements we end up like the _____?_____ Commission, with all but one signing the report, and then they each wrote a separate opinion and took back individually many of the things that were said in the supposedly almost unanimous report. The result was that it subtracted greatly from the effect of the report. I think it would be quite unfortunate if that were the result.

JUDGE DRIVER: The lack of unanimity should not detract from the force of our findings here. If we consider anything of any importance, if we are doing our job and we are capable, we will disagree. That is inevitable. Even in the Supreme Court, the members of the Court disagree at times.

MR. LEMANN: I agree with that statement fully. It is just a question of how far we want to go on record with separate statements. I thought we might be able to counteract the statement in the original draft that we were divided, by a general statement that while of course there have been differences of opinion on individual rules, which could happen in any group, the recommendations represent concurrence of most of the Committee. Something like that.

JUDGE DRIVER: I get your point. I think if we go out and air our individual views as to what we think about the action taken, it isn't going to help.

CHAIRMAN MITCHELL: I think you would stir up a

hornet's nest if you had a whole lot of dissents in here. We have never done that before. At the most, we could put a statement in the foreword that the fact that every member of the Committee has signed the report does not necessarily mean that he has approved everything in the report, but it is enough to say that everything we have proposed has the support of a substantial majority. Something like that.

JUDGE DRIVER: Yes.

CHAIRMAN MITCHELL: If you start putting in individual statements and dissents, and the reasons for dissents, and one thing or another, you are just going to feed the opposition, and you may have very great trouble and it may get into Congress on the thing. I should not think it would be very advisable to do that.

I think it has been understood all along that the fact the Committee members sign their name to the report does not necessarily mean that they are all unanimous on individual amendments.

JUDGE CLARK: By the way, Mr. Chairman, will you prepare a foreword for the report?

CHAIRMAN MITCHELL: I would rather have you prepare it and let me look at it.

JUDGE CLARK: I am willing to do my best. The responsibility of being fair is striking in on me. All right, I will give you a draft. I just wanted it settled who was to

take the initial step, and now I will take it.

JUDGE DRIVER: Judge Clark, getting back to 54(b) -- which I believe we had under consideration.

JUDGE CLARK: That is right.

JUDGE DRIVER: I had in mind that Professor Moore mentioned Rule 20. Would it be necessary to amend Rule 20 if we definitely provide in 54(b) that it does apply to multiple parties as well as multiple claims?

JUDGE CLARK: That is the question raised. We have not finally settled that.

JUDGE DRIVER: There is another one we passed conditionally.

JUDGE CLARK: I think it goes back to 14, too.

PROFESSOR WRIGHT: On Rule 14 we adopted language. Rules 20 and 42 we put over.

JUDGE DRIVER: Rule 42 is the other one I had in mind.

JUDGE CLARK: What is your pleasure on 54(b)?

MR. PRYOR: I move the adoption of the language suggested by the Reporter.

JUDGE CLARK: All right. Is there any more discussion?

DEAN MORGAN: The adoption of your substitute, is that it?

JUDGE CLARK: Yes.

MR. LEMANN: How are you changing the caption?

JUDGE CLARK: Do you have this before you (indicating)?

MR. LEMANN: Yes. Thank you.

CHAIRMAN MITCHELL: Giving finality.

JUDGE CLARK: No, giving a chance at finality. It could operate either way. Giving a chance at finality when the district judge acts when there are multiple parties. This judge has ruled that it doesn't go that far.

All those in favor will raise their right hands. Ten. Those opposed. There are none. That is supported.

PROFESSOR WRIGHT: Do you want to take up Rule 20(b) next?

JUDGE CLARK: Yes, we should. I don't think that that is as necessary in these other places. I am not sure but it makes it a little more elegant to put them in. I think if I were doing it myself, I would put them in. But I shall not object too much if you want to take them out. Let us look back at each of these cases. The first one is in 14.

JUDGE DRIVER: I think Professor Moore has a real point, that we should keep the number of these amendments to the minimum, if we can without sacrifice, and I think a note under 54(b) would take care of these other sections and show that we intended to provide for all the others without amendment of each of them.

MR. LEMANN: It would not take care of all the amendments to 14.

JUDGE DRIVER: Not all of them.

JUDGE CLARK: Rule 14 we are going to amend anyway. Maybe we could leave it in there.

MR. LEMANN: I should think so. I think it helps the practice of the lawyers greatly to have cross-references. He should be smart enough to look at all the rules, but if he has the language in front of him on page 10, line 38, referring to 54(b), it might be helpful to him.

JUDGE DRIVER: That has to be amended anyway, Mr. Lemann. I think Rules 20 and 42 have only the amendment pertaining to 54(b).

JUDGE CLARK: Rule 20(b) on page 15 of the green book and 42(b) on page 41.

MR. LEMANN: I think if we throw in a new amendment to 54(b), we might perhaps do without putting it in 42(b) and just cover it in a note.

MR. PRYOR: I think we should be very reluctant to propose amendments on any of these rules at this time which have not been submitted to the bar. I really don't see any necessity for changing any of these other rules if a proper note is added to 54(b).

MR. LEMANN: Are you opposed to this amendment to 54(b)?

MR. PRYOR: No.

MR. LEMANN: That would be an amendment which we had

not submitted.

MR. PRYOR: I understand that, but it is called for by the California decision, it seems to me. I didn't say we should not, but I said we should be reluctant to.

MR. LEMANN: The present proposal is that we should withdraw some that we had presented, as I understand it, is that right? The present tentative proposal is in the opposite direction. Instead of proposing amendments not submitted, we are withdrawing an amendment which we did submit.

JUDGE DRIVER: That is right.

JUDGE CLARK: I take it, therefore, the suggestion is that we withdraw the amendments suggested to 20(b) on page 15 of the green book and 42(b) on page 41 of the green book, and make cross-references in a note or not do anything about that.

MR. LEMANN: I think we ought to do that. "It was thought they were not necessary, especially in view of the fact that we are now making an amendment to 54(b)."

JUDGE CLARK: Make a reference to it in the note.

JUDGE DRIVER: To explain their withdrawal.

MR. LEMANN: That is right.

JUDGE CLARK: All those in favor of making these two withdrawals, raise their right hands. All those opposed.

DEAN MORGAN: I abstain.

JUDGE CLARK: Mr. Morgan was present.

... The motion was carried ...

JUDGE CLARK: Next we come to the summary judgment rule, and the first is the provision covering or making unnecessary a cross-motion. That is at page 49 of the green book, Rule 56(c), the addition at the end:

"Such judgment, when appropriate, may be rendered for or against any party to the action."

That seems to have been generally approved. It was approved, according to Mr. Wright's summary, by 11 of the 14 communications.

PROFESSOR WRIGHT: There is just one question about draftsmanship which had not occurred to me, but which I think may be of a very substantial character. We have a communication from one person -- I can't for the moment put my finger on who it was -- a lawyer in Corpus Christi, Texas, by the name of Allen Davis, who says it is a good amendment and he is all for what we are trying to do, except he says most lawyers are not going to read this amendment as doing it. He says they won't read this language as meaning that you can grant summary judgment for the non-moving party. They will read this language merely as meaning that any kind of a party to the action, whether plaintiff, defendant, third-party defendant, or intervenor, can have summary judgment. He says the amendment doesn't accomplish, in other words, what the Committee in its note says it is trying to accomplish.

JUDGE CLARK: These things can be said. I think all

the decisions to date except one go this way, anyway. Isn't that right? The decisions are pretty strong on it. I think Judge Medina ruled to the contrary.

MR. DODGE: What did you say, Judge? The decisions?

JUDGE CLARK: The district court decisions on this point have held that you could render judgment against the moving party.

MR. DODGE: Under the rule as it stands?

JUDGE CLARK: Yes. There is the decision of Judge Medina to the contrary. Were there more? I don't know.

MR. DODGE: There really isn't any conflict of authority.

PROFESSOR WRIGHT: I have here two decisions the other way, and it seems to me I have somewhere else a later decision to the contrary.

JUDGE CLARK: I was going to say, I think there is enough doubt about this that it is not clear. I should think that putting in our language we have here to resolve the doubt would be sufficient.

PROFESSOR WRIGHT: There was a third case in 1953. There is Judge Medina's case in the Southern District of New York, and somebody from the Middle District of Pennsylvania, and somebody from the District of Puerto Rico, all comparatively recent, 1948, 1949, and 1953. I have about eight decisions which held that it can be done.

JUDGE CLARK: I should think this language was adequate. Does anybody feel for the gentleman from Mississippi?

MR. LEMANN: Texas.

JUDGE CLARK: Excuse me. I mean from away down South.

DEAN MORGAN: He is just a little way off, that is all.

DEAN PIRSIG: I think if the addition is intended to cover the case where a judgment is proper against the moving party and not against anyone else, why not use the language that "Such judgment, when appropriate, may be rendered against the moving party." That would clarify the difficulty. I understand it would not limit what we are intending to do.

MR. LEMANN: I don't see how there is any difficulty with the meaning, in view of the note.

DEAN PIRSIG: I don't think you should need a note to clarify it if you can make it clear in the rule.

MR. LEMANN: With this language in the rule, I should think you could have a summary judgment for third parties or anybody else brought in. I should have thought that reasonably clear even under the original rule. This gilds the lily on that point, also. There hasn't any doubt come up as to granting summary judgment against third parties.

PROFESSOR WRIGHT: There is no doubt about it at all.

JUDGE DRIVER: Assuming there are two defendants to an action and one of them moves for summary judgment and the other one doesn't participate, he isn't in the motion and

it isn't against him. He doesn't go to the court house the day the motion is argued. Taking the language literally, motion for summary judgment might be granted against him.

MR. LEMANN: Wouldn't he have to be notified of that motion?

JUDGE DRIVER: It might be served on him, but certainly he should not be subject to summary judgment.

MR. LEMANN: You mean a third party?

JUDGE DRIVER: A third party, or a defendant who hasn't moved if there are several defendants. One of them may move for summary judgment and another not participate in it at all.

I agree with you that is a strained construction, but it is possible under this language.

What is the objection to Dean Pirsig's suggestion here, that you provide that judgment, when appropriate, may be rendered for or against the moving party, the party who has moved for summary judgment?

MR. LEMANN: You would not have to say "for the moving party," because that is implicit in the statement.

DEAN MORGAN: I agree we ought to have this, but couldn't you go further in your change of phraseology? You say in line 5, "The judgment sought shall be rendered forthwith if . . ." it is shown "that the moving party is entitled to a judgment as a matter of law."

JUDGE CLARK: You have gone into the next subdivision, (e), haven't you?

DEAN MORGAN: Assume that every party to the action is making a counter-motion.

JUDGE CLARK: How about going back and changing the third sentence. You could say this, beginning in line 5, "The judgment sought shall be rendered forthwith if the pleadings, depositions," and so forth, "show that there is no genuine issue as to any material fact and that either party", instead of "any party" -- "that either party is entitled to a judgment as a matter of law."

DEAN MORGAN: That is what I was thinking of. If you are going to extend it to third parties, intervenors, and third-party defendants, and things of that kind, you would have to say "any party" instead of "either party".

JUDGE CLARK: What do you think of that suggestion?

MR. PRYOR: Leaving out the last sentence?

JUDGE CLARK: Yes, leaving out the last sentence.

MR. LEMANN: How would it read?

JUDGE CLARK: In line 5 take out the "The" and start with a capital "judgment" -- "Judgment sought".

JUDGE DRIVER: You can take out "sought", too.

JUDGE CLARK: "Judgment shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue

as to any material fact and that any party is entitled to a judgment as a matter of law."

MR. LEMANN: I would prefer Judge Driver's amendment or Dean Pirsig's amendment. I think that is not as clear as the way it is now. It is somewhat obscure and you would need a note to explain it, I think. I would prefer to cover it by Dean Pirsig's or Judge Driver's suggestion in line 15.

JUDGE CLARK: May we vote on preferences?

PROFESSOR WRIGHT: What is the exact form of your suggestion, Dean Pirsig?

JUDGE CLARK: Wasn't it that "Such judgment, when appropriate, may be rendered against the moving party"?

DEAN PIRSIG: Lines 9 and 10 would cover any other situation, "the moving party is entitled to a judgment as a matter of law." That would be any party.

JUDGE CLARK: Then if it is agreeable, I will call for your votes, first on this language of Dean Pirsig's, and second, on the alternative form suggested by Professor Morgan which would involve changing the language beginning in line 5 and would leave out this last sentence.

All right, let us go back to Dean Pirsig's suggestion, "Such judgment, when appropriate, may be rendered against the moving party." All those favoring that raise their right hands.

MR. DODGE: What would the judgment against the plaintiff be when the plaintiff is the moving party?

DEAN MORGAN: Judgment for the defendant.

MR. DODGE: What would judgment against the plaintiff be, on a counter-claim?

JUDGE CLARK: It could be on a counter-claim. Of course a good deal of the time it would just be judgment for the defendant; the plaintiff has no case.

MR. PRYOR: Dismissal.

MR. DODGE: The plaintiff moves for summary judgment that the defendant is indebted to him, and there is no issue of fact.

JUDGE CLARK: Either one can move under our rules, and this would say that the opposing party might have the judgment where it is appropriate.

MR. DODGE: The plaintiff moves for summary judgment that the defendant is indebted to him, and there is no issue of fact, and he loses on that motion. What judgment could be rendered against the moving party?

DEAN MORGAN: On the affidavits, and so forth, you could render a judgment that there was nothing to try; judgment for the defendant. What is wrong with that?

MR. DODGE: That is summary judgment against the plaintiff. He fails on his motion.

DEAN MORGAN: Yes. It is just as if the defendant had originally made a motion for summary judgment on the ground that the plaintiff didn't have any case.

JUDGE DRIVER: Suppose the plaintiff moves for summary judgment. You may have a situation where there is no issue of material fact, but as a matter of law the defendant may be entitled to judgment on the record rather than the plaintiff. In that situation the rule would permit the court to enter a summary judgment in favor of the defendant.

MR. DODGE: Suppose there was another issue not made on the affidavits, that as a matter of fact any cross-claim against the plaintiff was barred by the statute of limitations.

DEAN MORGAN: This is "when appropriate".

PROFESSOR WRIGHT: Judge Driver, in one of our trial courts in Minnesota we had just the situation you describe. A person brought an action on a debt and attached affidavits showing how it arose, and all that. It appeared on the face of the plaintiff's affidavits that this debt was incurred as a part of an illegal transaction, the purchase of slot machines to be set up contrary to the laws of Minnesota. So the judge granted summary judgment for the defendant on the grounds that the complaint was barred by illegality. There was no issue of fact, but as a matter of law he found judgment for the defendant and not the plaintiff.

MR. LEMANN: What is the result one gets by putting himself under 56(c). All it means is that he is saved from filing a separate motion. He can get the results on the other fellow's motion. It cuts out one motion.

JUDGE CLARK: You have all the matter before you, all the affidavits. You don't have to go through then the more or less formality of decking it out in the words of a motion.

MR. LEMANN: Normally I would think the opposing party would file a counter-motion.

JUDGE CLARK: You see, this has been provided specifically in the New York statute and in the Wisconsin statute, among others.

Shall we go back and vote on the form of the wording?

PROFESSOR MOORE: I am in favor of Dean Pirsig's suggestion, but I think we need a word in lieu of that word "Such", because that refers back to "A summary judgment, interlocutory in character," going back to the preceding sentence.

DEAN PIRSIG: That is right.

PROFESSOR MOORE: I think you ought to say "Summary judgment".

JUDGE DRIVER: Yes.

JUDGE CLARK: "Summary judgment, when appropriate, may be rendered against the moving party." Now I will call on --

MR. PRYOR: Before we vote, don't you think we ought to be clear what the alternative is? As I understand it, the alternative is the one you suggested, striking the word "The" in line 5 and the word "sought" in line 5, and the words "the moving" in line 9, and inserting the word "any".

JUDGE CLARK: That is right.

JUDGE DRIVER: There is quite a change in phraseology. Am I not correct in assuming that Dean Pirsig's suggested amendment would provide that summary judgment may be rendered for the moving party or against the moving party? Under the alternative it could be rendered for or against any party, third-party defendant or a defendant who hadn't moved or anybody else in the action. That is the alternative, in substance, isn't it?

JUDGE CLARK: Yes.

MR. DODGE: It is just as if no proceeding had been had and he had no notice that he was to be involved in any way.

JUDGE DRIVER: I don't know about that. It would have to be appropriate, of course.

JUDGE CLARK: All those in favor of what we have labeled Dean Pirsig's motion please raise their right hands.

MR. DODGE: This is Dean Pirsig's motion?

JUDGE CLARK: Yes. Six. All those in favor of Professor Morgan's motion --

MR. DODGE: What is that?

