# P R O C E E D I N G S

## ADVISORY COMMITTEE ON RULES

## FOR CIVIL PROCEDURE

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May 1, 1945

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TUESDAY MORNING SESSION

May 1, 1945

The meeting reconvened at 9:30 a.m., Mr. William D. Mitchell, Chairman of the Committee, presiding.

THE CHAIRMAN: Judge Donworth served notice of motion last night, but he hasn't arrived yet. So, pending that, I dictated yesterday a phraseology for Rule 41(b), a suggestion which seemed to be acceptable, and then I think somebody raised an argument about it, and I had it typed.

PROFESSOR SUNDERLAND: I have no point to make. It is all right.

THE CHAIRMAN: It is before you. You don't press your objection?

PROFESSOR SUNDERLAND: I think it is all right. I didn't quite understand your reading.

JUDGE CLARK: I would like to bring up something for discussion when you get to it in connection with this.

THE CHAIRMAN: We are already there.

JUDGE CLARK: I have been talking to Mr. Moore, and it is a question of how far this is clear. I think the idea is certainly there. It is really a little doubtful whether it is a proper way to put it that "the court may then determine the facts". In a way, all the court can do is something very direct and stereotyped. He has to find for the defendant, so to speak. Mr. Moore has written out something which is a

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little more expanded, and I will give it to you to see whether it is more easily understood or clearer. This is what he has written:

"In an action tried to the court, and whether the motion is made at the end of the plaintiff's case or at the close of all the evidence, the court in ruling on the motion shall weigh the evidence as the trier of the facts. If the motion is granted, the court shall make its findings as provided in Rule 52(a). The court may postpone ruling on the motion made at the end of the plaintiff's case until the close of all the evidence."

THE CHAIRMAN: That hits an objection I had to this thing right on the nose.

JUDGE DOBIE: The court may then determine the facts and later he grants the judgment.

MR. LEMANN: "he" is a bad pronoun.

JUDGE DOBIE: Referring to a court, I think "he" is not very good.

THE CHAIRMAN: The point I was making was the difference between the two circuits on one side and one circuit on the other. The difference is whether the court in determining the facts at the close of the plaintiff's evidence shall determine them just for the purpose of finding out whether there is any substantial evidence, as he would if there were a motion to direct the jury, or whether he should go on as trier

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of the facts and resolve all inconsistencies and determine where the weight lies.

I think that Mr. Moore is right. I think that the phrase that we have, that "the court may then determine the facts", doesn't bring out clearly what we are trying to do, to choose between those two circuits. I think this description of him as the trier of the facts is just exactly what we want.

MR. LEMANN: There is another objection to the draft that we have before us. He may "render judgment against the plaintiff or decline to do so until the close of all the evidence." Strictly read, that implies that at the close of all the evidence he is going to render judgment against the plaintiff, that he is going to do it then. Of course, it is meant that he is then going to determine the facts.

Could we see Mr. Moore's wording? Could we get it typed?

THE CHAIRMAN: May I read that again?

SENATOR PEPPER: Please do.

THE CHAIRMAN: "In an action tried to the court, and whether the motion is made at the end of the plaintiff's case or at the close of all the evidence, the court in ruling on the motion shall weigh the evidence as the trier of the facts. [That is the point.] If the motion is granted, the court shall make its findings as provided in Rule 52(a). The court may postpone ruling on the motion made at the end of the

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plaintiff's case until the close of all the evidence."

At the close of all the evidence the motion is not before him, you see. There is a little inaccuracy there. If he waits until all the evidence is in, the motion that the defendant made at the close of the plaintiff's case is wiped out. He has waived it by putting in his proof.

JUDGE DOBIE: He can renew it, of course, in the light of all the evidence.

THE CHAIRMAN: It has a different basis, though.

JUDGE DOBIE: Yes.

THE CHAIRMAN: It isn't the same motion.

JUDGE DOBIE: Of course, if there are any holes in the plaintiff's case that the defendant plugs up, then he is out of luck.

THE CHAIRMAN: What we want to get here is that the court in its discretion denies the motion and waits until he has heard all the evidence. They often do that. The question is how to express it. To postpone its ruling until the end of all the evidence isn't accurate. It might be in some cases, but it isn't always so, because after the defendant's evidence is in, it is not a postponement that you are making; it is a new ruling on an entirely different record.

SENATOR PEPPER: With a different legal effect because the first motion---

THE CHAIRMAN: It might or might not.

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SENATOR PEPPER: ---might or might not be without prejudice, but the second one would have to be an adjudication.

THE CHAIRMAN: Yes. Suppose that during the day you try to catch that last point.

PROFESSOR MOORE: All right, sir.

THE CHAIRMAN: Fix that up in some appropriate way, have it typed, and we will take a look at it.

MR. TOLMAN: Mr. Chairman, I should like to make one suggestion there. When we had the question of the trial by the court with the questions of fact before it, we had a discussion of the use of that word "to". Up in my country we don't say "to the court". People wouldn't quite know what that was.

THE CHAIRMAN: "tried by the court"?

MR. TOLMAN: We say "by the court". We changed the other rule, and I think we ought to be consistent about it. To say "by the court without a jury" would of course be absolutely clear, but even "by the court" would probably do. I suggest that.

JUDGE DOBIE: I thought "to the court" was a technical legal expression.

THE CHAIRMAN: When I was a young man it was always "tried by the court". In the last half century this other "tried to the court" has developed, and it is quite commonly used.

SENATOR PEPPER: How long?

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THE CHAIRMAN: Half a century.

MR. HAMMOND: That is right. We have always tried not to use the words "to the court" in the rules.

JUDGE DOBIE: You don't mean it has been half a century since you were young, do you?

THE CHAIRMAN: Yes.

PROFESSOR CHERRY: Mr. Chairman, before final action on that redraft, I wonder if there is any necessity to state there the thing that has brought this difficulty, anything about what happens at the close of all the evidence. The one point we are trying to make is to take care of one situation which wasn't clear as between these circuits. Doesn't that really come up in the situation where the motion is made at the close of the plaintiff's case?

PROFESSOR MOORE: That is it.

PROFESSOR CHERRY: I was wondering if a simple way out wouldn't be just to eliminate all reference to what happens at the close of all the evidence.

THE CHAIRMAN: The trouble is that then, as it is worded, you are forcing the judge to make his decision and denying him discretion to receive all the evidence before he makes any ruling.

PROFESSOR CHERRY: Oh.

THE CHAIRMAN: That is the difficulty.

PROFESSOR CHERRY: No, I don't think so, not as I

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would suggest it. It is simply to say nothing about what he does if he grants the motion at the end of all the evidence, because we don't need to cover that.

THE CHAIRMAN: We don't need what?

PROFESSOR CHERRY: It is clear, isn't it, if he makes a decision at the close of all the evidence? Is there any difference between these circuits in that situation?

MR. LEMANN: No. That is covered by 52(a).

PROFESSOR CHERRY: That is what I thought.

THE CHAIRMAN: That is right.

PROFESSOR CHERRY: So, if we just leave that out here, he either grants or doesn't grant that motion. We say that the motion may be made then and, if it is granted, he shall make his findings. Isn't that all we need to cover at this point?

JUDGE CLARK: I would like to suggest perhaps the opposite of that. Why wouldn't it be a good idea here to put in by way of a separate sentence something of a motion for dismissal at the end of the case? Of course, we assume it can be made, and I suppose that is all right, but as it now stands what we are going to have is a provision for what we might well term a nonsuit, and in 50 we have a provision for a directed verdict, but we wouldn't have anything to cover a motion for judgment at the end of a case tried to the court.

THE CHAIRMAN: I don't understand that. The existing

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rule says: "(b) Involuntary Dismissal. .... After the plaintiff has completed the presentation of his evidence, the defendant, without waiving his right".