DEAN MORGAN: "any party".

JUDGE CLARK: Three. Six to three.

Professor Morgan suggested that in lieu of inserting this last sentence, that the third sentence, the one beginning

in line 5, be changed by striking out in line 5 the words "The" and "sought", and by inserting in line 9 in place of "the moving" the word "any". So it would read: "Judgment shall be rendered forthwith if the pleadings," and so forth, "show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law."

Does anybody want to modify his or her or its vote? If not, I take it that the vote stands by a substantial majority for the change in the italicized sentence at the end.

The next amendment comes up on 56(e). Of course that has brought forth quite a little interesting discussion. We have had various discussions before, which Professor Wright covers in his summary at page 50 and succeeding pages, and now he has something more.

PROFESSOR WRIGHT: We have received a number of additional comments, 13 more favorable comments, three unfavorable. I thought there were some here which raised reasons which perhaps the Committee might like to hear very briefly.

Mr. John Dorsey of Minneapolis, perhaps typical of the favorable comments, says:

> "We most heartily commend the proposed change to subdivision (e) of Rule 56. We trust that that amendment will be adopted, that it will overcome the understandable reluctance of some district judges to grant summary judgment, that it will curtail the number of expensive, useless trials

based on paper issues, and that it will revive this abused Rule by preserving for trial only genuine issues of material fact."

The Kansas City committee appointed by Judges Mellott and Hill oppose the amendment. They say:

"The committee unanimously voted to oppose the proposed amendment for the reason that motions for summary judgment are largely wasted effort on the part of the courts inasmuch as few such motions are actually granted, and the proposed amendment would impose an additional hardship on counsel which is not warranted by the uselessness of the procedure. Experience has shown that some attorneys use the motion for summary judgment as a means for discovering their adversary's evidence, and this additional requirement for furnishing specific details makes the task even more burdensome."

JUDGE DRIVER: Is that statement that summary judgment is rarely granted based on any statistics? I have granted two finally disposing of cases in my small district in the last year.

DEAN MORGAN: The Third Circuit has just repealed the common law rule for striking sham pleadings. It is absolutely absurd. Instead of liberalizing the thing, you are narrowing the common law.

JUDGE CLARK: Yes.

PROFESSOR WRIGHT: I doubt, Judge Driver, if the Kansas City committee had any statistics before it. There is a statistical study which was made a couple of years ago by the Minnesota Law Review. They examined every motion for summary judgment which had been made in the Minnesota district courts over a period of some years. I am just trying to see if I have any note here on the finding which they made.

MR. DODGE: What do you say to the suggestion that the word "may" be substituted for the word "shall"?

JUDGE CLARK: Something should be done along that line. I want to take that up just as soon as we get to it, either that or something else.

PROFESSOR WRIGHT: The study by the Minnesota people showed that in 845 cases which they studied, there had been 29 motions for summary judgment made, and that these had been granted in 11 of the 29 cases.

MR. LEMANN: A small percentage, 50 per cent.

JUDGE DRIVER: It is worth while, though. You get a lot of motions for dismissal and motions for summary judgment which have no merit at all, and they run up your statistics.

MR. LEMANN: In such a case it really goes on law.

JUDGE CLARK: I tried to get Mr. Will Shafroth and his office to work up something on this as to the use of it, but it is very difficult. It is difficult to distinguish it from other motions and it is difficult to get the reports from

the clerks, particularly motions that are denied. They don't make any record of them a great deal of the time. There is no appeal there.

I think it is fair to say that it is not statistically a large matter. It hasn't been even in New York. It started out being fairly large, but the New York Judicial Council figures do not run into big numbers. It varies quite a little as to courts, however. As I recall, certain city courts in New York had much more than others, and it is likely to vary, of course, and I think very obviously it will vary according to the type of case. But even so it is useful.

It has been hit, you see, by things like this Third Circuit rule which, I agree with Professor Morgan, seems to be going back of the common law.

JUDGE DRIVER: I think another thing which might be misleading in your statistics is that I have found a good many lawyers either get confused or think they would rather take a shot at the motion for summary judgment, and they use it in place of a motion for dismissal. Very often I get a motion for summary judgment directed to the complaint without any affidavits or supporting material, when clearly it should be a motion to dismiss. That, of course, in any statistical study would count as a motion for summary judgment.

JUDGE CLARK: In this we should do something as to the word "shall" in line 36. There has been a good deal of question

about that. It seems to me some commentators have read it more harshly than we expected. In any event, we ought to make a change.

MR. LEMANN: While we are considering that, Mr. Reporter, I want to direct the attention of the Committee to what the Department of Justice has suggested. They talk about that point, the use of the word "shall", and then they go on to say they don't like the rule for the reasons they give. Then they end up by saying, in a somewhat rambling discussion, that they would be made happier if we adopted the suggestions they make on page 21 of their comment.

MR. DODGE: "summary judgment shall be entered against him if otherwise appropriate." How would that do?

JUDGE CLARK: Yes, that is quite all right with me. I should think that would be clarifying. Mr. Lemann, I take it, is suggesting something more.

MR. LEMANN: I am really not suggesting it, Mr. Reporter, as much as I am asking that we stop to consider the comment of the Department of Justice. I am just reading it, myself.

JUDGE CLARK: I would say it seems to me that the courts have applied subsection (f) anyway. In any event it seems to me after it is there we are not taking away (f). Subsection (f) is there. If it is thought better to make it clear, I don't object to putting it in.

CHAIRMAN MITCHELL: What rule are you talking about?

JUDGE CLARK: It is 56(e), the proposal we have on page 50 of our green draft.

MR. PRYOR: The Department of Justice suggests the substitution of the word "may" for "shall" in line 36.

MR. LEMANN: Yes.

MR. DODGE: I suggest "shall if otherwise appropriate".

MR. TOLMAN: They suggest two ways to handle that, two alternatives.

JUDGE CLARK: The Department of Justice says that one way might be to substitute "may" for "shall". However, they go on:

"However, there is considerable merit in the mandatory form, particularly where the opposing party shows no grounds of substance in opposition to the motion.

"If it was made clear that Rule 56(f) would apply, we would have no objection to the proposal. That section reads:" -- and then they reprint it.

That section is:

"(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or

depositions to be taken or discovery to be had or may make such other order as is just."

I myself should think, first, that of course that applies. We are not taking that away. I should think that it would apply without protestation that it did apply. If it is thought desirable to add something more, I don't object.

This is what they say as their alternative when they spell it out:

"When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but must answer either in detail as specific as that of the moving papers, setting forth the material facts as he believes and intends to prove them to be, or as provided in subdivision (f) of this Rule. If he does not so answer under oath, summary judgment shall be entered against him."

MR. DODGE: Rule 56 takes care of the fellow who cannot raise an issue of fact by affidavit because of the hostility of the witnesses?

JUDGE CLARK: Subsection (f) does that, yes.

MR. DODGE: But there is every reason to believe he can bring the facts out upon examination at the trial.

PROFESSOR MOORE: I am in favor of your proposal, Judge, but I think it may go a little too far. You say the

party "must answer in detail as specific as that of the moving papers, setting forth the material facts as he believes and intends to prove them to be." If he shows that there is a genuine triable issue as to one material fact, I should think that that should be enough to defeat the motion without his having to go ahead and set out his entire case by affidavits or depositions, and so on.

MR. LEMANN: What do you think of the alternative suggestion in Mr. Wright's memorandum on page 52. He makes several suggestions there which might meet your argument.

DEAN PIRSIG: That first suggestion appeals to me.

MR. LEMANN: Yes. I thought the first suggestion would probably accomplish the end we have in view. I think the first suggestion would cover it.

JUDGE CLARK: I certainly would agree with Professor Moore. That is, I do not believe we need to make him set forth his entire case. I should not think this would be construed that way, but possibly it might. How would it do to say something like this? After the words "moving papers," we go on as here, "must answer in detail the moving papers" -- that is a general admonition -- "setting forth those material facts which he actually and in good faith controverts." I am taking language now out of (d).

MR. LEMANN: Why wouldn't the first suggestion of Professor Wright's on page 52 do all that we need do? How about

that, Professor Moore? What do you think of that?

PROFESSOR MOORE: I think that would be good, subject to this possibility: You might have, although not very often, a rather detailed pleading which is verified, and to the extent that it sets forth the facts on the knowledge of the affiant, it would be just as good as an affidavit. I think that is so rare that perhaps we could disregard it.

MR. LEMANN: I think it would be. Under the draft, all a person would have to do is write an affidavit and say --

JUDGE CLARK: To which suggestion are you referring, Mr. Lemann? There are three suggestions on that page. To which one are you addressing yourself?

MR. LEMANN: The first one, reading that we substitute for lines 28 to 36 the following:

"Allegations in pleadings, without more, shall not be deemed to create a genuine issue of a material fact."

JUDGE DRIVER: It occurs to me it sometimes happens that you get a complaint and then an answer, and then the defendant on second thought believes that he is entitled to judgment as a matter of law and he moves for summary judgment. That isn't at all unusual. Suppose a motion for summary judgment is made, as it may be made, on the complaint and answer, then where are you with this statement that allegations in pleadings are not sufficient to constitute a material issue of fact.

MR. LEMANN: All this means is that he cannot rely on allegations in the pleadings as the Third Circuit has said. He must file an affidavit.

JUDGE DRIVER: What if you have nothing there but the pleadings when the motion is made?

MR. LEMANN: That is not enough. It cannot stand on pleadings alone. That is practically what we are saying here a little bit more explicitly.

MR. PRYOR: I think you say it all in that first suggestion of Mr. Wright's. I think you say everything you need to in that.

JUDGE CLARK: You mean No. 1 on page 52?

MR. PRYOR: Yes.

JUDGE CLARK: I am a little worried about the point Judge Driver makes.

JUDGE DRIVER: Allegations in pleadings do set up an issue of fact, because you have the complaint and the answer. You have a material issue of fact, ordinarily.

JUDGE CLARK: The motion for summary judgment now can practically amount to the old demurrer. It is specifically held in the cases that it can be made without any affidavits at all.

MR. PRYOR: This says that isn't enough.

JUDGE DRIVER: I think you will find cases which hold -- I have read such cases recently -- that where a motion

for summary judgment is made on the pleadings alone, then suppose the defendant moves for summary judgment on the pleadings alone, the court must then take every allegation in the complaint as true and indulge every reasonable inference in favor of the plaintiff in deciding that motion.

PROFESSOR WRIGHT: How is that affected by my proposal here? Wouldn't that still work out the same way, Judge? If the defendant puts in an answer and then he puts in a motion for summary judgment, you wouldn't take the allegations of the answer as creating any material issues. It would simply do what I think you always do for a judgment n.o.v. You would take as true all the allegations of the complaint, supplemented perhaps by such allegations of the answer as are consistent with the allegations of the complaint, and see if then, as a matter of law, the defendant is entitled to judgment. You would assume that there is no issue of fact, you would assume the facts were as the plaintiff states, but the defendant would be saying, "I am entitled to judgment just the same."

PROFESSOR MOORE: Yes. But if you turned it around and the answer was in and the plaintiff moved for summary judgment just on the pleadings, he would not be entitled to it if the defendant had pleaded one good defense.

JUDGE CLARK: For my part, I rather think the way we were proceeding was a little more complete and a little more direct.

MR. PRYOR: I would be in favor of the language that we have proposed here in the printed booklet, if you change "shall" to "may" in the last line.

PROFESSOR MOORE: Mr. Pryor, do you think the party opposing summary judgment should have to set forth all material facts that he believes and intends to prove?

MR. PRYOR: I think he should set forth all material facts which are responsive to the facts pleaded by the plaintiff.

PROFESSOR MOORE: Suppose, though, that there are two or three issues in the case and the party moving for summary judgment has to show that there is no triable issue of fact at all. If the party opposing it can show that on one material issue there is a genuine issue of fact, why should he have to go to the court --

MR. PRYOR: I don't think he should. I didn't so understand this language.

JUDGE DRIVER: I haven't undertaken to work out any specific language, but I think this could be amended to cover Professor Moore's point, which I think is a good one, by simply saying that the adverse party may not rest upon the mere allegations or denials of his pleading, but must answer in detail as specific as that of the moving papers, showing that there is an issue of material fact.

JUDGE CLARK: I suggest this. This is taking the suggestion of the Department of Justice, which gilds the lily

but I don't object to that, and we start with the word "but" here because the other is covered: "but must answer either in detail as specific as that of the moving papers, setting forth the material facts which he actually and in good faith controverts, or as provided in subdivision (f) of this rule. If he does not so answer under oath, summary judgment in that event" -- I go back to the "shall" -- "shall be entered against him."

MR. LEMANN: That doesn't meet Professor Moore's point.

JUDGE CLARK: I think it does. I certainly intended it to meet it. Don't you think it does?

MR. LEMANN: In this you preserve the very language in italics in lines 33 and 34, "setting forth the material facts", and Professor Moore says he should not have to set forth all his material facts.

JUDGE CLARK: He has to under (d). He has to set forth those that he honestly intends to controvert. That is what I provide here. I intended that to meet Mr. Moore's point, and it seems to me it does, "setting forth the material facts which he actually and in good faith controverts".

MR. PRYOR: Will you read that over again, please?

JUDGE DRIVER: Is it in the Department of Justice comment?

MR. LEMANN: He is applying the language of the

Department of Justice.

JUDGE CLARK: It is adding something. It is making a modification. Do you have the Department of Justice suggestion? At the foot of page 21, I am suggesting changing their suggestion just this much. Where it says "setting forth the material facts as he believes and intends to prove them to be," I would change that to read "setting forth the material facts which he actually and in good faith controverts".

MR. DODGE: Isn't it a little unfortunate to use the word "answer" there as though we were contemplating an amendment to his answer, sworn to. Shouldn't he file affidavits either generally or under subdivision (f)?

JUDGE DRIVER: Would "respond" be better than "answer"?

MR. DODGE: Respond. Anything to avoid the suggestion that it is an amendment of the pleading.

JUDGE CLARK: "must respond either in detail as specific as that of the moving papers, setting forth the material facts which he actually and in good faith controverts".

MR. PRYOR: He isn't to set forth the facts that he controverts, but set forth the facts which controvert the facts pleaded by the opposing party.

MR. LEMANN: That is right. How would it do to just stop in line 31 with the word "pleading", and it would read: "When a motion for summary judgment is made and supported as

provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading."

JUDGE DRIVER: I don't think that answers Professor Moore's objection. You are requiring that he set forth the material facts as he believes them to be. That would mean the material facts in the controversy, in the action. You could not pick out just one and say "This is not a fact on this narrow point here that I am relying on."

MR. DODGE: "must respond by setting forth the facts or the reasons for his claim that there is a material issue of fact".

JUDGE DRIVER: Yes. That is the point. I think language could be worked out as long as we have clearly in mind what we intend.

MR. LEMANN: Professor Moore, do you think my last suggestion would meet your point?

PROFESSOR MOORE: Yes.

MR. LEMANN: Just stop with the word "pleading" in line 31 and omit the rest of the amendment. That knocks out the Third Circuit. That is pretty near to what Professor Wright suggested.

JUDGE CLARK: That is the trouble.

MR. LEMANN: I think it is more restrictive than what he suggests.

JUDGE CLARK: It doesn't seem to me to meet Judge

Driver's point, which I think is quite important.

MR. LEMANN: I would think it did. I should like to hear the point stated again with that language in view.

JUDGE CLARK: When there are no affidavits of any kind, you can still go ahead and decide on summary judgment.

MR. PRYOR: I make another suggestion, that you end it after the word "papers".

JUDGE CLARK: What is that, Mr. Pryor?

MR. PRYOR: That you end the sentence after the word "papers", "but must answer in detail as specific as that of the moving papers."

PROFESSOR MOORE: I just throw out this suggestion. Go right on, "setting forth such material facts as show a genuine issue of triable facts."

DEAN MORGAN: I had something like that. "but must in his counter-affidavit either set forth in detail such material facts as he believes them to be that will show an issue for trial, or facts which bring it into (f)." I do not have the latter part determined yet.

PROFESSOR MOORE: You really want to get away from what he believes, though. It doesn't matter whether he believes the facts stated or not. If they are not true, that should not be enough.

MR. DODGE: I noticed that.

DEAN MORGAN: "as he believes them to be which would

show that there is an issue of fact for trial"; "believes them to be and intends to prove". You could go on that way if you want to.

PROFESSOR MOORE: "setting forth the material facts that establish a genuine issue of triable fact."

DEAN MORGAN: "setting forth in detail such material facts, as he believes them to be and intends to prove, as will show that there is an issue of fact for trial." That is what you want.

MR. LEMANN: Under 12(c), if a fellow wants to he can move for judgment on the pleadings. This would not take it away from him.

JUDGE DRIVER: He may move for judgment on the pleadings, but he may also move for summary judgment.

MR. LEMANN: If he is going to move for summary judgment he cannot do it on the pleadings if we adopt this amendment. It would have to be dealt with as a motion for judgment on the pleadings.

JUDGE DRIVER: I have no objection to that, that he cannot rely upon the pleadings. But what you are saying here is that the pleadings alone are not sufficient to set up an issue of material fact, which is clearly unsound.

MR. LEMANN: For the purpose of a motion for summary judgment under Rule 56.

JUDGE CLARK: They don't do it and it is very convenient not to have this tied up with distinctions.

It would seem to me that we can cover this. There are various formulae of language which could be used. "but must respond, setting forth in detail such facts as show that there is a genuine issue and that the moving party is not entitled to judgment as a matter of law." Why doesn't that do it?

DEAN MORGAN: I should think that would be much better.

JUDGE DRIVER: I think that is sufficient. Always, of course, the Reporter can dress it up.

JUDGE CLARK: This goes back to the "but", beginning in line 31 with the "but" -- "but must respond, setting forth in detail such facts as show that there is a genuine issue and that the moving party is not entitled to judgment as a matter of law."

MR. DODGE: You said by sworn statement; by affidavit or affidavits.

JUDGE CLARK: All right.

MR. PRYOR: Do you need the "setting forth" in there? "must respond in detail". Isn't that it?

MR. LEMANN: Shouldn't you say setting forth such facts, "facts sufficient to show that the mover is not entitled to summary judgment." I don't think you need to throw in there again that there is a material issue, as you have in your language. You could omit that part.

PROFESSOR WRIGHT: He must show there is a genuine

issue of material fact and that the moving party is not entitled to judgment as a matter of law. If he shows the first, he doesn't have to show the second.

JUDGE DRIVER: If there is a material issue, there is no summary judgment. That is all a party has to show to head it off.

JUDGE CLARK: "but must respond with affidavits showing in detail that there is a genuine issue".

MR. DODGE: Why do you include the words "in detail"? He has to show there is a material issue of fact. He doesn't have to go into very much detail about it.

JUDGE CLARK: That comes back to what generalities would do. This leaves out "but must respond in detail as specific as that of the moving papers," and I think if you leave out that rather precise language it would be desirable to put in something which shows you need to have something more than generality.

JUDGE DRIVER: A general denial.

JUDGE CLARK: Yes.

MR. DODGE: "setting forth facts which show that there is a genuine issue."

JUDGE CLARK: I will settle for "specific facts", "but must respond with affidavits setting forth specific facts showing that there is a genuine issue."

PROFESSOR MOORE: Leave out "affidavits". If he has

depositions, that should suffice.

JUDGE CLARK: All right. "but must respond setting forth specific facts showing that there is a genuine issue for trial." How is that?

MR. DODGE: We don't require him in the first instance to file counter-affidavits of specific facts. We simply refer to them.

PROFESSOR WRIGHT: If he made an affidavit, would the affidavit have to comply with Rule 56(e)?

MR. DODGE: "affidavit showing there is a genuine issue of fact."

JUDGE CLARK: Why not? I am not sure that I get your point. This is a part of (e)?

PROFESSOR WRIGHT: Would the affidavit which he makes here have to be "made on personal knowledge, setting forth such facts as would be admissible in evidence, and showing affirmatively that the affiant is competent to testify to the matters stated therein"?

PROFESSOR MOORE: I should think so, unless you brought forth the 56(f) affidavit.

PROFESSOR WRIGHT: That is correct.

JUDGE CLARK: This is now the suggestion: "but must respond setting forth specific facts showing that there is a genuine issue for trial."

MR. TOLMAN: Mr. Chairman, suppose you took Mr.

Lemann's suggestion to omit all after "pleading" in line 31, and then insert after the word "pleading" the words "unless the motion presents only a question of law." Wouldn't that do it all? That would protect your point, would it not, Judge Driver?

JUDGE DRIVER: I didn't get your suggestion.

MR. TOLMAN: Omit all of the amendment after the word "pleading" in line 31, as Mr. Lemann suggested, and then insert after the word "pleading" the words "unless the motion presents only a question of law." That would save your demurrer situation, and I should think that would accomplish all that we want, and get away from all this discussion of facts which is causing trouble.

JUDGE CLARK: You have then a question of uncertainty in a good many of these things that are mixed questions of law and fact, and you would have the party making that determination. It seems to me that this rule, as we discussed, gives a rather clear formula to the parties. They have to answer what is in. I still think the form in which we now have it is really preferable, because it works out the process, so to speak.

MR. DODGE: You want them to respond by filing the kind of proof that is required all through the rule, that is, affidavits on personal knowledge, or under subsection (f).

JUDGE CLARK: Yes, that is it.

JUDGE DRIVER: Or depositions.

MR. PRYOR: I think something of this sort is needed very badly. We need something which says in so many words that he can't rely simply on denial of the pleadings.

MR. DODGE: It must be in accordance with the other provisions of this section.

JUDGE DRIVER: I don't think we should lose sight of what we are trying to accomplish, and that is Mr. Pryor's statement, what we are trying to do.

I think that could be done by preserving the language of the amendment as proposed with a sufficient change to meet Professor Moore's objection. That should not be too difficult for somebody who sits down and calmly goes about the task of doing it.

MR. DODGE: That is what we are trying to get at, isn't it?

PROFESSOR MOORE: I think the Judge just about had it.

JUDGE DRIVER: Yes, I thought he just about had it worked out at one stage there.

JUDGE CLARK: I will suggest it again. It seems to me that this would do it. In lines 31 and 32, "must respond setting forth specific facts showing that there is a genuine issue for trial."

DEAN MORGAN: That is right.

JUDGE DRIVER: I think that is all right.

MR. LEMANN: I move we adopt that.

PROFESSOR MOORE: In line 36, though, shouldn't that "shall" be changed to "may"?

MR. PRYOR: I think so.

PROFESSOR MOORE: That takes care of the 56(f) case where he can't present his affidavits, and also takes care of perhaps the complex case where the court says, "I don't want to enter summary judgment. I want to try it."

MR. PRYOR: That is one of the points made by the Department of Justice.

JUDGE CLARK: We change "shall" to "may". "If he does not so answer under oath, summary judgment" -- Mr. Dodge has suggested there "shall be entered against him if appropriate." I think that is perhaps a little better. It comes to the same thing.

PROFESSOR MOORE: That is all right.

JUDGE CLARK: Make that "summary judgment shall be entered against him if appropriate."

PROFESSOR WRIGHT: When Mr. Dodge made that suggestion, I understood it was to follow "summary judgment". Now that we have changed the rule, where do you want it?

JUDGE CLARK: I don't care. "summary judgment, if appropriate, shall be entered against him."

MR. LEMANN: "if appropriate", I suggested, rather than the word "may".

JUDGE CLARK: I don't know that there is much choice

on that. How many would prefer the "if appropriate"?

DEAN MORGAN: I think that is preferable. I think you are right. I think that is better.

JUDGE CLARK: How many would prefer the "if appropriate" course? Raise your right hands. Six. How many would prefer the "may"? Three. I guess we have the "if appropriate."

Now let's go back to the whole thing. Is it now acceptable? You have, therefore, the amendment as on page 50, but in place of the words beginning "but" and to the end of the sentence, lines 31 to 34, substitute "but must respond setting forth specific facts showing that there is a genuine issue for trial."

Is that acceptable? All those in favor raise their right hands. We are voting on the whole amendment now.

MR. DODGE: You ought to make it plain that they are sworn statements as provided for all through the rule.

PROFESSOR WRIGHT: The point is whether or not the response setting forth the specific facts has to be by deposition or by affidavits meeting the test of the first sentence of Rule 56(e), or whether it can be a mere general statement in an affidavit by a person who would not be competent to testify, or I think this rule could even be read that it would be enough to file an amended answer in which he would set forth specific facts.

JUDGE CLARK: What is the suggestion? What is Mr.

Dodge's suggestion? What would it be specifically?

MR. DODGE: What we want to do is to say that the pleadings are not sufficient, but you must proceed under this rule in the ordinary way of opposing a motion for summary judgment.

MR. PRYOR: By affidavit or deposition.

MR. DODGE: By affidavit unless by deposition.

MR. LEMANN: Why not say "file opposing affidavits"?

CHAIRMAN MITCHELL: Why not say "answer in detail under oath". It then may be a deposition or in any other form.

MR. LEMANN: You could, but it would have an affidavit. We have used the formula of affidavit.

JUDGE CLARK: I think it would be good if we made it "but must answer under oath".

DEAN PIRSIG: Line 35 now requires that. "If he does not so answer under oath".

CHAIRMAN MITCHELL: Suppose he uses the affidavit of a witness, what happens then?

JUDGE DRIVER: Notwithstanding the fact that he may use a deposition, he can produce a deposition and say, "Here is my answer to that motion."

MR. LEMANN: If you took Mr. Mitchell's suggestion, "answer under oath", why should he answer? He files the affidavit or a deposition. I therefore think it more consistent, to adhere to the formula we have used in other sections

of this rule, to say "file affidavits", because we have used affidavits and then we have some general language saying it may be supplemented by deposition, which could be carried over, I take it, to this section.

We haven't used the word "answer" anywhere else. I don't think we have. "in opposition".

JUDGE CLARK: But must respond by affidavits or depositions".

MR. DODGE: Or admissions on file.

JUDGE CLARK: "by affidavits, depositions, or admissions on file".

MR. DODGE: Or by affidavits under these rules.

DEAN MORGAN: I think if you are going to do that, Judge Clark, it would be better to have a separate sentence and say, "The response must be made", and so forth. You have it now, "but must in his response set forth in detail".

JUDGE CLARK: Yes. I think you could do this, making it a semicolon in line 31, "but his response, by affidavits or otherwise as provided in this rule, must set forth specific facts showing that there is a genuine issue for trial."

MR. PRYOR: That does it, I think.

MR. DODGE: I think something like that would cover it.

MR. LEMANN: You could change line 35 to say, "In the absence of such response" instead of "If he does not so

answer under oath".

JUDGE CLARK: Yes. "In the absence of such a response".

PROFESSOR WRIGHT: What is your language for line 31 now?

JUDGE CLARK: In line 31, change the comma to a semicolon and say -- I am not sure whether it should be a comma or semicolon. A comma might do. "but his response, by affidavits or otherwise as provided in this rule, shall set forth specific facts showing that there is a genuine issue for trial."

MR. DODGE: You can leave out the word "specific". That doesn't appear anywhere else in the rule, does it?

JUDGE CLARK: I think there should be something of this kind in there. This is a substitute for "in detail". I think it is desirable to have "specific" in.

What was it you said, Mr. Lemann, "If he does not so respond"?

MR. LEMANN: Yes.

JUDGE CLARK: "If he does not so respond, summary judgement, if appropriate, shall be entered against him."

All those in favor of that raise their right hands. Eight. All those opposed.

DEAN MORGAN: Before you leave this rule, I have to insist that you haven't got the first paragraph right here.

In line 5 you say, "The judgment sought shall be rendered forthwith", and one of the conditions is that the moving party is entitled to judgment as a matter of law. You certainly cannot say that that is absolutely consistent with the last sentence which you put in, "Summary judgment, when appropriate, may be rendered for or against any party to the action."

JUDGE DRIVER: I thought we had decided to strike out "The" and "sought" and simply say "Judgment shall be rendered forthwith".

PROFESSOR WRIGHT: I think we were outvoted on that, Judge Driver.

JUDGE DRIVER: I have my copy marked that way.

DEAN MORGAN: I think it is ridiculous to leave it that way, to say you have to have a finding for the moving party and then at the end you say you can give judgment either for or against him.

JUDGE CLARK: I think Mr. Morgan is right about that. I think even if we put in Dean Pirsig's suggestion, that the other changes in that sentence suggested by Mr. Morgan still should be made.

DEAN MORGAN: Say that either party is entitled to judgment and then strike out "sought". "Judgment shall be rendered forthwith", and so forth, "either party is entitled to a judgment as a matter of law."

JUDGE CLARK: "and that any party". How about that?

DEAN MORGAN: "any party" -- they didn't want to go that far because there might be intervenors, and so on.

JUDGE CLARK: I think Mr. Morgan is right about that. Shall we accept that further suggestion? All right, it is accepted.

Rule 58. I think this is generally approved. I suggest that we go on with it. The Department of Justice goes into this in great detail, and it seems to me does a good deal to take away the force of what we attempted to do in expediting matters of this kind.

I don't like to take back what we have done. I think this is appropriate. Judge Nordbye I think wrote somewhat along that line. There is no question, but merely some debate about that. It has been debated in New York a good deal as to whether you should delay judgment to polish it up, so to speak.

We have attempted to have it entered about as promptly as we could. I think it is rather desirable. I think we are slowly educating some of the lawyers in New York, not always, but I think we are getting ahead, that there are various anomalous situations that present problems if we don't push it along.

I remember one patent case when the court threw out a memorandum for decision, and it was a year and a half before they entered judgment. It could be said, of course, that

everybody was satisfied to wait, but it seems to me that there is some obligation for the court, having completed its action, not to have it held back by formality.

We had a good deal of a problem in connection with a case involving the government on motion for summary judgment where the court granted the motion for summary judgment. We took it that under the rule that entry was final. The Department of Justice came along ten months later and asked that some form of formal judgment be entered.

So I still stand by the amendment as we have recommended it.

PROFESSOR WRIGHT: Judge, I think perhaps we ought to say, just to keep our own record clear, Judge Nordbye is opposed to this on the grounds that this is a superfluous addition and he sees no need for cluttering up this rule, and this merely states what already has been the practice, and that we should not amend the rules every time some text writers have entertained a doubt, which I think may be a fair conclusion from our note which bears on the text. So I remind the Committee, in the proposed form of note which we had last year we cited four decisions from three different circuits which seemed to be to the contrary. The Committee directed us to take those out and cite merely the secondary authority, which in turn cites the cases, and that may have misled Judge Nordbye.

JUDGE CLARK: What is your pleasure here?

MR. DODGE: The Department of Justice seemed to be concerned about cases where the exact amount of the money to be entered in the judgment cannot be determined until a very considerable amount of figuring. Is there anything in that suggestion which we should consider? They say:

> "Accordingly, the Tax Division has suggested that language be inserted to provide that 'when the Court directs that a party recover money or costs, the judgment shall not be entered until a formal judgment, setting forth the exact amount involved, is approved.'"

JUDGE CLARK: I never knew of any case where any judgment was entered without having the amount due included there. I think they are borrowing trouble which does not exist. The reason I don't like to put that in is that this is surely going to hold it up until the Department of Justice or the Tax Division comes up with a formal judgment. That is what we have been trying to get away from. It should be the court's formal judgment when that occurs. I don't think there is any basis now for holding that a judgment which doesn't tell what amount is involved is to be entered. There is a provision that the matter of taxation of costs shall not hold it up, but this is a matter of the essence of the judgment itself.

MR. DODGE: Our provision is that when the court directs that a party recover only money or costs, that direction

would name the specific amount of money?

JUDGE CLARK: Yes.

CHAIRMAN MITCHELL: How could it do otherwise?

MR. DODGE: I wondered why they raised this question here.

JUDGE CLARK: I think they raised it because they do not like the provision for the court to enter its own judgment. I say that because the Department of Justice generally, and the U. S. Attorney among others, is always coming up with its own form of judgment. In New York, for example, we have had some difficulty as to holding onto the court's judgment and not substituting some form of judgment suggested by the Department.

The main reason I suggest we should do nothing is that it seems to be quite unnecessary, but a subordinate reason why I don't want to do anything is that it seems it is likely to tie up the court so they will have to await the Department's filing some very formal judgment.

MR. DODGE: The clerk could not enter it under our amendment unless he received a specific direction as to the judgment.

JUDGE CLARK: That is right.

MR. DODGE: Which certainly would include the amount of the money.

JUDGE CLARK: That is right.

MR. PRYOR: This seems to be the basis for their comment. On page 22 they say, "Nevertheless, some courts take the view that the appeal period starts to run when the decision of the court is entered on the docket even though that may occur prior to the determination of the amount of judgment." It takes some time to compute the amount,

MR. DODGE: Appeal from decision, not from judgment.

JUDGE CLARK: I should like to ask them to name places, dates, and events. I think I certainly have kept track of this because I have written several decisions on it, trying to hold the Department of Justice up to terms, and I think I know every reported decision. I will say quite straightforwardly that there is none. I cannot, of course, tell what goes on all over the country, but it just seems to me that this is a part of their not liking it, as we have had long arguments in a criminal case involving this matter where they attempted to give statistics from the docket in the Southern District which were quite misleading, as a matter of fact.