JUDGE CLARK: Of course, that implies that he may also do it when he does close his case. I suppose it is all there by implication, but for symmetry we naturally would put in a sentence, wouldn't we, to state what I suppose is obvious, that he can also move at the end of the case?

THE CHAIRMAN: He doesn't move. He just submits the case for decision. There is no motion, any more than when you submit the case to the jury.

PROFESSOR CHERRY: Why isn't that suggested by 52?

MR. LEMANN: Wouldn't you cover this discussion by making lines 21 to 23 read as follows: "If, in an action tried by the court without a jury, the motion of the plaintiff is granted, the court shall make its findings as provided in Rule 52(a)."

JUDGE DOBIE: Leave out the other?

MR. LEMANN: Yes, just substitute that for the sentence on 21.

THE CHAIRMAN: You have entirely missed the conflict between the two circuits.

MR. LEMANN: No, I think not.

THE CHAIRMAN: The two circuits differ as to what the problem is before the judge.

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MR. LEMANN: I am tying this up with the preceding sentence. I am reading the preceding sentence, beginning on line 17: "After the plaintiff has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief." I understand that all we want to cover is what happens if that motion is granted.

THE CHAIRMAN: No, no.

MR. LEMANN: We want to be sure that findings are made.

THE CHAIRMAN: No, no. That is just half of it, Monte. The question of whether or not findings are needed on such a motion is one question. We want to deal with that under 52. But there is another problem. In the circuit court decisions, one group of them says that when a judge is confronted with a motion like that at the end of the plaintiff's testimony, he deals with the case exactly as if it were a jury case, and the only question he has to consider is whether there is any substantial evidence to go to a jury or to go to himself later as the trier. That is one circuit. The other circuit says that the judge is the trier of the facts, and why does he apply that kind of rule in that case, when he himself is the trier? Why doesn't he face the record right then? The problem

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before him is not whether substantial evidence has been presented, but whether on the facts the plaintiff has a case.

MR. LEMANN: That is right.

THE CHAIRMAN: They are two quite different standards of weighing the evidence at the close of the plaintiff's case. That was the initial purpose that we were driving at. This business of providing for findings was just an incidental thing that we brought up afterwards to remove a question under 52.

SENATOR PEPPER: There are also situation where, when that motion is made, the court is in this state of mind: "If I had to decide this question, I would decide it in favor of the defendant, but it is for the jury, and there is some evidence from which they might reach a different decision. Therefore, I will submit it."

THE CHAIRMAN: That is what one group of circuit courts say you should do, and the other group says no, and we want to choose between those. That is why Mr. Moore said he should deal with the case as trier of the facts, you see.

MR. LEMANN: Then, you could cover that by making it read as follows: "In an action tried by the court without a jury, the court shall then deal with the facts--" What was the language? "shall then weigh the facts"?

PROFESSOR SUNDERLAND: "determine the weight of the evidence".

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PROFESSOR MOORE: "weigh the evidence as the trier of the facts".

MR. LEMANN: "--and if the motion is granted, shall make its findings as provided in Rule 52(a)."

THE CHAIRMAN: Why doesn't that hit it? It is "may"; it isn't "shall". "may weigh the evidence as trier of the facts and, if the motion is granted, make its findings as provided in Rule 52(a)."

PROFESSOR SUNDERLAND: Should it be "may"?

THE CHAIRMAN: It is discretion.

PROFESSOR SUNDERLAND: Either pass on it as a jury case or pass on it--

THE CHAIRMAN [Interposing]: Surely, often. If we say "shall" and he is forced to decide on the record, he may say, "Well, on this record I am going to find for the defendant," but if he has discretion (and many wise judges exercise it), the evidence may not be completely clear and conclusive. It may be vague and a little doubtful as to where the weight lies. Then he would say, "I guess I will hear the defendant in this case."

PROFESSOR SUNDERLAND: Wouldn't the word "may" mean that perhaps he could take a choice between these two doctrines?

THE CHAIRMAN: No. Maybe you want to look at it that way, but I certainly don't think we ought to compel the judge to at the close of the plaintiff's evidence.

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PROFESSOR SUNDERLAND: We ought to compel them to adhere to one or the other of those two doctrines when the point comes up.

THE CHAIRMAN: We ought to give him the option. One circuit says he hasn't any option, that if there is any substantial evidence, he is bound to deny the motion, just the way he would if there were a jury going to settle the case.

PROFESSOR CHERRY: "may" is all right there, because if he exercises that option it just means he goes on and hears the rest of the evidence and then he decides.

PROFESSOR SUNDERLAND: There are two options there. He can adopt one or the other of the two options. The option is whether he will rule then and there or go on.

PROFESSOR CHERRY: Suppose he adopts the other. It means merely that he will hear the defendant's evidence.

THE CHAIRMAN: I think the judge ought to have discretion and that the rules shouldn't force him at the close of the plaintiff's testimony. If the evidence isn't perfectly clear, he ought to say, "Well, I guess it is safer to hear the defendant's evidence, and it will clear up some of these things and make it a sure thing, so there won't be any reversal and a new trial." They often do that, and they ought to have that privilege. Call it, if you like, a choice between one circuit and the other.

MR. LEMANN: Will the use of the word "may" resolve

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this conflict in these cases, or will the two circuits continue to say, one under "may" that you shouldn't do it, and the other under "may" that you should do it?

PROFESSOR SUNDERLAND: That is what I am afraid of.

SENATOR PEPPER: Do you think the difficulty would be removed if you described the court as trier of the facts before you reach the stage at which you give him the option? In other words: "In an action tried to the court, the court as trier of the facts may then determine them and render judgment against the plaintiff or decline to render any judgment until the close of all the evidence. If at either stage he grants judgment against the plaintiff, he shall make his findings as provided in Rule 52(a)."

THE CHAIRMAN: That is good.

PROFESSOR SUNDERLAND: That is all right.

SENATOR PEPPER: That makes it clear that, whatever he does, he does it as trier of the facts and not as the presiding officer to determine what a trier of facts shall later do.

THE CHAIRMAN: I think that is good. Don't you think so?

PROFESSOR MOORE: I think so.

SENATOR PEPPER: I will turn that over to Mr. Moore.

THE CHAIRMAN: Maybe we could read it once more. Is this the way you want it?

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SENATOR PEPPER: I just suggest it. It seems to me to resolve the difficulty. I don't know.

THE CHAIRMAN: He has taken the draft that I had and amended it. It reads this way. "In an action tried by the court--" Do you want to say "without a jury", or don't you?

SENATOR PEPPER: "tried by the court" clearly means without a jury.

THE CHAIRMAN: "--the court as trier of the facts may then determine them and render judgment against the plaintiff or decline to render any judgment until the close of all the evidence. If at either stage he grants judgment against the plaintiff, he shall make his findings as provided in Rule 52(a)."

I have one little criticism of that last sentence because 52 already provides that, if it is after all the evidence, he shall make findings. So, you are just repeating here.

SENATOR PEPPER: You can fix that.

MR. LEMANN: I thought you thought the phrase "determine the facts" was insufficient in the preceding go-around. I thought there was some feeling that the phrase "determine the facts", which appears in the present draft in line 21 and is repeated in this suggestion, didn't cover it.

THE CHAIRMAN: It didn't, but they have inserted here now "as trier of the facts", which makes it a little different. Would you like these two drafts, the one that you

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dictated and this one, typed, and we will look at them later today? We can do it during the noon hour. I would strike out "at either stage", because as far as making findings is concerned, we need here only to provide for making findings if a motion is granted at the end of the plaintiff's case. It is already provided in 52 that, if he waits until all the evidence is in and the case is submitted, he must make findings.

SENATOR PEPPER: I think it is redundant, but it did seem to me there was some value in having in a single rule a guide to the court that in either alternative he must make the findings.

THE CHAIRMAN: We will copy it, then, just as you have it, and take a look at it later. We will make a copy of this and a copy of what Mr. Lemann dictated.

SENATOR PEPPER: It is very embarrassing, Monte, to be lined up against you.