I think this is a little an attempt to get away from that. If you are at all interested in going into this matter, the case of the United States v. Roth, which is cited here in the footnote on page 53, was a case where the Department of Justice made strenuous efforts to say that what we were doing was all wrong, and gave us statistics which, as I said, seemed to us to be quite misleading.

Does anybody wish to make any motion or, if not, shall we take a vote on the amendment? All those in favor of the amendment raise their right hands. Eight. All those opposed. None.

I think that carries us to Rule 60(b). There are two parts to that. The first part inserts in line 22 "and (6)", and it makes a difference in the period, "not more than one year after the grounds therefor have accrued and are known to the moving party."

The other is in lines 28 to 30, which makes it specific that no leave from the appellate court is required. Perhaps that should be in form to make clear that that is only when the appeal is ended. So when we get there, I am going to suggest as a substitute for lines 28 to 30, the words "Leave to make the motion need not be obtained from any appellate court except during such time as an appeal from the judgment is actually pending before such court."

Let me say a little broadly on this: As to the first provision as to time, when we worked on this we thought we were being really generally more accurate, that this was what was actually happening in the law, and that what we should do is to try to follow along with what the law is. Hence, I was quite surprised when Mr. Moore sent around the part from his book in which he objected to this. He has done a great deal of work on this, of course. He wrote a long

article in the Yale Law Journal, and so forth.

I thought we were following in general his teaching, which I think does show that there is a lot of assumption of finality of judgment beyond the actual facts, that courts will go pretty far in the extraordinary cases in changing a judgment previously entered.

Let me say that I have no particular pride about this. If this is wrong, I don't press it. I thought we were trying to be more accurate. I may not have understood just how far Mr. Moore's point goes.

It seems to me that what he is doing is in effect saying that while this is true law, we ought not to say it so boldly here, and cases of this kind we should push off to the old independent suit, the bill of review.

I wonder if that is a desirable thing to do, because I thought we were trying to make our motion here pretty inclusive. We have not prohibited, of course, that independent suit, but we have tried to make this the channelized form. I have that to say on the first one.

On the second one, I think he still opposes that one as to leave. I really think that that is sheer formalism and I should think really that is quite unnecessary.

CHAIRMAN MITCHELL: You mean leave from the court of appeals?

JUDGE CLARK: Yes.

CHAIRMAN MITCHELL: There are any number of decisions of the Supreme Court of the United States holding that where they decide a case and order a remand under certain conditions stated in the Court's opinion, the lower court is precluded from granting a new trial or hearing new issues or anything of that kind unless leave is granted by the Supreme Court, unless in the original decision or in the remand it gives them authority to grant a new trial or rehear the case.

JUDGE CLARK: These are particularly oriented grounds in 60(b). There has been no decision of the Supreme Court on this issue. There has been a decision of the Third Circuit saying that you have to have this leave, but my point is that the appellate court does not have any kind of record covering this, and we have had it come up several times. They come in with affidavits and we say we don't know what it is all about, and we send it back to the trial court to act.

Judge Nordbye, it seems to me, has stated this rather well:

> "It would seem that, regardless of the affirmance of a judgment by an Appellate Court, it is only a trial court who can determine whether there exists excusable neglect or mistake or newly discovered evidence which would justify relief under this rule. Merely because the proceeding had been before the Appellate Court on other grounds and the judgment affirmed by that court, no reason

is suggested why the trial court should be required in every case to have the formal approval of the Appellate Court before it considers the showing and makes a record thereof. Obviously, the Appellate Court has no facilities for determining whether or not there is any merit to the claim for relief under the rule until a record has been made before the trial court. And if the trial court has erred in granting or denying the relief, the right of appeal, of course, exists. The suggested provision in this rule makes it clear that leave of the Appellate Court is not necessary in the event the judgment already has been affirmed by that court."

CHAIRMAN MITCHELL: I had a case pending in the Supreme Court of the United States recently which raised this very question. I cited in my brief a number of cases heard in the Supreme Court, decided on their merits, in which there had been a remand of the case, and the lower court was absolutely precluded from hearing or entertaining any new issues or a new trial such as this statute covers, without permission of the appellate court.

What do you do? Are you wiping all those cases in the waste paper basket? They are not old cases. Some of them are quite recent.

The case arose in connection with an attempt to put in new issues after the case had been decided on the merits and

affirmed or reversed and a mandate had come down.

As to the statement that you don't have to get approval, I remember when I got into that case I began to think about our Rule 60(b), and I felt satisfied that maybe the rule went contrary to the decisions of the Supreme Court because it doesn't provide that the consent of the appellate court, which has already considered the case and decided it, must be obtained for any attempt of the court below to have a rehearing or introduce new issues or new proof.

There is the law. I can cite you a dozen cases to that effect, some of them quite recent. As I understand, what you are asserting here is that, notwithstanding those decisions, when you take proceedings under 60(b) in the lower court to get a judgment vacated for some reason, you don't have to go to the Supreme Court or the court of appeals which has already heard it and ask for leave. Maybe they will give it to you as a matter of course, or maybe they won't want the lower court to consider things that they don't know about. Still the decisions of the Supreme Court do hold that you have to get the consent of the appellate court. There is no question about it.

JUDGE CLARK: Of course I don't know just exactly the decision you have in mind, but I thought we were talking about somewhat different issues. Of course this does not say that the party can retry the case or bring in new issues, and

so on. This is our method of the independent bill of review.

I think there is no question that on an independent bill of review you don't go and ask permission of the court. As a matter of fact, that action in equity can be brought quite widely. It would not need to be brought in the same court.

For example, one time in our court we had a case of this kind attacking a state court judgment as having been procured by fraud. I suggest that this would be another way of pushing the matter over to the independent action and limiting the usefulness of this rule if we required this bit of procedure.

It seems to me from the suggestions which you have made, Mr. Chairman, that you are talking about a little different issue. As I see it, you are not talking about these several specified grounds here as substitution for an independent action. I would wholly agree that you cannot reopen the same trial and go back. I don't think this does.

CHAIRMAN MITCHELL: Why, then, do you put in that such motion does not require the consent of the appellate court, if you don't have to get it?

JUDGE CLARK: It is a motion under 60(b). It is a motion doing these things stated here, not a general motion just for retrying the whole case. It is a motion for newly discovered evidence, for fraud, for excusable neglect -- for these things which are specified in 60(b).

MR. PRYOR: Isn't the distinction that in cases which

Mr. Mitchell was talking about, a person is bringing in new issues, and here there isn't any question of that kind.

JUDGE CLARK: That is the distinction, as I understand it.

CHAIRMAN MITCHELL: One of the cases I have in mind, cases in which I had my attention directed to this subject, was a case involving the reorganization of the Florida East Coast Railway Company, their plan of reorganization, and so on, in which the Interstate Commerce Commission had ordered the property of the Florida East Coast Railroad transferred and assigned to the Atlantic Coast Line, and the holders of the liens on the Florida East Coast Railroad were compelled by this reorganization to accept, in lieu of their lien rights, their interest in the Florida property, stock and bonds of the Atlantic Coast Line, with which they had never had anything to do and did not want to invest in. That is the way the case came up.

The case went to the Supreme Court of the United States and they heard it and set aside that merger and ordered the case remanded to the district court to proceed in accordance with the decision of the mandate.

When it got down to the district court, the point on which the court had held that the merger plan was illegal was because neither the Florida East Coast Railroad nor anyone connected with it had ever initiated or consented to that kind of reorganization plan, as required under the Interstate Commerce

Act.

After it got down into the lower court and went before the district court to interpret the decision of the Supreme Court and enter appropriate orders executing its mandate, the Atlantic Coast Line bobbed up in the case with alleged proof that the stockholders of the Florida East Coast had actually initiated and consented to this merger, which raised not a new issue but one which was taken for granted in the Supreme Court because there was no evidence at all in its record that these stockholders had ever assumed to act for the Florida East Coast Railroad.

We contended that the stockholders hadn't anything to say about it anyhow; that the road was busted and the bondholders were the equitable owners of the property and that they were the ones who had, under the Interstate Commerce Act, the right to insist on no merger of that type which they had not initiated and had not agreed to.

There is a plain case of asking the lower court to reopen the record to allow the truth of the facts which didn't even exist when the case was up in the Supreme Court. I don't quite see your distinction.

MR. PRYOR: As I understand your statement of that case, it does not involve any of the situations envisioned by the enumerated clauses on page 53. Maybe I do not understand it, but it doesn't seem to me that it does.

JUDGE CLARK: That would be my impression. I should think that what they were asking for there was a direct retrial of an issue that they had already, and which they could have brought up. That is the kind of thing that I should think would have been estopped by the ordinary rules of res judicata when you got through, and that it was not any of these very special things here.

CHAIRMAN MITCHELL: Maybe not, but I got the impression that once an appellate court considered a case on its merits and rendered judgment on the merits and ordered it remanded, unless they consented to it you could not raise new issues or do anything to obtain a rehearing in the lower court except to carry out the Supreme Court's mandate.

MR. PRYOR: Judge Clark, did I understand you correctly that you were changing the italicized language in lines 28 to 30 by making an exception where the case was pending in the court of appeals?

JUDGE CLARK: Yes. We are expressly excepting that. "Leave to make the motion need not be obtained from any appellate court except during such time as an appeal from the judgment is actually pending before such court."

MR. PRYOR: I wondered if we should not consider the insertion in line 25, following the word "known", of something like this: "or should have been known".

PROFESSOR WRIGHT: There has been a lot of support for

that from the bar, with two forms generally being offered. The form which the Department of Justice has suggested, and Mr. Lon Hocker, would be "known or should be known"; and the alternative form, somewhat longer, which has been backed by Judge Sheehy and Judge Dooley from Texas, the Cincinnati Bar Association, and a couple of other local committees, is "known or should in the exercise of due diligence have been known".

MR. PRYOR: They all have the same idea.

PROFESSOR WRIGHT: They have the same idea.

CHAIRMAN MITCHELL: Where would this go in, what line?

MR. PRYOR: Following the word "known" in line 25. It is easy enough for a party to say he didn't know.

JUDGE CLARK: I think that is all right. I think perhaps we ought to hear from Mr. Moore, who has sent around some objections. Of course, these two are separate. I was not intending to push them together. That is, the amendments in lines 22 to 25 are a separate matter from the amendment in lines 28 to 30.

PROFESSOR MOORE: Speaking to the first part, where you change the time limit applicable to the first three grounds from one year as the maximum, to a reasonable time, I think perhaps that change reflects somewhat the position I took back in 1946. I may have been right then and may be wrong now, but I have been working at this pretty steadily for the last year, and I don't want to push more things over to the independent

action. On the contrary, I don't want to enlarge the grounds for the independent action.

I believe if you make these amendments which you are proposing here, you will have wiped out essentially the difference between intrinsic and extrinsic fraud.

CHAIRMAN MITCHELL: We do it expressly, don't we? Doesn't it say whether it is intrinsic or extrinsic?

PROFESSOR MOORE: That is right, General, if at the present time you move within a time not to exceed a year, but once your year has gone past under the present rule, unless your fraud is fraud on the court -- which substantially involves some sort of chicanery on the judge, tampering with judicial administration -- if you are going to get any relief from judgment on the basis of fraud, you must bring an independent action.

Scores of decisions will deny you relief unless you can bring the fraud within some sort of category that they are willing to call extrinsic.

You may say, that is formalism, but the point remains that after the year period has run it is a very exceptional case that you will be able to get relief from the judgment on the basis of fraud. I think that is the way it ought to remain. It seems to me you are opening the finality of judgments far too much now in allowing a motion on any type of fraud after the one-year period; the same on mistake, and newly

discovered evidence. I think in the interest of finality of judgments the year period is ample, subject to a few exceptional situations where you can get relief in an independent action. Under the present decisions today, it has to be a very exceptional case.

MR. DODGE: Reopening a case on a bill of review was abolished. What is the nature of the independent action that you have in mind?

PROFESSOR MOORE: Just like any other civil suit invoking equitable jurisdiction to enjoin the enforcement of a judgment on the ground that it is inequitable because of -- and today you have to bring your fraud within the category of what the court calls extrinsic. At times it is almost impossible to distinguish between extrinsic and intrinsic fraud, and we eliminated that troublesome distinction by providing that the motion was to be made within a year, but beyond that the counsel really has a laboring oar if he is going to set aside the judgment, and I think that is the way it ought to be.

I think Judge Clark's comment is correct, that there are some decisions that perhaps grant relief from judgments which under our present rule should not be, but I think the number of those is not very many, and I think you are just opening and giving a wide invitation now for attacks on judgments.

MR. DODGE: Wouldn't that be really in the nature of a bill of review?

PROFESSOR MOORE: We have eliminated bills of review and bills in the nature of a bill of review.

MR. DODGE: You have also eliminated a bill in the nature of a bill of review.

PROFESSOR MOORE: Yes.

MR. DODGE: Lines 38 and 39 say "bills of review and bills in the nature of a bill of review".

DEAN MORGAN: You don't have to call it that any more.

MR. DODGE: Let's call it that now.

PROFESSOR MOORE: We have not eliminated the independent suit for relief from judgment.

MR. DODGE: The independent suit is in the nature of a bill of review.

PROFESSOR MOORE: Not exactly. You can get an independent suit in equity for relief from a judgment at law or from a judgment in state court, while the bill of review always has to be filed in equity court in the same court that rendered the judgment.

MR. LEMANN: That isn't true of independent action under our procedure. You wouldn't have to bring it in the court which rendered the judgment.

PROFESSOR MOORE: That is correct.

MR. LEMANN: You could bring it anywhere, and then you would be confronted by the available defenses of laches, statute of limitations, or whatever they might be, is that

correct?

PROFESSOR MOORE: Today you would seldom be able to get relief unless you could show an extraordinary situation of fraud, if you bring it on that basis. If you adopt this amendment nobody would be forced to bring an independent suit. He would just go to the court and attack the judgment and move for relief long after the 12 months' period had run.

CHAIRMAN MITCHELL: I don't quite get your point, because this rule limits summary proceeding by motion to the court in which the case was originally decided, to one year.

PROFESSOR MOORE: Not now, General. Under the proposed amendment it would be a "reasonable time".

CHAIRMAN MITCHELL: Where does it say that in the amendment?

MR. LEMANN: Line 21.

MR. PRYOR: "not more than one year after the grounds therefor".

MR. LEMANN: It says "not more than one year after the grounds therefor have accrued and are known to the moving party." That would be some limitation on your objection, I guess, Professor Moore.

CHAIRMAN MITCHELL: Your point is that, notwithstanding the one-year limit, the judgment may remain open for a longer period under this amendment if the fact of the fraud or whatever it was wasn't known at an earlier date.

PROFESSOR MOORE: Precisely.

MR. LEMANN: Before this, we had a flat limitation of one year on grounds (1), (2), and (3).

JUDGE CLARK: Don't you think we had better suspend now so we can get down to lunch in time. Would you be willing to come back, say, not later than a quarter of two? This is the last big question, I think. The others are small.

MR. DODGE: Shouldn't we give some consideration to the general suggestions made by the Department of Justice in the last few pages of their comments?

JUDGE CLARK: I did want to bring up notably what they say about trial by jury, but I would suggest if we could come back a little earlier, it would be very helpful to me if I could get away by 3:30 perhaps. There aren't too many large questions left.

CHAIRMAN MITCHELL: Let's adjourn until 1:45.

... The meeting adjourned at 12:55 o'clock p.m. ...

Dudley
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FRIDAY AFTERNOON SESSION

March 11, 1955

The Advisory Committee on Rules for Civil Procedure for the United States District Courts reconvened at 1:30 p.m., William D. Mitchell, Chairman of the Committee, presiding.

JUDGE CLARK: Everybody is here promptly, and I should think we might go ahead.

Mr. Moore, you were talking, I believe, at the end of our morning session.

PROFESSOR MOORE: I don't know that I have anything more to add, other than the fact that while technically you still have the year period retained, it is rather meaningless because it doesn't start running until the grounds therefor have accrued and are known, and you intend now to say reasonably could have been known.

MR. PRYOR: That places a limitation on it.

PROFESSOR MOORE: I say that the time for an independent action would normally be the same, perhaps shorter. The independent action has always been limited by reasonable time, laches.

Take the old case of United States v. Throckmorton, where there was an issue as to the validity of a deed, and that suit was pending for a long time, first before a board of commissioners in private land claims and then before the district court. Finally, a land patent was obtained. Then

years later, approximately 20 years later, but within a very short time after the government had gotten new proof which it asserted established now that the deed had been forged, the government began its independent suit in equity, and was denied relief on the ground that that was not extrinsic fraud; that it was a question which had been in litigation in the original suit and would not support the basis of an independent suit.

Under the proposed amendment to the rule, I wonder if in that situation the government could not come in, not with an independent suit because it would be met immediately with United States v. Throckmorton, but right back into the district court which rendered the judgment, and move for relief under 60(b)(3).

CHAIRMAN MITCHELL: I want to add this to that. I had a good deal to do with this rule. In fact, I believe I made the draft of it. I got exercised because I found out that the normal limitations had been swept aside and that there was no finality to a lot of cases like this. We wiped out the rule that the right to appeal expired with the term, and in place of that we specified this limitation on proceedings under this section.

The initiation of this section really came about through the realization that there should be a time limit to give finality to the judgment. We abolished the term rule so the court had no jurisdiction. If it still had jurisdiction

after expiration of the term we ought to put something in its place. So the whole purpose of this thing, as I saw it then, was to give some finality to judgments and to fix a time limit within which you can open them up for all these various reasons.

I am very reluctant now to see any amendment go in like this which throws the finality business up into the air. That is the result, because there are no longer limitations by expiration of the term, which affects most of the judgments.

MR. PRYOR: What was the reaction of the bar?

PROFESSOR WRIGHT: The reaction of the bar was somewhat unfavorable to this first amendment as contrasted with the second one in 60(b). On this one, if you assume the modification that I think we pretty much agreed on, "known or should have been known", you come out with 20 that favor it and 12 that are opposed to it.

MR. LEMANN: A very small percentage of the total number of people who commented on the rule.

PROFESSOR WRIGHT: Yes.

MR. LEMANN: Am I right, Judge Clark, that in the original draft of this rule we had the time very severely limited? I am looking at what I believe to be our 1948 amendments. "The motion shall be made within a reasonable time, but in no case exceeding 6 months after such judgment . . ." Then we changed that to "shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year . . ."

We had it to begin with, which may have been your draft, Mr. Chairman, limited to 6 months. Then we extended it to a year, and now it is proposed to be extended further by "reasonable time".

JUDGE DRIVER: The one-year provision was a 1948 amendment, was it not?

MR. LEMANN: Before that it was 6 months, and it was 6 months in every case. In 1948 we put in an amendment which gave one year for (1), (2), and (3).

DEAN PIRSIG: As I recall, at the last meeting there was a suggestion or proposal, I don't remember how specific it was, that "reasonable time" be made the measure in all cases for leave to make a motion of this character. It was partly in response to that suggestion that this was proposed as something of a middle ground.

As I recall, there were two points that were involved: One, that the starting point of the running of time was from judgment rather than from some other point which had some relation to the party's knowledge of his rights.

CHAIRMAN MITCHELL: Maybe the trial.

DEAN PIRSIG: The point I was making was that if you have a fraud case, for example, the time on the right to make a motion under this rule runs from the time of the judgment, even though the defrauding party has successfully concealed the fraud during that period of time. This change would

introduce the running of time, the time of demand, from the time it was known or should have been known, which has no relation to allowing the motion to be made at all.

The other point which I thought we were trying to meet was the fact that under your residuary clause here, (6), for "any other reason justifying relief from the operation of the judgment", there was no limitation at all. The year limit did not apply.

In one or more of the federal cases which I think are cited in the note, such as the Klapprott case, the tendency appeared to be that whenever a difficult case came up, a case where the court was impressed by the unfairness of the result which arose under (1), (2), or (3), particularly (1), they would bring it under (6) and there would not be any limitation. So this was introduced partly to liberalize the running of time in (1), (2), and (3), and secondly, to put a limit on (6).

So this works both ways. It not only liberalizes it in (1), (2), and (3), but it does put a time limit on (6), which I thought tended to leave open a wide door of escape from (1), (2), and (3).

MR. LEMANN: There was a limit of reasonable time in (6), too, and you could make the argument, I think, talking about the hardship of these cases, if you are going to get rare hardship cases where the court feels it should have a way to handle it, it might be a good thing not to have a rigid time

limit in that limited group of cases, which is a sort of grab bag group, which had no time limit except reasonable time.

I don't know that it is terrible to leave it as we have had it up to now. Suppose they do bring in some of these hardship cases and escape the rigid time limit, possibly the result might be the same under those cases if we adopted this amendment. In most of them probably the fellow would be able to show he did not know or should not have known, and you would end up with the very same result.

DEAN PIRSIG: My thought was that the court might feel that any fellow who after one year could not get his relief would come under (6). That was the danger. You are sort of defeating the time limitation on (1), (2), and (3).

JUDGE CLARK: I think the Dean has quite correctly stated this. If you will look on page 55, that is the explanation, you see, to bring it under (6). Since the courts do not want to hold a person for fraud that he has not known about, they would allow this as a means of escape.

MR. PRYOR: It does seem to me if you are going to be reasonable, you ought not to start the limitation period until the man knows what his rights are, and then he should have a reasonable time to act. Maybe one year is too long, I don't know, one year after the grounds have become known to him. We changed that from 6 months to a year.

CHAIRMAN MITCHELL: As it stands now, they have a

year from the time the judgment is entered in which to apply to the court which rendered it, but there is nothing in this section which creates any time limit as to an independent action.

MR. PRYOR: That is correct.

CHAIRMAN MITCHELL: That is governed by the ordinary statutes of limitation. There are a great many state statutes which provide that if you think judgment has been obtained by fraud or chicanery or something, you have a year within which to proceed to set it aside.

MR. PRYOR: I think that is the way it is in Iowa, Mr. Mitchell, a year.

CHAIRMAN MITCHELL: That is true in most states. That is where we get the one-year limit which we eventually put in here, to try to conform it to the usual rule.

I remember when I had to do with the drafting of this rule in the first place, I was impressed by the fact that because the expiration of term no longer had any effect on the thing, unless we had a limitation of this kind we didn't have any finality to the judgment. You couldn't tell whether the judgment was final or not or whether it could be set aside or vacated.

I have never heard any complaint from any source that this one-year limit on motions was harsh or undue. It is in conformity with most state statutes.

As far as the independent action is concerned, they

have only the general statute of limitations which limits it. The result is, if you took the one-year limitation out and made it a limitation based on knowledge or discovery of the fraud, or something of that kind, you never can tell when a judgment is final. There is no finality. As long as we have knocked out the expiration of the term limitation, I thought we ought to have some limitation.

I still think we are making federal judgments very wobbly if we strike out this one-year limit on motions to set aside or vacate judgment on these grounds in the court which rendered the judgment.

JUDGE CLARK: Does anybody care to make a motion?

MR. LEMANN: I move that we let the rule stand as it is.

DEAN MORGAN: Is there anything to be said about this report of the title examiner people about the effect upon purchasers on execution under judgments of this kind, or does that go into substantive law?

PROFESSOR WRIGHT: This is the suggestion at page 54 of the summary, from the senior vice president of the Chicago Title and Trust Company, who says that the rule doesn't make reasonable provisions for protection to third-party purchasers who have bought property in reliance on the judgment.

I would think two things, Mr. Morgan. The first is that I suspect it is a question of substantive law. The second

is that, as I understand the cases, this has been one of the factors which the courts have looked to with considerable care before they have been upsetting judgments, whether or not intervening persons have acquired rights relying on the judgment. This is the first suggestion I have seen that there is any hardship because of the possibility of upsetting a judgment in this way.

DEAN MORGAN: In an independent action, you see, if it were going to affect third persons, that would be one of the things the judge would take into consideration, and of course this doesn't affect the question of an independent action for damages which result from the fraud or anything of the sort.

JUDGE DRIVER: The matter of protecting innocent purchasers is a problem under the present rule. It is a matter of degree. The danger might be greater under the amendment, but it is there in the present rule as it is now.

DEAN MORGAN: Yes.

JUDGE DRIVER: If the judgment is set aside within a year, somebody may have purchased within 6 months after judgment.

PROFESSOR MOORE: I didn't think there was anything to that, because even if the judgment is set aside that doesn't set aside the execution of the sale on its face. If the judgment was fair on its face and the execution failed to stand in accordance with the statutes, and so on, and a third person

who was a bona fide purchaser purchased it, he would get good title even though a party to the judgment might be able to come in and have the judgment set aside, as I understand it. So I didn't think there was much to that.

DEAN MORGAN: What good would it do him to get it set aside?

PROFESSOR MOORE: He might get restitution from the judgment debtor.

MR. DODGE: It would be the same, wouldn't it, if the suit itself involved title to the property and it was awarded to one party and he made a conveyance of it during the pendency of the case. Wouldn't that be the same question?

PROFESSOR MOORE: I think so.

JUDGE CLARK: Mr. Lemann has moved -- what did you move, Mr. Lemann?

MR. LEMANN: To delete the amendment.

JUDGE CLARK: -- to delete the amendment. Do you wish to discuss it any more?

MR. PRYOR: May I call attention to this comment in the material just given out. Referring to Rule 60, they say, "This proposed amendment, like that of Rule 25, will remove strict and rigid time limits. The danger is that we may destroy the finality of judgments. This does not appear to be a real danger in view of the care courts have heretofore used in examining requests to open judgments. We recommend the

amendment."

JUDGE DRIVER: What is that, the Pittsburgh bar?

MR. PRYOR: Yes.

JUDGE DRIVER: Western Pennsylvania.

CHAIRMAN MITCHELL: I think most state laws have a provision fixing limitations on actions to set aside a judgment on these various grounds.

JUDGE DRIVER: Do you persist in your motion despite the late election returns here?

MR. LEMANN: Yes, I do. My colleague here asked me who this gentleman was and what opportunities they had had to hear the views of Professor Moore and others, and I said I didn't know them and I didn't think they had had any opportunity.

MR. DODGE: Does this relate to the first amendment proposed here?

MR. LEMANN: I would say the late election returns don't affect my position. I don't see why we should attach more weight to it because it comes in late than if it had come in earlier.

MR. DODGE: Is the motion to strike out that first amendment in lines 24 and 25?

JUDGE CLARK: Yes, lines 22 to 25.

MR. DODGE: The substance of that is to make the time run from the accrual or arising of the ground and the knowledge

or the knowledge which the moving party ought to have had of it. Isn't that a better time, a better starting point for the running of time, than the mere entry of judgment?

MR. LEMANN: I am considerably influenced by Professor Moore's strong feeling that it is an undesirable interference with the finality of judgment. My understanding is that Mr. Mitchell shares that view. I doubt if this rule has had frequent application. I don't know much about it. The fact that we have had so little comment on it among several hundred answers we have received does not indicate any great interest.

Then the fact that the court is able to take care of the hardship case under paragraph (6) and require a reasonable time limit, whatever he concludes that means, and besides that he always has recourse to an independent action -- all those circumstances lead me to feel that this is an amendment which we could do without.

MR. DODGE: Did you want the time to start as provided in the former rule rather than this changed time?

PROFESSOR MOORE: Yes. Just leave the rule alone.

CHAIRMAN MITCHELL: Do we say anything in our previous note, our present note, about finality? When we adopted this rule, did we have any note on it?

JUDGE CLARK: We had. Of course what we say now is over on page 56. There was something said originally. The

first paragraph on page 56 covers this.

MR. LEMANN: We had about four and a half pages of comments, Mr. Mitchell, on this rule when we amended it in 1948. At that time we extended the time. It was originally 6 months altogether, in every case.

PROFESSOR MOORE: Up until then there was only one ground for relief by motion, and that was for mistake, inadvertence, surprise, or excusable neglect, and the time period was 6 months.

MR. LEMANN: That is right.

PROFESSOR MOORE: At that time a party could use the old ancillary common law and equitable remedies. In 1946 we abolished those and attempted to state the substance of the various grounds in these expanded clauses (2) to (6), and put the one-year time limitation on the first three. That was an extension of 6 months on the first three, which had been limited to 6 months. Now you have a year for that. Also, that represented an extension of time for newly discovered evidence. For fraud we made clear that it wouldn't make any difference whether it was intrinsic or extrinsic within that year's period.

CHAIRMAN MITCHELL: Why do you in line 24 speak about "grounds therefor have accrued"? As a matter of fact, all the grounds for breaking the judgment that you talk about up to that point necessarily existed when the judgment was rendered.

JUDGE DRIVER: Newly discovered evidence might be

afterwards. Wouldn't that arise afterwards?

CHAIRMAN MITCHELL: I guess that is right.

MR. PRYOR: I would think so.

JUDGE DRIVER: I suppose that would presuppose evidence which was in existence but wasn't discovered until afterward.

CHAIRMAN MITCHELL: I haven't any very rigid views about it. Just because I have spoken up on this one case, I don't want to affect the judgment of the Committee.

JUDGE CLARK: This is, of course, on the first provision only. We will cover the second one later.

I take it, Mr. Lemann, you have not changed your motion in the light of the subsequent discussion.

MR. LEMANN: No.

JUDGE CLARK: Mr. Lemann has moved to delete the first provision here.

CHAIRMAN MITCHELL: Which one is that?

JUDGE CLARK: Lines 22 to 25 on page 54. Are you ready to vote? All those in favor of deletion -- that is the way it comes up this time -- those in favor of striking out this amendment raise their right hands. Five. All those opposed, which is in turn in support of the amendment. Four. Five to four.

I suppose that strikes it out.

Now lines 28 to 30.

CHAIRMAN MITCHELL: That is another thing that I am doubtful about.

JUDGE CLARK: I suggest that this seems to me a very formal application to a court which doesn't know anything about it, and I don't see how it can affect the judgment by way of reopening it for just the same things that should have been brought up before. You have to proceed specifically on this sort of proceeding. That is, you have to proceed specifically to reopen a judgment which has been rendered, for these specific reasons stated here.

As I say, the upper court doesn't know anything about it. I think we have followed the rather general principle which seems to be sound, that the upper court is not in as a kind of director of business. It is really a court to consider errors. It reviews what has been done below. It does not take the initiative.

I think that is sound. It is sound practically, because the upper court cannot take the initiative. I don't think you ought to have upper court interference with trial court action as such. You should have only the correction of errors already made. I think that is sound in theory. The upper court cannot do it otherwise. It isn't geared to know what is going on. All these preliminary things come to us in the way of affidavits made by counsel. They really come to us on argumentative statements of counsel.

MR. DODGE: Are you suggesting an amendment as to pending appeals?

JUDGE CLARK: That is right.

MR. DODGE: What do the words "or settled" mean?

JUDGE CLARK: That would not be in the form that I was suggesting. This is the suggestion which came in by way of some comments: "Leave to make the motion need not be obtained from any appellate court except during such time as an appeal from the judgment is actually pending before such court."

JUDGE DRIVER: I think what Mr. Dodge was inquiring about, though, is the language in your proposal as printed. Wasn't that your question, Mr. Dodge, the language "Such motion does not require leave from an appellate court, though the judgment has been affirmed or settled upon appeal to that court." Would modification of a judgment be "settled"?

JUDGE CLARK: That is what we meant, but the language I am suggesting is a substitution for that, and it takes that out entirely.

MR. PRYOR: I move the approval of the substitute language.

JUDGE DRIVER: I would like to hear it. I didn't get it clearly.

JUDGE CLARK: By the way, it is at pages 8 and 9 of my last suggestions, so you can look at it, but I will read it

again. "Leave to make the motion need not be obtained from any appellate court except during such time as an appeal from the judgment is actually pending before such court."

MR. LEMANN: Before we vote, I would like Professor Moore to state what I see he has written in opposition to this proposed amendment. I think you should have it in mind when you vote. I see he devoted about two pages of his statement to this. He says, "the present practice is a sound continuation of past practice; and should . . . be retained."

I am not sure whether that applied to this last amendment or to the whole thing.

PROFESSOR MOORE: It is mainly directed to the first part which we have discussed. I do not feel very strongly one way or the other on this latter matter. Personally, I would require leave of the appellate court. I think that tends to make it harder for a party against whom a judgment has gone, and which has been affirmed on appeal, to upset it. I think that is a desirable thing.

Incidentally, that is in accord with the practice prior to 60(b) when you had to get leave of the appellate court to file a bill of review, writs of coram nobis, audita querela, and so on. If you have that requirement, then if the movant cannot show to the appellate court there is some good reason for him to proceed, he doesn't get a chance.

The Butcher & Sherrerd case, which is cited at page 56,

is one where, if the party seeking the relief from the judgment had had to go to the court of appeals, they never would have allowed him to proceed. That is certainly one case where the court of appeals knew a good deal about it.

I think most of these motions would have to be made, at least those under the first three clauses, within a year, and the appellate court would stand to know a good deal about the case. Unless the movant can show that he has something which was not considered by the court of appeals, it would be denied forthwith, unless he makes some sort of prima facie case. Then they can grant the leave and proceed in the district court to hear it.

I don't feel awfully strongly one way or the other. It tends to make it harder to upset judgments, I think, to have to go to the appellate court.

MR. DODGE: I should think the application to the appellate court would be in almost every case merely a matter of form on the statement of counsel, and on a reasonable statement of counsel the court would say, "Go down to the district court and try it out."