MR. DODGE: If he does deal with the case finally at the end of the plaintiff's evidence, it is covered in Rule 52 anyway.

THE CHAIRMAN: Yes.

MR. DODGE: You don't have to say anything about the requirement that he shall make his findings.

THE CHAIRMAN: That was my suggestion, but the Senator thought it might be clearer if he left it that way.

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Judge Donworth?

JUDGE DONWORTH: I won't take up much time on this. It is what we have just been discussing. I have here a draft which I understand was presented by the Chairman and has now been modified. The one that I have before me says: "In an action tried to the court, the court may then determine the facts and render judgment against the plaintiff or decline to do so until the close of all the evidence."

THE CHAIRMAN [Interposing]: That has been abrogated, and two new drafts have been prepared.

JUDGE DONWORTH: That implies that he is going to render judgment against the plaintiff at the close of the evidence. That is all out? I arrived late, and I guess I am wasting time.

THE CHAIRMAN: You are not, but we will have two new drafts of that section ready after lunch, and we will take another shot at it.

JUDGE DONWORTH: I thought the expression "decline to do so" was ambiguous.

JUDGE DOBIE: It is, and that is out, Judge. We have two new drafts that are going to come up, so I don't think we will gain much by discussing what is out.

JUDGE DONWORTH: I apologize.

THE CHAIRMAN: Is that what you served notice about last night?

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JUDGE DONWORTH: No, no. That is another subject. I will take that up now, with the permission of the Committee.

THE CHAIRMAN: What rule is this, now?

JUDGE DONWORTH: This is Rule 41(b), the final sentence. I am inclined to think, having slept on the matter, that my fear was groundless, and I am inclined to withdraw what I had in mind, but I will state it, anyway. The final sentence reads:

"Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits."

My fear was that the expression, "any dismissal not provided for in this rule," meant a dismissal under any circumstances, but upon reflection I think that from the opening clause, "Unless the court in its order for dismissal otherwise specifies," it is fairly clear that the court in ordering the dismissal in the nature of a nonsuit may qualify it by this clause. That is, I think that now in any kind of dismissal the court can make it a nonsuit dismissal, if it wishes. I was afraid, if you get my point, that "any dismissal not provided for in this rule" meant that such a dismissal not provided for in the rule must always be a final adjudication.

THE CHAIRMAN: You agree that the phrase, "Unless the

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court in its order for dismissal otherwise specifies," qualifies all the rest of that sentence?

JUDGE DONWORTH: That is the thought entirely now.

SENATOR PEPPER: May I inquire of Judge Donworth what would be a case where such a reservation would be needed? Why shouldn't it be universal?

JUDGE DONWORTH: Of course, it is something that depends on what we have inherited from the local state practice, so I will state it. In the state of Washington, when a motion is made by the defendant for dismissal either at the close of the plaintiff's evidence or at the end of the case, the court has discretion to make the judgment one of nonsuit or of final adjudication. It is to help out the party who finds that he has failed to prove a point that the court thinks might be proved. In that case, the court makes a judgment in the nature of a nonsuit without prejudice. If he thinks, on the other hand, that the situation is such that the whole case has been fairly tried, and there is nothing more to be developed, then he makes his final adjudication.

SENATOR PEPPER: Thank you, sir.

JUDGE DONWORTH: That is the thought that led to this, but on reflection I think it is all right as it is.

THE CHAIRMAN: Has anybody any further suggestion on Rule 41?

MR. LEMANN: In the note on Rule 43 in the printed

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statement it says, "While consideration of a comprehensive and detailed set of rules of evidence is upon the Committee's agenda--"

THE CHAIRMAN: Where is that?

MR. LEMANN: That is in the first draft that we sent out and, as I understand it, it remains in this new draft.

JUDGE CLARK: It probably will.

MR. LEMANN: I wonder if that raises either false hopes or false fears, according to your point of view, and whether it was accurate to say that we have an agenda remaining after this goes to the bar and finally emerges from the Supreme Court.

JUDGE CLARK: That is, we had an agenda last year, but the agenda has disappeared by this time?

MR. LEMANN: The agenda has been exhausted, and we will not be actively functioning immediately after this goes through. I wonder what you mean. I would get the impression from reading this that after this draft has been submitted to the Court and to Congress, the Committee will continue to debate this matter of the evidence rules. Wouldn't you get that impression from reading this?

THE CHAIRMAN: Isn't it a fact that you went over the edge a little bit there because Mr. Morgan has been active in the Code of Evidence of the American Law Institute, where it has been considered? We thought very properly that we should

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not slap that suggestion down offhand, so we put this in here. I have a feeling that, although some day or other we will get around to that job, I doubt very much if this Committee as presently constituted ever will.

SENATOR PEPPER: Hear! Hear!

THE CHAIRMAN: We have this war on, and we have been at this thing now for ten years. After the experience of the Institute Code and all the controversies that arose about its provisions, I feel that the job of getting up a complete code of evidence for the federal courts is a ponderous one, fully as difficult, if not more so, as the drawing of this whole set of rules. I think we will get more rows over it. If we were going to have a code of evidence drafted, I think we ought to reconstitute our Committee somewhat. I am not an expert on evidence, although I have tried hundreds of cases. I think maybe we would have to enlarge our staff along the evidence line and do a lot of reorganization. I am frank to say I have shrunk from the idea of tackling this job, because I have felt that personally I have spent as much time on the rules as was justified. I am getting old. It is a hell of a job to do it. It is a bigger job than this other thing was.

SENATOR PEPPER: You are really assenting to Monte's suggestion, aren't you?

THE CHAIRMAN: I was trying to bring out that, in my own mind at least, I felt that I doubted that the Committee as

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it is presently constituted would tackle that job or certainly that, whether as it is now constituted or otherwise, it would tackle it in the near future.

SENATOR PEPPER: Is there an implication that we would? If so, we want to remove that implication.

MR. DODGE: There certainly is such an implication here.

MR. LEMANN: I would enjoy doing it, but I think it is a big job, and I don't see any prospect of this Committee's doing it. This seems to me to be a little misleading, in either direction, to the people who want us to do it and to the people who don't want us to do it.

JUDGE CLARK: Let me suggest this. It seems to me that what you say about the exact wording is correct. We should manipulate the wording a little, anyway, and perhaps not make it too much of a promise. Being a pure outsider from the Code of Evidence, and without reference to what committee does it and whether or not it is for the federal courts, I think it is a pretty good job, and I should like to give it a little boost or at least not to give it a black eye. In one sense, it is before us. I think the Committee on Jurisprudence and Law Reform said something about it, didn't they, in the Bar Association? It is out there.

SENATOR PEPPER: Could we hear the language just as it is?

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THE CHAIRMAN: It says: "While consideration of a comprehensive and detailed set of rules of evidence is upon the Committee's agenda, it was not feasible [this was before the preliminary draft] to propose amendments at this time. Such consideration should include the adaptability to federal practice of all or parts of the proposed Code of Evidence of the American Law Institute."

Instead of saying it is on the Committee's agenda, suppose we said, "While consideration of a comprehensive and detailed set of rules of evidence has been pressed upon the Committee," or "urged upon the Committee," or something like that, "we have not felt it feasible to attack the problem at this time."

JUDGE DOBIE: Have you ever talked to the Chief Justice about it?

THE CHAIRMAN: No.

MR. LEMANN: I would like, while I think of it, to interpolate that I certainly didn't want my comments to be construed as indicating a lack of enthusiasm for the Code of Evidence. The Reporter seemed to think that some of us brought up the point and didn't think as much of the Code of Evidence as he did. I haven't reached any conclusion about it. My general impression is that it contains notable reforms and that certainly it was done with the greatest skill and is a model to work for, but at the same time I am sure that it contains

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many seeds of controversy for the practitioner, the bench, and the bar generally. That is all I meant to imply, whether we were really going to undertake to do it and to lead the procession. I didn't mean to indicate any disapproval of the Code at all, Mr. Reporter.

THE CHAIRMAN: You asked me if I had ever taken it up with the Chief Justice. Not with the present Chief Justice, but you may remember that way back in '35 when we were at our first meetings, we were considering just what we were going to tackle and what we were not, and what this statute intended to have us do, and some of us started out with the strong impression at that time that the rules of evidence were not strictly practice and procedure within the meaning of those words as Congress had used them, that Congress hadn't really intended us to tackle evidence, even though they had used words in some aspects that include evidence. We put it up to the Court at that time, the old Court, Chief Justice Hughes, and we told them we didn't feel we ought to tackle the job of evidence, that that was a job by itself. The Court unanimously endorsed our conclusion, but that, of course, was nine or ten years ago.

SENATOR PEPPER: Mr. Chairman, wouldn't it meet the difficulty if we said something like this? "Consideration of a comprehensive and detailed set of rules of evidence has not been found feasible by the Committee. If such a proposal were ever to be considered by the Court, doubtless such

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consideration would include ...." Just leave it where it belongs--in the hands of the Court.

MR. LEMANN: You might do two other things, it seems to me. One, omit this comment here on Rules 43 and 44 from the new draft that goes out to the bar, just say nothing. There would be no recommendation. That is one suggestion. Another suggestion would be to say a little bit more positively, Senator, than your suggestion, something like this: "While consideration of a comprehensive and detailed set of rules of evidence seems desirable, it has not appeared feasible for this Committee to undertake it."

SENATOR PEPPER: Yes, that is better than mine.

MR. LEMANN: And then go on with the last sentence about the model code.

JUDGE DOBIE: There certainly are seeds of controversy, because Eddie Morgan came down to our judicial conference a couple of years ago and explained his Code the best he could in a two-hour speech. We had quite a lot of very hot fights. We didn't go into the merits of them at all. I mean there are certainly seeds of controversy there. Some of the oldtimers just buck like steers on a lot of Eddie's changes, not that I agree with them.

PROFESSOR CHERRY: Everyone who has attacked that problem has had similar experience.

JUDGE DOBIE: I don't mean it is not a good Code,

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but there are seeds of controversy there.

PROFESSOR CHERRY: I am corroborating your statement by reference to other parts of the country. I thought I recalled that this agenda statement was justified by something we did do.

THE CHAIRMAN: I don't think it is unjustified, but as conditions exist I think it gives a little stronger impression, that we have it on the table, and as soon as we get through with one job we are going to that one.

PROFESSOR CHERRY: I like Mr. Lemann's suggested wording for the comment.

JUDGE CLARK: I would rather do what Mr. Lemann has suggested as a second alternative to Senator Pepper's. It seems to me rather too bad to push it aside, perhaps partly because we have spoken already, and you will remember another thing: Walter Armstrong's rather good article on the amendment. You remember he had one, and in there there is a suggestion that the Code ought to be considered, and so forth.

SENATOR PEPPER: Mr. Chairman, I move that it is the sense of the Committee that the second of the two alternatives suggested by Mr. Lemann should be adopted, the phraseology to be left to the Reporter.

THE CHAIRMAN: The phraseology of the note under Rules 43 and 44.

SENATOR PEPPER: Yes, sir.

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JUDGE DOBIE: I second that motion.

THE CHAIRMAN: Is there any objection?

MR. TOLMAN: I would like to call your attention to the fact that the Bar Association has been working for one year on this proposition of rules of evidence to be presented to the Supreme Court under the rule-making power, and out of the entire code at least one-half of the provisions have been favorably considered by that committee as pure procedure. There was a difference of opinion as to other questions, and it is in process of debate. I think something will go to the Supreme Court of Illinois in the not too far distant future. The Supreme Court of Texas has already adopted part of the code by the rule-making power of that court. The Texas Bar Association is not quite in agreement with the action of the court. There are, I think, three states that are at work on that piece of work very earnestly. I think the whole tone of this note should be encouraging rather than discouraging.

SENATOR PEPPER: That was the thought that I had in moving the second of Mr. Lemann's suggestions.

THE CHAIRMAN: May we have that read now?

SENATOR PEPPER: May I add to what the Major has said that in Pennsylvania a committee of the Bar Association has reported adversely on the approval of the American Law Institute's Code of Evidence as a whole, has suggested the desirability of preparing a code of evidence for Pennsylvania, and I am doing

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what I can to prevent that step from being taken pending an ultimate decision as to whether there will be a uniform code. So, it does seem as if the Major's suggestion was sound that we ought to strike a note of encouragement and not impress the several bars with the idea that nothing is going to be done and that it is up to them to scatter all over the surface of the earth with various codes and various sets of rules.

JUDGE CLARK: In this connection, I think we ought to remember that Title 28 is being revised and, I think, rather extensively revised. It is to be a new Judicial Code. There have been some features of it that have worried me somewhat as to how that Code would operate the rules into the Code. That is a separate and important question. Whatever we don't do here, they are going to do, and I think that this will end by at least all the present provisions as to evidence being continued and perhaps some new ones added.

THE CHAIRMAN: You mean the present provisions of the U. S. Code?

JUDGE CLARK: Yes.

THE CHAIRMAN: What do you mean by saying that what we don't do, they are going to do? They don't legislate. They just codify, don't they?

JUDGE DONWORTH: I didn't understand what body it is that is considering the revision.

JUDGE CLARK: Officially it is the House Committee on

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the Revision of the Laws. Congressman Keogh, of New York, is the Chairman, and it is an extensive Committee. They have set up a great organization with the West Company as the editorial staff and Mr. Barron as the chief editor. They have a committee of judges. Judge Parker, Judge Maris, Judge Miller, and Judge Galstone are on the committee. And they have various consultants. In fact, I think they have everybody except this Committee.

THE CHAIRMAN: That hasn't anything to do with the question of evidence, has it?

JUDGE CLARK: First I was asked whether they were going to legislate. They are going to legislate. They have done the same thing on the Criminal Code, and Title 18, which is the Criminal Code, is already presented as a bill for a statute. Title 28 also will be. I don't know how far they are going to make new legislation. I have seen some drafts.

THE CHAIRMAN: Does it deal with evidence?

JUDGE CLARK: Not as a whole, no. It will deal with it only incidentally, it is true, but it will free such legislative control as already exists, at least.

SENATOR PEPPER: Could we have the reading of Mr. Lemann's suggestion?

THE CHAIRMAN: The only suggestion I have is that it means we never will undertake it. We can say, "So far it has not been feasible."

MR. LEMANN: Yes. Insert "so far," "up to this time."

THE CHAIRMAN: It might otherwise be construed as a decision by this Committee that we never will tackle the job.

MR. LEMANN: I think that would be a wise suggestion, and you might make it a little bit stronger provision, too.

SENATOR PEPPER: Suppose you state it again, Mr. Lemann, as a separate motion, instead of mine. Mine took the form of the sense of the Committee approving your second alternative. I withdraw that if you will propose an affirmative motion putting it as strongly as you think proper.

MR. LEMANN: Subject to further polishing, I would suggest this: "While consideration of a comprehensive and detailed set of rules of evidence seems very desirable, it has not been feasible for the Committee so far to undertake this important task. Such consideration should include the adaptability to federal practice of all or parts of the proposed Code of Evidence of the American Law Institute."

THE CHAIRMAN: That is good, isn't it?

JUDGE CLARK: Yes.

SENATOR PEPPER: That is excellent. I second that motion.

THE CHAIRMAN: If there is no objection, that alteration in the note to Rules 43 and 44 is agreed to.

MR. DODGE: Is Congress likely to repeal any of our rules?

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JUDGE CLARK: Is Congress what?

MR. DODGE: Is Congress likely to repeal any of our rules?

THE CHAIRMAN: Not wittingly.

JUDGE CLARK: I think that is the correct answer. I see no indication from the Committee that they are going to, but of course it is a ticklish subject. By reënacting some of these statutes they might do it.