CHAIRMAN MITCHELL: Some cases arose in the court of appeals in the Pennsylvania Circuit.

JUDGE CLARK: There is the case we cite. That is the only one I know of. But that is a direct holding. There isn't any doubt about that. That was a Third Circuit case. They held

that you had to have the permission. That is the case here cited.

MR. DODGE: What page?

JUDGE CLARK: Butcher & Sherrerd.

CHAIRMAN MITCHELL: Is that the case of bribery of the judge?

JUDGE CLARK: It wasn't that. The bribery case is a separate matter. The bribery case has come up, of course, and it has come from the Third Circuit to the Supreme Court. They held that affects the tribunal, and you can apparently upset judgment without end on that. There is no time limit on that at all. That in effect made the very judgment invalid.

Fifteen out of seventeen comments here were favorable. The Justice Department says it is clearly desirable.

I don't want to keep on talking, but I will add that every case I have seen, just as Mr. Dodge said, has been of the utmost formality with us. We have these statements from counsel, and so in effect we say, "Go ahead." We haven't had this lately, but when the rules were first adopted we were getting a good many from old habit, and we would always then say, "All right, go ahead and see what you can show to the district court."

CHAIRMAN MITCHELL: I withdraw all objection to both amendments. I think maybe I have been a little bit overwhelmed by the question of lack of finality.

MR. DODGE: I second the motion.

MR. PRYOR: It does seem to me that by the very nature of the grounds which form the basis for the motion, they deal with matters with which the court of appeals would not have come in contact in their previous handling of the case.

PROFESSOR WRIGHT: I don't think we can say it is clear in Butcher & Sherrerd that it has done any good to have this formalism. The latest indication shows even a great court can be worn down by constant pressure. The latest indication is that the Third Circuit finally is going to let this fellow reopen the judgment, or at least so it sounds. I have been getting a tremendous barrage from the lawyer here ever since I wrote a piece in the Vanderbilt Law Review and I said he was hyper-litigious and this was just the kind of case in which a weak judge made a mistake and wrote a bad opinion, as I thought they had in the Third Circuit.

He went back for rehearing before the Third Circuit and put my article before them to show them how wrong they were, and therefore they should withdraw their previous opinion and say he was entitled to a new trial. So the Third Circuit, as a great court properly should, denied rehearing. They didn't say anything, but the clerk wrote to the lawyer enclosing this little per curiam and said, "The court directs me to tell you that this is without prejudice to your right now to apply to the court for leave to have the trial court consider a motion

to reopen the judgment."

JUDGE CLARK: We have a motion to approve the substitute form of the amendment. All those in favor will raise their right hands.

JUDGE DRIVER: I am not sure we understand the motion, Judge Clark.

JUDGE CLARK: The motion is to approve this amendment in the form that I read. Do you want me to read it again?

JUDGE DRIVER: No.

JUDGE CLARK: All those in favor raise their right hands. Eight. All those opposed. Two.

That is carried.

Now let us go forward. Rule 81(f), I should think just legalizes something which was existing. This is to state "director" instead of "collector". Is there any question about that? May we assume that that is approved?

MR. LEMANN: The Internal Revenue Code does not use the word "district director". It uses the words"commissioner or his deputy". I don't think you will find "district director" in there. I don't know how formalistic you want to be.

CHAIRMAN MITCHELL: We might as well use the right title.

JUDGE CLARK: I think this is the right title. Isn't that right, Leland?

MR. TOLMAN: Yes, this is the right title.

JUDGE CLARK: That is the fellow you are making all your big checks to.

MR. LEMANN: I don't think he is the person you sue any more. We left that up in the air the other day. You yourself said, I believe, that they have amended the statute to permit you to sue the United States, but I think you ought to take out the word "collector". Just what you should put in, I don't know, and I don't want to take time here to decide it. There is no more "collector".

JUDGE DRIVER: The present title of the old collector is now director, isn't it?

MR. LEMANN: That is right.

MR. PRYOR: District director.

MR. LEMANN: He is more things than collector. He is internal revenue agent in charge, plus the collector. He has all the functions of the collector and some other functions. So the Internal Revenue Code apparently says he is deputy to the commissioner.

JUDGE DRIVER: That is right. Your point now is that the statute provides for suit against the commissioner, naming the commissioner rather than the director?

MR. LEMANN: I think it permits suits against the United States, but why not leave this to the Reporter to check up. It is purely a detail point.

JUDGE CLARK: Shall we approve it subject to Leland's

making further check if there is any question about it? All right.

The next is Rule 86. There should be something of that kind. Of course, if we don't put the rules in now, the date of August 1, 1955, would be changed. Otherwise, we do very much need something of this kind, and this is the usual one.

All right, we will take it that it is approved. It is approved.

Form 22 we will have to change about some. We have discussed this and I think we settled the principle. We may have settled the wording, I am not sure. This refers back to Rule 4(b). We decided that the pleadings would be served on the plaintiff.

PROFESSOR WRIGHT: We decided, I believe, Judge, that the Committee approved in principle the notion that these papers should be served on everybody, and the Reporter should make such changes in the rules and forms as necessary to carry that principle out.

JUDGE CLARK: Then that is settled. That covers it, I hope.

Forms 30 and 31 appeared to be quite warmly approved. Our friend, Mr. Longsdorf, had what I thought was a rather bromidic question, but we might cover it, and therefore I suggest that we might well drop a footnote in Form 31 after or

around the word $10,000 appearing in the statement there, "recover . . . damages in the amount of $10,000". I would drop a footnote numbered 2 there, and say "or here substitute direction for specific relief when ordered by the court."

Mr. Longsdorf said, What are you going to do when it is some other form of judgment? I should think the reasonable thing was to change it, but nevertheless we can put in a footnote and say that, and perhaps it might add a little clearness. What do you think about that?

DEAN PIRSIG: Wouldn't it be possible to put it in brackets just following the $10,000. Put in brackets "state such other relief".

JUDGE CLARK: We could do that. Do you think that would be better?

JUDGE DRIVER: It would be more likely to be seen and not overlooked.

JUDGE CLARK: All right. The substance of the idea will be carried out by putting another bracket in the text in Form 31.

That covers these specific suggestions. May we now turn for a moment to two or three other things, the most important being the Department of Justice suggestions. Do you want to look at those?

... At this point Chairman Mitchell left the meeting ...

JUDGE CLARK: If you will turn to those, starting at page 24 and going on, the first suggestion, as I understand it, is that there always be served two copies of the summons and complaint when they are upon the government.

The second suggestion, going along, is their suggestion made originally by the old Department of Justice, pressed by Acting Attorney General Philip Perlman, reiterated by Mr. Brownell, and here again brought up, that is, that there be allowed also service on some official of the Department of Justice designated by the Attorney General in writing, filed with the clerk of the United States District Court for the District of Columbia. They think that would save expense, time, money, and so on.

That particular amendment, you may recall, I recommended before, but you gentlemen voted it down. You thought it was unnecessary. I don't know whether you want to do any more or not. I don't know that I have any very strong feeling.

It seems a little hard to make special provision for special litigants. If we provide for two copies here for the government, shouldn't we provide for two copies to the State of New York, and so forth.

At any rate, there it is. There are two parts to this, you see, the two-copy matter and service on an official of the Department designated by the Attorney General.

MR. LEMANN: Mr. Reporter, I think we are justified

in making a special classification for the United States. We do in some other rules, such as the time to answer. Making an extra copy is no burden. It merely means adding another sheet of carbon paper. I should think it was in the interest of the plaintiff and would facilitate the consideration of the matter by the Department to have another copy, especially if the statement was rather long and they have to have another copy made.

I don't think there would be any objection, nor do I think it would require us to extend it to the states. The United States is in a class by itself, I think properly. I think we should comply with that suggestion.

I think it would be wise for us to adopt some of the suggestions of the Department of Justice and not have them feel that we are not sympathetic to them. I think they are perhaps the most likely ones to undertake to foul us up in the Supreme Court.

JUDGE CLARK: They want this carried further over into Rule 5(b) as to the pleadings. This, you see, comes up first as to the service of the complaint, and quite logically I should say if that were done, then in the case of the pleadings they would require it. That particular suggestion, the second one, is at the bottom of page 26.

DEAN MORGAN: It seems to me it is a pretty picayune kind of thing to handle by way of amendment to the rules.

JUDGE CLARK: That was a little my feeling. Although,

as I say, I don't think anyone would raise a question, it would seem almost as though there are other litigants who would be asking us for copies.

Monte, in line with your remarks, what do you say as to the other one, that old one?

MR. LEMANN: I would do it in both. I would not amend the rules just to do this, but when we are amending them anyhow and we can give this added protection, if you will, or added facility to the government, which is certainly oppressed in many, many suits, I would do it. If I were the litigant I would give them an extra copy.

JUDGE DRIVER: You have to bear in mind that the activities of the Department of Justice cover the whole United States. What might seem trivial to us and would be trivial to an individual litigant, might amount to considerable annoyance and inconvenience when you realize that these complaints are being served on United States Attorneys in all the 48 States in great volume.

MR. LEMANN: That is right.

JUDGE DRIVER: So it might be important to them. I am impressed by what Mr. Lemann has said here. I think if it doesn't add too much, if I may use that discredited word, it might appease the Department a little and not have them say, "This Committee has turned down everything we have suggested, and now we will see what we can do before the Supreme Court and

Congress. The Committee is going out anyway, probably, and we will see what we can do."

DEAN PIRSIG: We are already dealing in 4(d)(4) especially with the manner of serving summons and complaint on the United States. We are already dealing especially with that subject.

MR. LEMANN: The most extreme thing we do for them, I think, is to enlarge their time to answer. We didn't have any trouble in agreeing that we should because of what Judge Driver said.

JUDGE DRIVER: We made it 60 days.

MR. LEMANN: That is a much more important concession to them, I think, than this is.

DEAN PIRSIG: When it comes to the other amendment which would extend to all the pleadings, that would be principally the answer, wouldn't it, of which they want two copies. I am not so sure, when we are already dealing with that topic especially for the United States, we should introduce that new item into a rule which is now broad in character. I am not sure that the need is great.

MR. LEMANN: I should think that their set-up is such that they have more than one body to consider these things.

JUDGE CLARK: What would you do, Monte, as to this idea of allowing them to designate an attorney to take service here in the District?

MR. LEMANN: I am wondering why we turned it down, Charlie, because I can't see that it would bother me down in Louisiana. It doesn't interfere. It is an optional thing. You don't have to do it. It doesn't add to what I have to do now. I now have to give a copy to the U. S. Attorney, and I now have to mail a copy to the Attorney General.

As I look at the other language, I am wondering why, if he is going to have two copies mailed to him, they want two copies delivered to the Attorney General. Because as the rule now stands you give two copies, one I take to the United States Attorney and one comes here. Now they want two copies sent here. Maybe the answer is that they have several agencies here which have to be consulted. In these tax cases I am quite sure they have to send over something to the Treasury Department. If I file a claim and refund is denied and I bring a suit for refund, the Department of Justice has really to get its ammunition from the Treasury. I guess that is why they want an extra copy.

Answering my own suggestion, the United States Attorney has to have a copy because he has to be in correspondence with Washington about the case, and he is bound to have a copy.

In short, Charlie, I would favor accepting all their suggestions, including this optional added method of service.

JUDGE CLARK: All right. As I think back on the

other, as I say, I definitely recommended it but I thought there was some feeling then that this was a sort of special and not very important thing, and that we ought not to do special things. I think there are answers which have been suggested to that.

At any rate, Mr. Lemann moves that we adopt the substance of these, really three proposals which are set forth on page 26 as to the copies of the summons and complaint, and I take it the other papers covered by 5(b), and allowing the designation of an official of the Department of Justice for service.

Do you wish to discuss this more? Those in favor raise their right hands. Six. Those opposed.

DEAN MORGAN: I won't vote against it, but it seems to me pretty silly stuff for an amendment.

JUDGE CLARK: The next suggestion we have from them is on time. It is a fairly important thing. This is that we except in our rule Saturday. Nobody works except a few judges who work on opinions that they have in their office.

I wonder whether we should do this or not. This has come up in the Judicial Conference. Many of the clerks' offices say that everybody now has only a five-day week and all the clerks want that time.

At the last session of the Judicial Conference we said that the law still was, at least for clerks as well as for

the courts, that we were open on Saturday and they had to keep open with a skeleton force. I certainly think it is getting so nothing much happens on Saturday, but that would seem to be a rather general policy.

I should almost be inclined to think that the legislation ought to take effect first. You see, they say: "If such a proposal has merit, and we think it does, the Department would be willing to support similar proposals or legislation where needed to conform the law generally".

What do you think about that?

MR. PRYOR: I think Saturday should be excluded. I don't know whether this Committee should do it or not. I know I have tried to file papers in the district clerk's office on Saturdays, and there wasn't anybody there.

JUDGE CLARK: Is that federal or state court?

MR. PRYOR: Federal court.

JUDGE CLARK: They should be open. We voted that they are to be open.

JUDGE DRIVER: They have at least one there, I think, in the Federal Building in Spokane.

MR. LEMANN: They are open with us.

This would be a departure from the general state statutes. They still count Saturday. I guess in country places state courts work on Saturday generally. It is not as universally a non-working day as it is in the city.

I was thinking of how corresponding rule-making bodies for the states would feel. Not that that is a controlling circumstance.

JUDGE CLARK: Is there any further suggestion? I guess I will say that in the absence of some motion we have not taken any action.

Shall we pass on, then. I would say broadly speaking I think we are probably coming this way. This is the type of thing, I think, on which I would not want to rush into leadership. This seems the kind of thing we do not want to spring on the profession, do we.

JUDGE DRIVER: I think the leadership probably should be taken by Congress in the way of legislation.

JUDGE CLARK: The next suggestion, Rule 30(c), is on this matter of mechanical recording devices. They think the language is broad enough. I had supposed it was. I should not think we needed to say anything there. My thought there would be that the law is developing naturally. There is a committee of the Judicial Conference now working on this somewhat. I don't think there ever has been any question raised.

PROFESSOR WRIGHT: I wonder, Judge, if the Department of Justice has ever noted the existence of Rule 29, which seems to me to state about as clearly as language can that this is proper.

JUDGE CLARK: What is that?

PROFESSOR WRIGHT: Rule 29. "If the parties so stipulate in writing, depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions." Certainly "in any manner" would permit them to use a recorder if they wanted to.

JUDGE CLARK: Hearing no motion on that, we will proceed.

Rule 56(a), Summary Judgment. They want a limitation of 60 days on suits against the government, which is the usual pleading rule. Since this is an application to the court, the court doesn't act here, this is not something that runs outside of court action, I should not think there was any danger that they would be caught summarily.

DEAN MORGAN: They can get all the time they want. The court is not going to give judgment by default.

JUDGE CLARK: I think of Senator Pepper's famous statement that I spoke of before, that he would eat his pants if anything happened in less than 60 days.

Let us turn, then, to the condemnation rule. I will have to say I haven't been able to assimilate this in detail. It is a very long rule. It did seem to me, as I looked at it hastily, that they had come over pretty much to our camp. Since this has been a great bone of contention, really I was surprised when I read this, knowing how strongly some of the

"under" people in the Department have felt.

You will remember what the Chief Justice said about Mr. Brownell's statement yesterday. I wonder if this isn't a little compulsion from the top.

DEAN MORGAN: Doesn't that rule require the consent of everybody, so the government doesn't have to consent.

MR. LEMANN: What is that, Eddie?

DEAN MORGAN: My point is that I don't think they have come over to any extent at all on the jury trial, because before jury is waived all parties have to agree, and that means that the government will still claim jury. That is all. It isn't wherever the defendant will waive it.

MR. PRYOR: I don't understand the language.

MR. LEMANN: Here is their language, Eddie. I think they accept our language. There is only one quite significant limitation. Here is their language. Turn to page 28 under (h), second sentence.

DEAN MORGAN: "any party may have a trial by jury".

MR. LEMANN: "unless the court shall find, upon a proper showing, that some exceptional condition exists which makes it desirable, in the interest of justice".

That is our language except for the reference to "some exceptional condition," which is what I meant by a rather significant limitation. Then they have in the sentence before the last: "A reference to a commission shall be the exception

and not the rule."

Those are the two particulars that, on quick reading, I see they are differing from what we propose.

MR. PRYOR: Down at the end they have a provision whereby the court can set aside the finding of the commission and submit it to a jury or recommit it to the commission.

MR. LEMANN: That is permissible.

MR. PRYOR: Yes. I think they have gone a long ways toward admitting our viewpoint.