THE CHAIRMAN: I wonder about the reënactment. The U. S. Code up to date is not an enactment. The revision committee revise the Code and drop out of it things that they think are obsolete and repeat things they think are still law. Then the statute provides, in adopting that Code, that it is _prima facie_ evidence of the law, the U. S. Code. If you want to know what the real law is and be sure about it, you have to go back to the Revised Statutes or the Statutes-at-Large and find out whether or not a certain law has been repealed or hasn't been repealed. So, I don't treat the Code as an enactment, except that Charlie is right about this: You get a _prima facie_ showing of some statute still being in effect that is in conflict with our rules.

MR. LEMANN: Ought we to take some formal action to request the Chairman of the Committee to permit us opportunity--

THE CHAIRMAN [Interposing]: We have done that. We have told them we would like to look at it.

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JUDGE DOBIE: Is that the Maris Committee?

JUDGE CLARK: Maris is on it. The head Committee is the House Committee of Congressman Keogh, but Maris is on a committee of the judges. Then, the West Company have some committee of their own. I will say that Mr. Moore is on the West Company's committee. They have quite a delegation when they all get together. I have written and have had very nice replies, but that is all there has been so far. Maybe we will hear further. I wrote Congressman Keogh after discussing it with Mr. Mitchell, and he replied very nicely and said he was turning it over to his staff. Perhaps Mr. Moore can tell you a little about it because he has attended some of the meetings.

I would like to ask, this is going to be an enactment, isn't it?

PROFESSOR MOORE: Congressman Keogh says that this is not to be a mere codification, that he is going to present it in the form of a bill, and that to the extent the Committee wants to change the law or enact new provisions, we should go ahead.

THE CHAIRMAN: This is something different, then, from what they have done before.

PROFESSOR MOORE: Yes.

SENATOR PEPPER: Mr. Chairman, may I say this by way of reminiscence? I was Acting Chairman of the Committee on the Revision of the Laws of the Senate and the House when we put the

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Code through. The idea of the Committee was the same as Mr. Keogh's idea, that it should be an enactment, but Senator Tom Walsh said that if we pressed it as an enactment, he would insist upon the bill's being read by the clerk, which is equivalent to killing it. He and I worked out the formula to which the Chairman has referred, making it prima facie evidence of the law but leaving it open for anybody, if he disputed the soundness of the Committee's work on a particular point, to show that the law was otherwise by a reference to the original statutes. I apprehend that, unless all the cranks have gone from the Congress by the time this new measure comes before them, they will meet the same difficulty. Somebody always insists that he is not prepared to vote for a blanket enactment of a thousand pages of something unless he is sure that it is all right, and he always has in his hands the destructive weapon of his parliamentary right to insist that the thing shall be read by the clerk--and that is never possible. I have seen a number of measures of importance killed by insistence on that parliamentary right. Therefore, we have had to resort to the formula that you have just called attention to.

THE CHAIRMAN: On the thing that the Reporter speaks about, we have a set of rules, and we are a little bit worried for fear this Revision Committee may abrogate some of our rules--unwittingly, not intentionally, maybe. That involves the question of whether this Committee ought to check that

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revision when it is in preliminary form against our rule. That presents the question of whether we have any authority to monkey around with acts of Congress without authority from the Court. We are supposed to advise them as to what they ought to promulgate. Of course, we will have to get the Court's permission, which we could doubtless get. Then that would mean also that we would have to have an appropriation, because if our staff is going on with the job of checking our rules against the statute, it is a big staff job that will have to be done, and we will have to get the money to pay for it. In the correspondence going back and forth I have suggested that we would like the opportunity of looking at the draft as soon as they get it in shape, and then if we can get the permission of the Court and the appropriate funds, and if our staff is willing to undertake it, we will set them to work on it.

SENATOR PEPPER: Did you put Mr. Lemann's motion? I guess you did. That passed, didn't it?

THE CHAIRMAN: Yes.

SENATOR PEPPER: The Reporter expressed himself as satisfied with it.

JUDGE CLARK: Oh, yes.

THE CHAIRMAN: He agreed to that.

JUDGE CLARK: Might I add just one thing more?

SENATOR PEPPER: Then, that stands, and it will appear

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in the notes as the judgment of the Commitee.

JUDGE CLARK: I want to add just one thing more about the statute matter. A similar question, if not almost identical, comes up in connection with the Criminal Code, which is farther advanced, and I have been trying to get Arthur Vanderbilt worked up about it. I don't know that he is very much. I don't think he appreciates it. I have already received, as perhaps some of you have, the proposed bill to enact Title 18. That is the new Criminal Code. In that they have interspersed the Criminal Rules. I mean they have broken them up and put them in what they thought was more proper order and incorporated them in. I suppose in some ways that is a good thing to do, except that again you can see how dangerous it can easily be. Some of you may get that bill. It is a fat document. You can see what they are doing on the Criminal Code.

MR. DODGE: As long as our organic act of 1934 stands, can Congress change our rules?

THE CHAIRMAN: Oh, yes, anytime.

MR. LEMANN: It is just a statute.

THE CHAIRMAN: It is a question of which is last in point of time. They can pass a statute tomorrow modifying any practice rule we have. The Court can turn around the next day, if they can get Congress not to veto it, and put it back again. It is like a treaty and a statute. The one last in

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point of time controls.

Shall we pass on now to Rule 45? Has there been any suggestion on subdivision (b)?

PROFESSOR SUNDERLAND: I thought we might add in line 5 after "quash", the words "or modify".

JUDGE CLARK: I should think that might be a good idea.

JUDGE DOBIE: In other words, just because there is something wrong with it, you don't want to withhold it completely or deny it completely, but to change it a bit. That sounds plausible.

THE CHAIRMAN: It is suggested that in line 5 of Rule 45(b), after the word "quash", insert the words "or modify". Is that agreed to? All right.

PROFESSOR SUNDERLAND: Then I would suggest that the language in (b) and (d)(1) isn't identical. In lines 2 and 3 you refer to "books, paper, documents, or tangible things". In line 19 you refer to "documents or tangible things". I think they both ought to be the same. So, I suggest that in line 19, after the word "designated" we insert the words, "books, papers". Then it would read, "designated books, papers, documents, or tangible things", which is exactly the language that we have in (b).

PROFESSOR CHERRY: I so move. I hadn't noticed it.

JUDGE DOBIE: I second it.

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THE CHAIRMAN: Is there any objection? That correction is in subdivision (d)(1) of Rule 45. If there is no objection, that is agreed to.

JUDGE CLARK: We made some changes in (2) according to the vote.

MR. LEMANN: I wanted to ask about that, particularly the last sentence, the last clause, "at such other place as is fixed by an order of court." Could you make a man go more than 100 miles by an order of court after you did this? Generally you can't require a witness in a civil case to attend more than 100 miles from his residence, but I wondered, if you put in as broad a statement as this is, whether you could do it.

JUDGE CLARK: That, of course, has been in. That was in the original rule.

THE CHAIRMAN: The phrase in lines 27 and 28 were not.

JUDGE CLARK: That is the only thing that is added to it. What Monte is talking about is the last sentence, as I understand it.

MR. LEMANN: Yes. The last sentence, "such other place as is fixed by an order of court." It is repeated in 31, but it is in 27 also. It is in and has given no trouble. I withdraw my comment.

JUDGE DOBIE: I don't see why you ought to restrict him to the county.

THE CHAIRMAN: "may be required to attend an

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examination only in the county wherein he resides or is employed or transacts his business in person, or at such other place as is fixed by an order of court."

The court might make an order so that the place of attendance would be infinitely more burdensome than the county of residence.

JUDGE DOBIE: Or it may be less burdensome, General.

THE CHAIRMAN: I know, but we are worried about it being more so.

JUDGE DOBIE: I think you can leave that to the court. I don't see why a resident should have the right to say, "You can't take me outside of my county." You can drag the witnesses, you know, a long distance.

JUDGE CLARK: This came from a gentleman in Boston who had some suggestion about the county lines there, that it would be much easier for him to step across the county line into Boston. I am not giving you the exact statement, but that was the general approach.

JUDGE DOBIE: I think you can leave that to the court. I believe it is a good provision.

JUDGE CLARK: Mr. Dodge probably remembers the county lines better than I, but this gentleman said it would be much easier to go into Boston itself than to go back in the country somewhere to the county seat.

SENATOR PEPPER: That is my case. It is much easier

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for me to get from where I live in Chester County to Philadelphia than it is to go to the county seat at West Chester.

JUDGE CLARK: That is what it was designed to hit.

THE CHAIRMAN: It was the intention to ease the situation and not to make it more burdensome. The way it is worded, it gives the court a chance to require a man to undertake more trouble than the original rule.

JUDGE DOBIE: We have committed a lot more important things to the discretion of the court. It seems to me that this is quite small compared to some of the things.

PROFESSOR SUNDERLAND: I wonder if we can introduce the word "convenient" after the word "other", so as to give a sort of test to the court to make its order.

SENATOR PEPPER: I was going to say that or even "such other more convenient place as may be fixed".

PROFESSOR SUNDERLAND: Yes.

SENATOR PEPPER: That shows it is a ceiling and not a floor.

MR. LEMANN: Convenient to whom?

PROFESSOR SUNDERLAND: The parties.

JUDGE DOBIE: I wouldn't put "more" in. I am willing to put in "convenient", but I think to have the court squabbling over whether Turkeyville or Goosewood Gap was more convenient--

SENATOR PEPPER [Interposing]: That is right. "such

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other convenient place".

JUDGE DOBIE: I think "convenient" is fine. That gives a little standard.

MR. LEMANN: Put it in both lines, then.

PROFESSOR SUNDERLAND: If we do that in 27, we do it in 30.

JUDGE DOBIE: That is right, before "place".

THE CHAIRMAN: Then, for the record, in Rule 45, subdivision (d)(2), line 27, insert the word "convenient" before the word "place".

MR. LEMANN: Wasn't it "more convenient"?

THE CHAIRMAN: No.

JUDGE DOBIE: And at the end of line 30.

THE CHAIRMAN: And at the end of line 30 insert the word "convenient". Is there no objection to that? That is agreed to.

We are up to Rule 50. Has anybody any suggestion as to (a)? Apparently there is nothing new in that.

JUDGE CLARK: Just a change of title.

THE CHAIRMAN: Oh, yes. Anything to suggest about (b) of Rule 50?

PROFESSOR SUNDERLAND: In line 24 I thought we should have that sentence cover both verdict and judgment, having it read: "The court may allow the judgment or verdict to stand". There may not be a judgment; there may be just a verdict.

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MR. HAMMOND: "verdict and judgment"?

PROFESSOR SUNDERLAND: "verdict or judgment", whichever it is. If there is a judgment there, it would be the judgment. If there isn't any, it would be the verdict.

JUDGE DOBIE: Don't some courts take a little time in entering judgment on the verdict?

PROFESSOR SUNDERLAND: Our rule on new trials indicates it may be either way. "On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered". We contemplate there that the entry of the judgment may not follow immediately upon the verdict.

THE CHAIRMAN: This is a directed verdict, isn't it, that we are talking about?

PROFESSOR SUNDERLAND: But the judgment may not be entered on it. There may be a motion right after the verdict is in.

THE CHAIRMAN: The rules require that, as soon as the verdict is rendered, the clerk shall enter the judgment.

PROFESSOR SUNDERLAND: No, according to our Rule 59 we contemplate that it may not happen that way.

THE CHAIRMAN: I see.

PROFESSOR CHERRY: What is the suggestion, again?

PROFESSOR SUNDERLAND: In line 24 it would read this way: "The court may allow the verdict or judgment to stand or

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may set it aside".

JUDGE CLARK: "or may vacate it".

PROFESSOR SUNDERLAND: Would you vacate or set aside a judgment?

SENATOR PEPPER: "set aside" is better if you are going to apply it to both, because you don't usually vacate a verdict.

PROFESSOR SUNDERLAND: But you can set aside either a verdict or a judgment.

JUDGE CLARK: In either case it must be a court order, I suppose. Suppose the court directs a verdict. That is a court order. We sort of metaphorically speak of it as a verdict.

THE CHAIRMAN: I don't really think it is necessary to change that. "The court may allow the judgment to stand or may vacate it". Suppose there isn't any judgment. That is all right. "and either order a new trial or direct the entry of judgment for the moving party." Whether there is a judgment to vacate or not, if only a verdict has been returned, he can order a new trial or direct the entry of judgment for the moving party. So, really, you don't have to make any other condition there. It would fit the case where there hasn't been any judgment as yet.

JUDGE CLARK: Isn't that setting aside his own verdict, so to speak? That is perhaps all right. I guess we

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know what it means. I should think that was quite metaphorical. What he is doing is changing his order of direction, really. I guess that is pretty technical, but nevertheless I wonder if you can set aside your own verdict.

THE CHAIRMAN: Of course, this is not that case. We are dealing with a jury trial here, as I understand it. All of this relates to jury trial.

PROFESSOR SUNDERLAND: This is jury verdict.

THE CHAIRMAN: We are not talking about a verdict by a judge or a finding by a judge. Don't you think, Edson, that what I say about line 24 is probably right?

PROFESSOR SUNDERLAND: I suppose you would have to insist on a judgment being rendered then.

THE CHAIRMAN: It says, "The court may allow the judgment to stand or may vacate it".

MR. HAMMOND: Suppose there isn't any?

THE CHAIRMAN: All right, suppose there isn't any. Then he may "either order a new trial or direct the entry of judgment". So, it is perfectly plain whether there is a judgment or not. If there is one, he can set it aside, if he wants to, and order a new trial. If there isn't any judgment, he can direct one to be entered.

SENATOR PEPPER: In other words, to set it aside.

THE CHAIRMAN: No, no. He may "either order a new trial or direct the entry of judgment". "direct the entry of

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judgment" is an affirmance of the verdict. I don't care. It is a matter of phraseology. What is your proposal, Edson? How would you word it?

PROFESSOR SUNDERLAND: Have it read this way in line 24: "The court may allow the verdict or judgment to stand or may set it aside".

MR. HAMMOND: "or may set the verdict aside or vacate the judgment".

SENATOR PEPPER: "set aside" is a good expression for either a verdict or a judgment. "vacate" is peculiarly applicable only to a judgment.

PROFESSOR CHERRY: I don't see any necessity for it. Of course, if he orders a new trial, that is the end of the verdict.

PROFESSOR SUNDERLAND: Then he doesn't allow the judgment to stand, does he?

PROFESSOR CHERRY: No, but we have provided for that.

THE CHAIRMAN: How would your statement in 24 read, please?

PROFESSOR SUNDERLAND: "The court may allow the verdict or judgment to stand or may set it aside, and either order a new trial or direct the entry of judgment".

JUDGE DOBIE: "for the moving party."

THE CHAIRMAN: What is your pleasure with that?

SENATOR PEPPER: I move Mr. Sunderland's proposal.

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THE CHAIRMAN: Any objection? It is agreed to.

Is there anything further on this rule?

MR. TOLMAN: Mr. Chairman, I have a suggestion in this rule that you have passed by, and I didn't get to it. In line 17 of Rule 50 I suggest that we bring the verb right up to the beginning. "to set aside the verdict and any judgment entered thereon". Then strike out at the end of the line the words "set aside". In the line next, "and for judgment" instead of "to have judgment entered".

THE CHAIRMAN: "and to move for judgment"?

MR. TOLMAN: Yes.

THE CHAIRMAN: "in accordance with his motion for directed verdict." Did you get that?

JUDGE CLARK: I think so.