JUDGE DRIVER: I didn't make a direct comparison. I have had to rely upon my memory of our rule in reading this. It seems to me that about the only significant changes they have made here are to emphasize, I think, what the Committee intended, that resort to commission is exceptional and there must be special circumstances existing. The other is the discretionary power that they put in the court to set aside the commission's finding and have trial by jury if he isn't satisfied with the commission's work. That is about the only significant changes I can see in there.

MR. LEMANN: The thing which struck me was the language in the first paragraph of (h) putting heat on the judge not to appoint commissions. It admonishes him that it shall be the exception, not the rule, like the appointment of a master. That might have a deterring effect on many judges if they felt a necessity to appoint a commission. That gives

me a little concern.

JUDGE DRIVER: As General Mitchell pointed out to the Chief Justice yesterday, the Committee originally voted for jury trials, and we came around to this commission exception only because the Court would not approve it without our making some provision for a commission. I thought it was the sense of the Committee that it was to be used only in exceptional cases, principally these big government projects where you had a large area to be acquired by the government.

I don't think there is anything important enough in here. As far as I am concerned, I have no objection to it.

MR. PRYOR: I haven't, either.

JUDGE CLARK: It seems to me at least to go quite a little ways, and possibly we should treat with them. I don't know.

JUDGE DRIVER: There may be some districts where the court is appointing commissions as a matter of course without making it exceptional. I don't know of any. I don't do it and I don't know of any district in the West where it is being done.

MR. PRYOR: We might go a long way toward buying their good will by adopting this.

JUDGE CLARK: That is what I was thinking. Here is one case where we know that the Department has taken a pretty intransigent position. Of course that is going down underneath.

The man who has made this almost a life effort is a gentleman by the name of Palmer. He has gone around making speeches. I take it really one can at least surmise that Mr. Palmer has been a little muzzled.

MR. LEMANN: They have changed their position, as I recall it, over the years. First they wanted us to adopt such a rule, and Major Tolman, the uncle of our colleague, did a lot of work getting up the rule. Then they changed their mind and didn't want a rule. Then they rechanged and came back and said they did want it. Then I think they vacillated on the question of whether they wanted a jury or didn't want it. At one time they didn't want a jury because the jury would stick the government for damages. It has been pretty hard to keep your hand on them.

JUDGE DRIVER: While the judge has control and discretion to appoint commissioners to act as a tribunal to try the issue of just compensation, as a practical matter it is very difficult to accomplish it and carry it through without the cooperation of the Department of Justice, because at the present time the commissioners are paid by the Department and the Department has control over the amount of compensation they receive. They have been going to Congress and having a definite limit placed on the amount of per diem that can be given to these commissioners, and as long as you have the Department of Justice holding the purse strings, controlling the pay of the

commissioners, you almost have to have their cooperation, if they use the commission extensively anyway. If you don't have to make any major concessions, I think it is well worth while to get a system which they approve of and will use.

It is significant, I think, that the day before I left to come here the lands attorney for the Department of Justice who is in charge of their condemnation work at Yakima, made a trip down to see me, and he told me they were having some difficulty with the land they are taking in connection with the enlargement of the Hanford reserve where they make plutonium. They have raised the amount of the appraised value of the land, but they still have difficulty with the landowners. He said, "We may ask you to appoint commissioners in that case, I don't know; but I just wanted to throw out that suggestion that we may, if we can't effect enough settlements here, ask you to appoint commissioners."

That surprised me very much in view of the prior attitude of the Department.

MR. LEMANN: I thought the Chief Justice made a significant observation when he talked of the effect on the dockets of the courts, of jury trials in all these condemnation cases.

In my office we have right now a suit by the government on a considerable tract of land, and there are many people involved in the expropriation. The land is subject to

a lot of leases. They had to bring in all the tenants in the proceeding. It has been going on now for I think about two months before a commissioner.

If you had to have that case before a jury, just think of the burden it places on the docket. I was glad that the Chief Justice has that very much in mind, because I think that is the chief problem.

JUDGE DRIVER: It is physically impossible to try more than a limited number of these jury cases at any one term, and if you have one of these huge projects where you have hundreds of cases to try, it is a matter of several years to dispose of them.

MR. LEMANN: I wonder if it is worth while to ask them to withdraw the language in the middle of the paragraph, "upon a proper showing, that some exceptional condition exists which makes it desirable" -- take out those words and say, "upon a proper showing, that in the interest of justice the issue of just compensation".

That would slightly reduce the emphasis, which they still preserve by the sentence before the last, that references to commissions shall be the exception and not the rule. That is the most important part of their proposal.

JUDGE CLARK: How would it do to ask somebody -- and I should think the natural person here might be Leland -- to talk with at least the gentleman who sent the letter, the

Assistant Attorney General, and say we are favorably impressed, and make some suggestions along the line you are doing, Monte, and make another suggestion which I really think is quite important, that is, not so much making a suggestion as perhaps to make the inquiry: What would they do, if these were adopted, with the legislation which has been reintroduced?

DEAN MORGAN: The legislation is still pending?

JUDGE CLARK: I understand it has been reintroduced.

MR. TOLMAN: The same old bill has been reintroduced in this Congress.

MR. LEMANN: It is possible that Leland might persuade them to withdraw their changed language in (h) if we agree to the language at the bottom of page 28. It just makes more explicit the power the court would have, anyhow.

MR. PRYOR: It seems to me that that provision about trial by commission rather than a jury being the exception rather than the rule is not a proper statement to put in any rule. Whether or not it is the exception rather than the rule ought to be indicated in the text of the rule by the provisions you make as to what you do in special circumstances and special conditions where there is a large body of land, and so forth. To say that that sort of trial should be the exception rather than the rule, it seems to me is not proper language to put in a rule of court.

PROFESSOR WRIGHT: I think they took that from Rule

53(b) where we say a reference to a master shall be the exception and not the rule.

MR. PRYOR: What I have said, I still believe.

DEAN PIRSIG: This is a matter of some considerable importance which came to us without any opportunity to study it. The bar hasn't had an opportunity to register its reaction, and I suppose lawyers on the other side of the condemnation cases might take a somewhat different view. I am a little reluctant to act on a matter of this importance under those conditions.

JUDGE CLARK: I think there is a great deal in that. Why don't we take it under consideration, very careful consideration, with the suggestion that Leland talk face-to-face with some of the Department people and report back to the Committee. If necessary we can take a vote by mail.

DEAN MORGAN: What do you think, Charles, of adopting this without canvassing the lawyers?

DEAN PIRSIG: That was my point.

DEAN MORGAN: That is what I am wondering about.

JUDGE CLARK: It looks now very much, as I read the signs, that we are very definitely not going to put these rules up at once, so there may be time to consider that.

JUDGE DRIVER: This is a highly technical proposition, and we want to make sure that the bar as a whole understands it. Most lawyers are not well informed, and I think what you would

get if you circulated this to the laweyrs would be probably quite a few letters, some favoring juries and others favoring commissions, and that is about it. They would not realize the significance of the changes.

MR. LEMANN: It might be good public relations to take it up with the American Bar Association section, which I think you appeared before.

MR. TOLMAN: Yes, there is a special committee of the American Bar Association constituted solely for the purpose of getting Rule 71A(h) changed according to the wishes of the Department of Justice. It is still in existence and it still annually makes reports and tries to get the House Judiciary Committee to hold hearings on this rule.

MR. LEMANN: They want to do whatever the Department of Justice wants to do.

MR. TOLMAN: Apparently it is their idea.

JUDGE DRIVER: I think we should submit it to that committee.

MR. LEMANN: That is what I was thinking.

I am also wondering what we are going to do about the redraft of some of these provisions. Would we go right to the Supreme Court without telling the bar that we have made some changes in our proposals, further amendments, withdrawals, changes in language? Should we do that without asking for their further comment, or should we inform them?

MR. TOLMAN: I was talking to Mr. Mitchell about that, and he said he thought we could not publish our report again. He was afraid it would just stir the bar up again.

MR. PRYOR: Especially since with respect to a great majority of the changes we have made, we have made them pursuant to suggestions we have gotten from the bar.

JUDGE DRIVER: There would never be an end to it if you kept submitting it back to them. You would always have to make some little change to meet their suggestions, which is mostly what we have done.

MR. TOLMAN: However, in general we have published a report to the bar. When we have made a report to the Court we have distributed them to the bar, at least to people who have made comments.

ME. LEMANN: That might be what we should do now, just distribute the report to the people who have made comments, when we make the report, and not invite any further comments.

JUDGE CLARK: How shall we leave this? Shall we leave this without taking definite action, and with Leland to look over the situation and make a further report to us?

MR. TOLMAN: I will wait until I see the transcript. I didn't hear all the discussion, so I am not quite sure what was decided.

MR. LEMANN: Really the enlistment of your valiant

efforts is the suggestion of the Reporter, Judge Clark. We were just debating the extent of the suggestion. The impression I get from comments around the table is that it is the general opinion that they have gone a far way toward meeting us, but perhaps we could get them to go a little further. Isn't that about right?

JUDGE CLARK: I think that is right. I think they retreated from their intransigent stand, and if we went along with them at all, they can't ever go back to that. When you start descending to hell, the road is easy.

MR. PRYOR: It seems to me we ought to consider whether we are doing it in the light of the pendency of this legislation. As I understand, there is a bill in Congress to change this rule.

JUDGE CLARK: That is right.

MR. PRYOR: If we should adopt the recommendations of the Department of Justice, we would be in a much better position to defend against Congressional action.

JUDGE CLARK: Yes. But I should think we could ascertain in advance from the people most interested what they were likely to do, so we would not be foolish about it.

MR. PRYOR: That, I take it, would be this committee of the American Bar Association.

JUDGE CLARK: Both that committee and the Department of Justice. My guess is that the Department of Justice is the

most involved, because I think the committee probably follows the Department of Justice. But we should like to know, if we could, what both are likely to do.

Leland, you see, when this came up, I first suggested here that we ought to consider it, and I said for my part, reading it somewhat hastily, I thought they had given up their major stand and that therefore we ought to approve them some way. I think there is a good deal of sentiment that way.

MR. TOLMAN: I will be glad to see what I can find out from them and to talk to them.

JUDGE CLARK: Of course this came in very late. We are perfectly justified in telling them that we are very much interested, but we got this just as our meeting opened.

MR. TOLMAN: That is right. I really don't believe, as the House Judiciary Committee is now constituted, that that bill, which keeps coming in, is ever going to pass, because Congressman Walter and Congressman Celler, both very influential members of the committee, are very much opposed to it, and they won't let it get out to the floor unless someone forces it out. And I don't think it has anything like sufficient support to get it forced out ahead of the chairman of the committee. So I don't think we need to give in on this because of any fear that they will do anything in Congress, unless the Attorney General takes a very strong stand.

JUDGE DRIVER: I don't think the bill would have

as much support as it would have had in prior Congresses. There were some people in the West who didn't want a condemnation rule at all and were disgruntled and unhappy about it, and that helped to stir it up in Congress, I think. I certainly accept Dean Pirsig's viewpoint here. I think it is unreasonable to expect a committee to pass on this.

I happen to be in a situation where I have been in contact with this and have worked with it rather closely for a number of years. I don't think it would be reasonable to ask the Committee to pass on it definitely with this report coming in this late, without a chance to consider it. Perhaps we can get some opinion from outside.

I think if there is any committee in the American Bar Association or section of the American Bar Association which would consider this, it would be well to submit it to them. I don't think we should undertake to circulate it generally to the bar and bench this late.

MR. TOLMAN: There is that special provision.

JUDGE DRIVER: Wouldn't it be possible to get up a draft by mail without letting this die by default or having to call the Committee back together again?

JUDGE CLARK: We often get the sentiment of the Committee by mail. We will undoubtedly get it on this draft as it comes out. I should think we could do it on this if it doesn't become too complicated.

All right. There are only two more suggestions from the Department of Justice appearing on page 31 of their comments. Having done so much for the Department, I don't know that we need to do any more. I would not recommend these.

On Rule 79(a) they want a further notation as to the entry of judgment. We have not done anything in response to their suggestion as to Rule 58, and I should think it would naturally follow that we would not think this was necessary.

Rule 81(c). They have worked it out by mathematics that in a removed action they would not get as much time as otherwise. I am a little surprised at that. I have not had time to do any mathematics myself. Could you tell if that is right? It doesn't seem to me that their figure was right, but I can't say that for sure.

They suggest that this is a question of removing doubts, and I should doubt if we needed to work on that.

Unless somebody has some feeling about that, I will pass that. I guess nobody has any feeling, so I will pass it.

Now I want to turn over to two suggestions that appear in Mr. Wright's summary, page 64.

Judge Riley, in a letter to Mr. Pryor, is not clear as to whether a party who has made a timely demand for jury trial in the state court must repeat his demand in the federal court after removal. A local rule in Iowa calls for such a new demand. Moore's Federal Practice says that the renewed

demand is unnecessary. A note in the Iowa Law Review says this should be the rule, but that cautious counsel had best repeat the demand in order to be sure. The cases are conflicting.

I don't know how important this is. Perhaps Mr. Pryor will speak about it. I don't object if you want to do something there. You could do it this way, I suppose: Insert at the end of 81(c) the following:

> "; but a party who has made a timely demand for trial by jury prior to removal need not make a new demand after removal."

I don't want to say that I am urging this. I don't know how much of a question it is. Perhaps Mr. Pryor would like to speak to it.

MR. PRYOR: I think this question arose initially in a case that I had before Judge Riley himself, in which I had removed to his court from the state court. The plaintiff had endorsed on his petition the demand for jury trial, but he didn't serve any jury demand after the removal. Judge Graven and Judge Riley have this local rule requiring service of a jury demand, and I filed a motion to take the case off the jury calendar. Judge Riley sustained the motion.

The plaintiff then went to the Court of Appeals of the Eighth Circuit and asked for a writ of mandamus to compel Judge Riley to put the case back on the jury calendar. The

court of appeals properly said that they couldn't mandamus the court to do that, but they wound up their opinion by suggesting that he give them an enlargement of time to serve the jury demand, for which they promptly asked, and the court granted it.

So since then the case has been tried and it is all over. But that is the way this question arose.

In his letter, Judge Riley suggested that we clarify the situation somewhat as you have suggested by an amendment to 81(c).

MR. DODGE: I move that amendment.

DEAN MORGAN: I second the motion.

JUDGE CLARK: It has been moved and seconded. Does anybody wish to debate it or discuss it? If not, all those in favor will raise their right hands. Seven. Those opposed. None. Two not voting. That is carried.

Now there is a plea from the Attorney General of Alaska -- Alaska is being forgotten around here.

PROFESSOR WRIGHT: You Democrats are going to take care of the problems up in Alaska.

JUDGE CLARK: You aren't addressing that to me. You are addressing that perhaps to Mr. Lemann.

MR. LEMANN: I didn't get it.

PROFESSOR WRIGHT: I said you Democrats are going to take care of the problems up in Alaska. You are making a mistake. You don't have to worry about that.

JUDGE CLARK: If you look on page 64 of Mr. Wright's summary, there is a letter from the Attorney General of Alaska. What he wants, really, is a provision to be added to Rule 81, perhaps a new paragraph (g) -- I think it would almost have to be a new paragraph because it is not quite the same as the rest -- "that all rights and privileges granted the United States under these rules shall likewise be granted to the Territory of Alaska."

There again, I don't know who carries the burden of this. I bring it up, that is all.

MR. TOLMAN: I should say after this letter came in I mailed copies of this letter from the Attorney General of Alaska to the Delegate from Alaska in the House, and to the Attorney General, and to someone else --

PROFESSOR WRIGHT: Senator Langer.

MR. TOLMAN: -- Senator Langer or somebody like that. I had telephone calls from all of them saying that they thought there was great merit to the suggestion and they wondered what we were going to do about it. I said I didn't know; that the Committee was going to meet and discuss it. The Delegate in Congress said if there was any help he could give, he would be glad to do it.

JUDGE DRIVER: What procedure do they have up there now. Don't they follow the civil rules?

MR. TOLMAN: Apparently not.

JUDGE DRIVER: All the courts in Alaska?

MR. TOLMAN: The only court in Alaska is the district court.

JUDGE DRIVER: Although they handle territorial matters?

MR. TOLMAN: They handle both kinds. They are much like the District of Columbia, with dual jurisdiction.

MR. PRYOR: So it is not a United States district court.

MR. TOLMAN: That is a good question. I don't know. It is hard to classify what blood type it is. It has the jurisdiction of a district court.

JUDGE CLARK: He says here, for example, that the district court and the Ninth Circuit Court of Appeals have ruled that the territory shall have to furnish bond, even though there is a statute which expressly states that the territory shall not have to. He says:

> "Apparently the court relied on Rule 62(e), holding that only the United States is entitled to such a privilege. There are other instances in the rules where the Territory is not afforded the same privilege as the United States, for instance, Rule 45(c). That rule should be amended granting to the Territory the same privilege the United States enjoys, relative to fees upon the issuance of a subpoena."