THE CHAIRMAN: It is an improvement in the verbiage, all right.

JUDGE CLARK: That must have been done by Mr. Velde originally. This was in the original rule.

MR. DODGE: Where is that?

JUDGE CLARK: Lines 17 and 18 of Rule 50(b).

THE CHAIRMAN: It would read this way: "at the close of all the evidence may move to set aside the verdict and any judgment entered thereon and for judgment in accordance with his motion for directed verdict."

MR. TOLMAN: Yes.

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JUDGE DOBIE: I think that is an improvement.

THE CHAIRMAN: If there is no objection, that is agreed to. Is there anything else on Rule 50?

MR. DODGE: I am wondering about that last sentence, the last sentence of the rule. "and shall be effective only in the event that the judgment is reversed and the case is remanded by the appellate court for further proceedings." Suppose the judge has allowed the motion for judgment but has denied the motion for new trial. Does the denial of that motion become effective when the court sends the case back for new trial?

JUDGE CLARK: I suppose then it is a matter for the appellate court also to rule on. I should take it that it almost necessarily then would have to hold that action also erroneous.

MR. DODGE: The motion for new trial is based on the fact that even if there was an error in directing the verdict, if there was error in directing the verdict, nevertheless there was an overwhelming weight of evidence against it; that is, the verdict was against the weight of the evidence. In the federal courts, however, a motion that should be set aside on that ground leads to the conclusion that a verdict should be directed, doesn't it? In federal courts the verdict should be directed if the evidence is so overwhelming that it should be set aside if granted for the plaintiff.

PROFESSOR SUNDERLAND: Not quite that. I think they

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hold that where it is so clear that as a matter of law it would have to be set aside, then they direct the verdict, but if as a matter of discretion it would have to be set aside, they wouldn't direct the verdict. That point has been made in some of the federal cases.

MR. DODGE: The motion for a new trial might be based on something altogether independent of the verdict.

JUDGE DOBIE: Erroneous rulings.

MR. DODGE: It might be based on misconduct of a juror.

MR. LEMANN: That isn't what this is supposed to cover, as I understand it. This is a case where you represent the defendant, and you have moved for a directed verdict. That has been denied, and the case goes to the jury, and the jury finds for the plaintiff. Then you make a motion for judgment notwithstanding the verdict or for a new trial. You say to the judge, "Either you ought to throw this guy out or you ought to send it back to try it over again and let the jury take another whack at it." In that case the court enters a judgment directing a verdict for the defendant. They are not going to have any trial.

MR. DODGE: Denies the motion for new trial.

MR. LEMANN: He doesn't say anything about it. In effect he does. Then the case is appealed. This seems to be the case noted here on 57.

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THE CHAIRMAN: Haven't you missed a cog under this rule in Roberts' decision? He makes a contemporaneous ruling on the motion for new trial and, as I get the drift of this, that means "I will set aside or grant judgment notwithstanding the motion--"

MR. LEMANN [Interposing]: "--and deny the motion."

THE CHAIRMAN: No, he doesn't deny the motion. He says, "As long as I have granted judgment, I won't grant the motion for new trial, but I make a contemporaneous ruling on it that if the judgment is set aside, I will at least grant a new trial." That is what you are driving at here, isn't it?

JUDGE CLARK: Yes, that is what we are driving at.

THE CHAIRMAN: That is what Roberts tried to get the court to pass on, to pass contemporaneously on the motion for a new trial to indicate what the trial judge would do with that in case he hadn't granted judgment or in case the judgment was ordered set aside. So, you see, now you have the trial judge's order granting judgment notwithstanding the verdict, coupled with a contemporaneous ruling on the motion for new trial that he would grant that if his judgment is set aside or wouldn't grant it. He might take either course. Then that goes to the court of appeals. Now what happens next?

MR. LEMANN: I suppose, if he is logical, if he grants the motion for a directed verdict or for judgment notwithstanding the verdict, he would be bound to say, "If I am

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wrong about that, at least this case should be tried over again."

JUDGE CLARK: Not necessarily.

MR. LEMANN: Not necessarily?

JUDGE CLARK: He might be emotionally that way, but if he thinks the trial has been fair, he ought really to deny the motion for new trial, and that could happen. That is, he may say, "I think in law that there should be a directed verdict this way but, if I am wrong about that, the trial has been fair enough, and therefore the verdict should stand. I will deny the motion for new trial." He could do it either way, you see.

THE CHAIRMAN: Then you say that that order denying the new trial is effective if the order for judgment is reversed on appeal with instructions for further proceedings. What further proceedings can there be, if the new trial has been denied by the district judge, even if the judgment is ordered to be vacated, if it comes back and that is effective?

The point about this, which I have made in the note to the preliminary draft, I think, is that it is very complicated, and to apply Judge Roberts' decision you have to visualize a variety of different cases. I don't feel that we have safely visualized every situation that may arise. Then, there is this business about making it effective only in the event the judgment is reversed and the case is remanded for further

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proceedings. Maybe the court remands the case, and its directions are inconsistent with the order that the trial judge has made on the motion for new trial. I am sure that you are going to have trouble with this thing, and you are going to find that there is a hole in it somewhere.

MR. LEMANN: The judge might do one of three things in this situation. He might not pass on the motion for new trial or---

MR. DODGE [Interposing]: He is required to rule on it.

MR. LEMANN: I mean apart from this rule. He might say, "I won't act on this," or he might say, "I will grant it," or he might say, "I will deny it." I have a little difficulty myself in visualizing how he grants it, but that is what the judge seems to have done in the case reported on page 57. He entered the judgment notwithstanding the verdict, and he also granted a motion for a new trial.

THE CHAIRMAN: This says, "shall be conditioned upon".

MR. LEMANN: The upper court read a condition into his order which he must have had in his mind. I don't see how they could make any sense from his order except by reading the condition into it. That is what the appellate court did there. I inferred that that was what the rule was undertaking to embody.

SENATOR PEPPER: I had this case: The Tax Court had made findings of fact and entered judgment against a

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taxpayer, and an appeal was taken to the C.C.A. for the First Circuit. The C.C.A., realizing that it was the business of the Tax Court to find the facts, not the business of the C.C.A. to substitute its judgment on the facts, nevertheless thought that the trial before the Tax Court had not been fair to the taxpayer and remanded the case to give the Tax Court a second shot at it in the light of certain statements of the law made by the C.C.A. The Government, instead of going back to the Tax Court, got a certiorari and, in arguing to the Supreme Court, I said, "This is simply that familiar case not in which the court is substituting its judgment for that of the jury as the trier of the facts, but that in which, as all Your Honors with nisi prius experience will recall, you can order a case remanded for a new trial by the triers of the facts in the light of the instructions given by the court on matters of law."

When I said that to the court, Mr. Justice Jackson grinned at me with evident apprehension that maybe I was talking to the wrong crowd.

The Court held that the circuit court of appeals had been powerless to do the thing which they had done and that they were bound by the findings of fact, that you couldn't send the thing back for a new trial.

It is really so familiar to you, if you have been trying cases, that there are loads of cases in which you don't want the court to make new findings to supersede those made by

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the jury but, the trial having been unfair to the losing party, there ought to be a new trial. That is the thing that we are dealing with here, and I think we have got to spell it out because there is a lot of confusion about it.

THE CHAIRMAN: When you say "contemporaneous ruling on the motion for new trial" by the district court, that is the first place where it is suggested that he, having ordered judgment, shall go on and make a ruling on the motion for new trial. You just assume that he will do it.

PROFESSOR SUNDERLAND: The first sentence requires him.

MR. LEMANN: The preceding sentence requires him to dispose of it.

THE CHAIRMAN: But that is a little different thing. "dispose of the alternative motion for a new trial when ruling on the motion for judgment." That also requires him. "I will grant the motion for judgment and, therefore, I deny the motion for new trial." Then the rule goes on to say that that order denying the new trial should be effective if the order for judgment is reversed. You get back in the district court with an effective order denying a new trial, when the district court wanted it to go so far as to grant judgment for the other side and would at least grant a new trial.