They want to be like the government, and must it not also mean that they get 60 days for pleading, and so forth?

PROFESSOR WRIGHT: I think it would.

MR. LEMANN: Aren't there some other territories besides Alaska?

PROFESSOR WRIGHT: Not in this position, at least, Mr. Lemann. Hawaii has just adopted its own rules of civil procedure, which makes provision for different special treatment of the territorial government; but Alaska, by virtue of an Act of Congress, is made subject to the Federal Rules. This is not true in Hawaii and is not true of Puerto Rico, as I understand.

JUDGE CLARK: Of course Puerto Rico is not a territory. Puerto Rico is an associated free state.

DEAN PIRSIG: I am puzzled by our status here. Apparently the Federal Rules are made applicable to Alaska by a Congressional Act, is that it?

JUDGE CLARK: That is right.

MR. TOLMAN: A special Act of Congress made them applicable.

MR. LEMANN: Why shouldn't he get an Act of Congress saying that they should be in the same position as the United States.

DEAN PIRSIG: Can we make rules specifically applicable to Alaska?

JUDGE CLARK: No.

MR. TOLMAN: Yes, I think we can, because at the same time they amended our rule-making act to include Alaska.

JUDGE CLARK: I am sorry. I didn't understand. I thought you asked if we had done it.

MR. TOLMAN: The question was of power, wasn't it?

DEAN PIRSIG: Yes.

MR. TOLMAN: I think we can, because the Act was amended at the same time.

DEAN PIRSIG: Then I think we are under some obligation to do what we can for them.

PROFESSOR WRIGHT: The rule-making act says:

"Rules of Procedure for District Courts. The Supreme Court shall have the power to prescribe, by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the District Courts of the United States and of the District Court for the Territory of Alaska in civil actions."

DEAN PIRSIG: We have given this enough consideration so we are satisfied in our minds about what we want to do.

JUDGE DRIVER: We should suggest to Judge Black that a separate set of rules should be formulated for the court of Alaska.

JUDGE CLARK: I was thinking of bringing this up when the Chief Justice was speaking about this. You recall

that Congress has required the Supreme Court to make rules for the Tax Court and they have dragged their feet. I think Chief Justice Vinson appeared, didn't he, before Congress and opposed it. Nevertheless, Congress believes in the Supreme Court so much that it passed the Act.

MR. TOLMAN: The Chief Justice wrote a letter for the Court saying he was opposed to it and thought it was a matter that should be handled by the circuit courts of appeal. They didn't pay any attention to that at all, and went right ahead and passed the Act.

JUDGE CLARK: That shows the high regard in which the Supreme Court is held by Congress with respect to this rule-making function.

MR. TOLMAN: I haven't seen any activity under that Act.

JUDGE CLARK: They need an advisory committee on tax law. Maybe we should suggest that, too, a continuing advisory committee with respect to tax law.

MR. PRYOR: Would it be true that in view of the language of the enabling act, these rules, if adopted by the Supreme Court and not changed by Congress, would then be effective in the territorial court of Alaska? It seems to me they would be.

JUDGE CLARK: Yes. That is just as I understand the effect of the statute.

MR. PRYOR: Then what is the question now?

PROFESSOR WRIGHT: The question is whether or not the Territory of Alaska in an action in the territorial court is to have the privileges that the United States has in an action in the continental courts as to fees, time, and so on.

MR. PRYOR: Number of copies.

PROFESSOR WRIGHT: I should think that would be true, yes.

JUDGE CLARK: There is this much further to be said, as I gather from the statement here, that there are statutes which assume to give the exceptions to the territory such as not having to give bond, and so on, but apparently the court, including the Ninth Circuit Court, feels that those statutes do not cover the ground of the rules, and that the rules, not referring to Alaska, don't carry out the statutory idea.

I think that is important, that is, that there is a past record in the Congress of giving privileges.

MR. PRYOR: But under the enabling act the rules would not have to refer to Alaska.

JUDGE CLARK: Not specifically, no.

MR. LEMANN: Mr. Reporter, I would like to have a little time left before we break up, to look at the redraft of Rules 33 and 34. I am wondering whether we can dispose of the discussion on Alaska. Equitably, I suppose the only reason we could refuse is to say it wasn't important enough.

DEAN PIRSIG: I would not agree with that, but I don't think we have had an opportunity to study what the effect of what we are doing would be.

MR. LEMANN: Could we leave it that we will have the Reporter make a study and communicate to us if he develops any special objection. The particular point we are talking about is really with respect to costs, fees, and expenses. Somebody said something about copies. Did they mention anything about copies?

JUDGE CLARK: They didn't mention it, no.

MR. LEMANN: I don't think we are under any obligation to go forward with that.

DEAN PIRSIG: The proposal is that "all the rights and privileges granted the United States shall likewise be granted to the Territory of Alaska" by these rules. That is a very broad provision.

MR. TOLMAN: I don't think they mean all the special privileges applicable to the United States, such as two copies if that applies, would be applicable to the Territory of Alaska. They do mean 60 days to answer. I am sure that is what they mean.

JUDGE DRIVER: I don't think we should grant anything like that until we know what we are doing. Somebody would have to go through the rules to see what the effect of that would be.

MR. LEMANN: That is too far-reaching.

JUDGE CLARK: All right. That is passed for the present, and the Reporter will try to see what light he can gather, unless we want to let Leland do it.

PROFESSOR WRIGHT: I don't understand. Does "passed" mean it is approved?

JUDGE CLARK: No, not approved. Action is postponed.

MR. TOLMAN: Why don't we leave it to the Reporter, and I will assist the Reporter.

JUDGE CLARK: All right.

MR. LEMANN: I thought they were talking about fees and expenses. That was the Ninth Circuit case, wasn't it?

MR. TOLMAN: That is right.

MR. LEMANN: Bonds.

MR. TOLMAN: Security for costs.

MR. LEMANN: You might consider, Mr. Reporter, throwing them a sop by putting in some language that wherever the United States is relieved of bonds, fees, and expenses, the Territory of Alaska shall be entitled to corresponding relief.

JUDGE CLARK: Yes.

I wanted to call attention to one thing more. You said you wanted to bring up Rules 33 and 34.

MR. LEMANN: I would like to have a chance to look them over and exchange views on that.

JUDGE CLARK: Let me bring this up further. This is a rule as to proof of official records abroad, and it has been

recommended for some years by the Section of International and Comparative Law of the American Bar Association. It has been brought to our attention repeatedly by Professor Re, who is the chairman of the committee. I think it is a good and desirable thing.

I have to say that there is quite a little in it, and I think perhaps we may have been a little remiss that we have not studied it more. I don't know that it is proper --

MR. LEMANN: Do we have a copy of it?

JUDGE CLARK: Yes. It is fairly long, you see.

MR. LEMANN: You didn't distribute it to us?

JUDGE CLARK: Yes, it was distributed.

PROFESSOR WRIGHT: It was distributed very early.

JUDGE CLARK: It was distributed, so you officially have it before you. This is just Rule 44, Proof of Official Record.

It is difficult or well nigh impossible to prove records in what we might call "iron curtain" countries. We have certifications by public officials, and so on. There isn't much that can be done to carry out that exact rule, and this proposed draft is a way of getting certificates by someone other than the "iron curtain" official, mainly such officials as our own, the vice consul, the consular agents, and so on.

That is a very inadequate statement of it, but I am not trying to state it exactly. I wanted to try to tell you the

purpose, and I think the purpose is a good one because it is a serious question in the cases where it comes up.

MR. TOLMAN: I understand the reason they are worried about it is that the New York state law for proof of those documents was recently changed to make it very difficult to prove them. Isn't that right?

JUDGE CLARK: I think that is true.

MR. TOLMAN: Our rule provides that you can use either the state procedure or the procedure under the rule. They find they have to use the procedure under the rule, which is impossible now, and the state procedure is also impossible.

JUDGE CLARK: They have recommended this for two or three years. I have had letters and of course the Committee has had letters through Leland.

I am a little worried that we have not paid too much attention to it. Of course, it is a question that to most of us is away off most of the time. But in the exact case it is fairly important.

I would like to do something about it sometime. I do not know that I can ask you to pass this long statute, even though it were carefully studied, in two or three minutes at the end of a session.

MR. TOLMAN: Professor Morgan was the draftsman of our Rule 44. Did you have a chance to look at it, Dean?

JUDGE CLARK: What did you say?

DEAN MORGAN: It would have to come under Rule 44. It would be an amendment to Rule 44.

JUDGE CLARK: That is what they are doing.

DEAN MORGAN: I have read the thing over. I thought they had a tremendously long proposal.

JUDGE CLARK: Let us refer that to Professor Morgan to give us a rule for it, not to Leland and the Reporter this time but to Professor Morgan. How about it.

DEAN MORGAN: I haven't anything to do.

JUDGE CLARK: Sure. You haven't anything to do. You have Puerto Rico all taken care of.

MR. LEMANN: From a quick glance at this report, I do not see the proposed language they want. They say something ought to be done.

JUDGE CLARK: There are booklets for several years here. The one I have is for 1953.

MR. LEMANN: It is not much longer than the present rule, apparently not much longer, but I would have to study it. They don't italicize and delete like you do, so I don't know what has been done.

I second the motion to refer it to Professor Morgan.

JUDGE CLARK: All right. That is the sense of this meeting.

DEAN MORGAN: You didn't say how soon you wanted a report.

JUDGE CLARK: Do you want us to put a time limit on it, 20 days or 60 days?

DEAN MORGAN: I should like to have 60 days.

MR. PRYOR: Sixty days from the time you know about it.

JUDGE DRIVER: It might be well to make the report before the Committee is disbanded.

JUDGE CLARK: Mr. Lemann?

MR. LEMANN: There are some points I want to bring up, first under Rule 34. This is Professor Wright's redraft of Rule 34.

JUDGE CLARK: Go ahead, Mr. Lemann.

MR. LEMANN: I think the English is bad in Rule 34, "In addition to the right to obtain the production". Then as to substance he says, "In addition to the right to obtain the production of any document or thing for inspection in connection with an examination under Rule 26 or interrogatories under Rule 33".

That, I should think on quick reading, would imply that you had a right to obtain the production of a document or thing for inspection by interrogatories under Rule 33, whereas my understanding is that under Rule 33 all you can call for is copies of designated documents, and not for inspection. Is that right or wrong?

JUDGE CLARK: You can answer that, Mr. Wright.

PROFESSOR WRIGHT: That is an objection I made

yesterday, and the Committee told me I was all wrong, I was reading this too literally, and everybody would know this was merely a general reference to Rule 33 and you would look to Rule 33 to see what could happen.

MR. LEMANN: One member of the Committee, I think, does not share that opinion. That is why I suggest that you try your hand at rewriting it, because I thought the original language was bad and I think this redraft is bad.

PROFESSOR WRIGHT: This is not a redraft, Mr. Lemann. This is what the Committee approved.

MR. LEMANN: You did not redraft it?

PROFESSOR WRIGHT: No. I have been working on a redraft, but I wanted to give the Committee what they had approved yesterday.

MR. LEMANN: I see this is supposed to be our work product.

PROFESSOR WRIGHT: I take no responsibility for this. This is the Committee's work.

MR. LEMANN: I would have to move to disapprove this work product of the Committee.

JUDGE DRIVER: This is what the Committee did. That is why it looks so bad.

MR. LEMANN: I repudiate it.

JUDGE CLARK: We expect to work this over and cast it in its proper rule words.

MR. LEMANN: If my rights are reserved to look at a redraft, I will abstain from further comment at the moment.

JUDGE CLARK: This is not a redraft. This is just an attempt to state what the vote was.

MR. LEMANN: I think it certainly ought to be redrafted from the standpoint of clarity and English. I have the feeling that we have a certain inconsistency now between 33 and 34 which I am sure will be the occasion for much adverse comment. Under 33, by use of interrogatories you can get copies of papers that are not subject to Hickman v. Taylor without any showing of good cause. Whereas, under 34 you cannot look at them without showing good cause.

I am a little concerned as to whether that is an inconsistency. Perhaps the answer is that in 33 all you are asking for is copies, and in 34 you are asking to look at the documents themselves.

JUDGE CLARK: We did want to make a distinction. Maybe it isn't clear enough, but I think it is a good thing to do, if we can make it clear. That is, there ought to be quite a difference between getting an order to enter on a man's land and merely a question like this: "Did you serve a notice? If so, attach a copy." In the latter case you don't want this rigmarole.

MR. LEMANN: I would agree, Mr. Reporter, if you could cut down 34 to apply to going on land, photographing, and so on,

and restrict it to that, I think you would have removed a good deal of the overlapping and inconsistency and complication.

DEAN MORGAN: Rule 33 applies only to documents that are attached to interrogatories, and Rule 34 applies to other documents as well.

JUDGE DRIVER: Isn't Rule 34 the rule you would have to use if you wanted to get an original to introduce in evidence?

JUDGE CLARK: That is right.

MR. LEMANN: Rule 34 is what you would have to use to get the original. Under 33 you could get copies.

JUDGE DRIVER: And inspection and photographing.

PROFESSOR WRIGHT: Mr. Lemann, the reason I don't have a redraft for you as I promised last night, I did work up several redrafts, as a matter of fact, last night and again this morning, and although it seemed to me that it was quite clear exactly what the Committee wants done and I don't think there is any substantial disagreement as I have understood the discussion, I found that the drafting problem is not as easy as it might have seemed at first glance.

So I was going to propose, and I neglected to mention it to you, that the Judge and I be given some leeway, when we get back and have some time in New Haven and Minneapolis, to try to work out a draft there and circulate it to the Committee, rather than trying to do something under pressure overnight here which might not be satisfactory.

MR. LEMANN: I am wondering whether your authority should go so far as to consider transferring from 34 into 33 a provision about the inspection of the original document or paper which would incorporate then the finding of good cause in that connection, and would tie up the two rules in one place.

PROFESSOR WRIGHT: That is the kind of plan I was proceeding on. It seems to me we have two different classes of things. We have on the one hand the class which includes the original documents. That includes documents which are within the Hickman v. Taylor doctrine, it includes extraordinary things like getting an order to go on land. But as to these things we want a showing of good cause and a court order.

We have another entirely dissimilar class which is copies of documents which are not within the Hickman v. Taylor doctrine, and these can be gotten by way of interrogatories. At the same time, I thought if we were going to recast this we might want to take some account of Rule 45(d), and the question there is the subpoena.

I think the courts have worked it out pretty well. They said this is the kind of thing for which you have to show good cause, and you have to show good cause on it, but we want to make some reference to it.

So I thought of trying to put these together, distinguishing clearly between these two classes of things and

saying as to one you have to bring a motion and show good cause, and as to the other a subpoena or interrogatory will be enough. I found that the drafting of this is tougher than I thought it might be.

MR. LEMANN: I am sure it is complicated. I would just like to suggest for your consideration this possibility, when you redraft Rule 33, that you stop provisionally at line 42 and insert in Rule 33 a provision for the inspection of the original of the documents, copies of which you are entitled to obtain under the interrogatory. I am not saying that is desirable, but it occurred to me it might be a help to the profession.

DEAN PIRSIG: May I make a suggestion, Mr. Lemann. As Mr. Wright points out, we have two different types of documents or objects or whatever it is. One you can get without showing of good cause, and for the other you must show good cause.

As to those without a shoring of good cause, there are two possible ways of getting them, I suppose: One, where you are submitting interrogatories and you want to obtain also the documents; the other where you are not submitting interrogatories but you still want the documents. The procedure there should be merely a notice or a demand for the production of those documents. No order is required, no motion of any kind.

If the man doesn't want to submit interrogatories but he wants the documents, there should be some procedure for that in those cases which do not require good cause. Wouldn't that be proper?

MR. LEMANN: I think that is a very persuasive suggestion.

I want to add another caution or suggestion. As I visualize it, the protection of Hickman v. Taylor should apply to both Rule 33 and Rule 34. There is a certain amount of confusion in my mind, and I think there will be confusion at the bar, between the showing of necessity to take it out of Hickman v. Taylor, and what you mean by good cause. I think if you could clarify that, it would also be helpful.

PROFESSOR WRIGHT: This is one of the things which has held me up. I really don't see how you can work this out without some pretty substantial reference to the Hickman doctrine. This, of course, is not easily stated.

JUDGE CLARK: That is fine. Mr. Wright will do all those things.

Now, if I may, I have to catch a train, and I thank you all and say that I will be seeing you. We will communicate with you just as rapidly as we can.

MR. TOLMAN: Mr. Mitchell asked me to say he was sorry he had to leave so hastily. He wanted to catch a plane.

... The meeting adjourned at 3:25 o'clock p.m. ...

end aj