I say that the trouble here is that we are not sure that we have got the thing doped out right. It says it shall

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be effective in case the judgment is reversed and remanded for further proceedings. Suppose the mandate of the circuit court of appeals is inconsistent with the order about the motion for new trial that the district judge has made, and yet an order granting or denying a new trial as an alternative to the judgment would be made effective in the face of a mandate of the circuit court of appeals the other way, telling him to do something else. I think you can dig out cases in your imagination and find your trouble in this paragraph.

Maybe my objections here are based on prejudice against the conclusion that Justice Roberts reached. I think that if the judge below grants judgment as a matter of law for the defendant, why should he have to bother his mind as to whether there has been misconduct of a juror or improper conduct of the lawyer in the court room or evidence received improperly or anything of that kind? He disposes of the case, and all those things are unimportant. What I think the Supreme Court ought to have done was to say, "If they are made in the alternative and the trial judge grants the judgment notwithstanding the verdict and we or the court of appeals reverse it, then the court of appeals in an appropriate case, unless the case is disposed of on a point of law that makes a new trial unnecessary, should remand the case with instructions to the district court to do thus and so, subject to his picking up then his discretionary motion for a new trial and passing

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on it so as not to deprive the district court of its discretionary power over motions for new trial." That is the way that thing ought to have been done, but Justice Roberts said that when they are made in the alternative, you decide both of them. You decide the motion for new trial in the district court on the assumption that your order for judgment isn't going to stand. It is a hypothetical decision that you would have granted the new trial or wouldn't have granted it if this judgment didn't stand. Then, when you come back, that is the order that prevails if the judgment was reversed.

PROFESSOR SUNDERLAND: It pretty nearly makes it a moot question, doesn't it, if the court has decided?

THE CHAIRMAN: It does, unless the judgment is reversed. It involves digging into all sorts of questions that may be very difficult and troublesome, that are important on a motion for new trial but of no importance at all on a motion for judgment. He now has the thing fixed so that the judge has to do both. If I were district judge, I would be mad at having to render a hypothetical decision on a motion for new trial. I would say, "If you do set my judgment aside, then remand the case and I will then consider the motion for new trial."

SENATOR PEPPER: Or the appellate court may reverse and order a new venire.

THE CHAIRMAN: Well, yes, the appellate court can do almost anything.

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SENATOR PEPPER: I mean with us in Pennsylvania that is common practice. Where judgment has been entered on a motion for an instructed verdict and the losing party goes up, if the Supreme Court thinks the lower court was wrong but thinks also that there should be a new trial, it remands the case with instructions to grant a new trial.

THE CHAIRMAN: Yes. Suppose this district judge makes an order saying, "If this judgment that I have ordered doesn't stand, I won't grant a new trial." Then the upper court remands the case with instructions to conduct a new trial. Yet our rule says that the order of the district court on the motion for new trial shall be effective only in the event judgment is reversed and the case is remanded by the appellate court for further proceedings. So, you have a rule giving effect to a hypothetical order of the district court that he won't grant a new trial in the case of a mandate ordering it.

SENATOR PEPPER: Isn't the logic of your observations, sir, that the rules should provide that if motion for judgment is granted by the district court, the court shall not rule on the motion for the new trial?

THE CHAIRMAN: That is what I would do, but Judge Roberts said that the proper practice was for him to do it. One reason I object to this is that we are putting in the rule something that perpetuates a clumsy practice that the Court thought was working out a fine scheme to handle this thing, and

I don't think it does. I would dislike to see the idea of the district judge having to pass on both motions perpetuated in the rule.

SENATOR PEPPER: The only way we can prevent that is by a negative provision, then leaving it in the hands of the appellate court, where it ought to be. They can reverse and remand with instructions to grant new trial.

THE CHAIRMAN: Or they can reverse and remand with judgment on the verdict.

SENATOR PEPPER: Certainly.

THE CHAIRMAN: Unless the court, taking up the pending motion for new trial, which has never been passed on, in its discretion grants it.

JUDGE CLARK: I would like to say something about this. Of course, in one sense it isn't my baby; it is Justice Roberts', but I really don't think it is quite so bad. The idea, of course, is to avoid unnecessary procedure, unnecessary re-trials when they are not necessary or otherwise. When the matter comes to the Supreme Court and the Supreme Court decides that the directed verdict is erroneous (and that is one of the most usual decisions now, because they are very strong for jury trials), what are they to do next? The most immediate thing they would think of would be to direct entry of judgment on the verdict, but there still may be grounds for a new trial that haven't been considered, and therefore the upper court

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hesitates to direct entry of an order for judgment on the verdict. What are they to do? Are they always to order a new trial or are they always to order entry of judgment on the verdict which the court below has not accepted?

If they have the final reaction of the district judge to all the questions, then they can pass on it, and I don't think it is out of the way for the upper court then to take one of the two positions which it may take--one of the two, because it has already decided to reverse. It may then say, "The trial judge had sound reasons for ordering a new trial, and therefore that is the order." Or it can say, "The trial judge has denied a new trial without sound reason or, if he thinks there were sound reasons, we don't agree, and he was also in error in denying new trial. Therefore, we will direct entry of judgment on the verdict."

As to the wording here, I wonder if it is still so incomplete. The suggestion was that there may be an inconsistency between the mandate of the upper court and the rule. A mandate of the upper court controls the action, whatever it is.

THE CHAIRMAN: Not the rule. The inconsistency is between the mandate of the upper court and the order made by the district court on the motion for new trial. You say that order should be effective in the case of reversal, remanding for further proceedings.

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JUDGE CLARK: What we really mean is, remanded by the appellate court for further proceedings, without other directions.

THE CHAIRMAN: I would say that what you intended to say was this: "shall be effective only in the event the judgment is reversed and the case is remanded by the appellate court for further proceedings consistent with the trial court's ruling on the motion for new trial." That is probably a different way of saying it, but that is the idea I had.

MR. DODGE: Do you mean to take away the discretion of the appellate court and commit the whole matter to the lower court, when the motion for new trial in the lower court was based on the misconduct of a juror and it was overruled, but the appellate court feels that the case has probably not been fully tried and thinks that, instead of entering judgment on the verdict, it should have sent it back for new trial?

THE CHAIRMAN: And the district court has filed a previous order on that motion for new trial, denying it.

MR. DODGE: Denying a new trial.

THE CHAIRMAN: That is the case I am talking about. You put your nose down on this draft and you will see that, under the terms of this rule, it says that when that mandate goes down, the trial court's order denying new trial shall be effective if the case is reversed and remanded for further proceedings. I say that what we meant was that it shall be

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effective only if the reversal and the mandate that goes down from the appellate court are consistent with what the district judge did on the motion. It doesn't say that, and on the face of it, it is an absurdity. Maybe that is one reason why it would be given the proper construction. I made a note about this thing at the time of this other draft that:

"One member of the Committee would strike out from this proposal in line 36 everything after the word 'judgment' and strike out lines 37 to 43. This member's view is that the provision objected to is an attempt to condense in a few lines the proper practice in disposing of alternative motions for judgment, or for a new trial, prescribed by the Supreme Court in Montgomery Ward & Co. v Duncan (1940) 311 U.S. 243, and he thinks the provision is too condensed, will not always have the effect which the draftsman intended, and does not visualize all the possible situations that may arise, and it is better not to attempt to state in the rule the practice prescribed in the Montgomery Ward case."

JUDGE DOBIE: Won't the mandate of the appellate court take care of those situations? Whatever the ruling of the trial judge has been, the mandate of the appellate court is going to tell him what to do.

JUDGE DONWORTH: It will if this rule lets it do it. I think that is the whole difficulty here. We are undertaking to make a rule that may be in conflict with the decision that

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the circuit court of appeals makes in its desire to do justice. Whatever we say about the subsequent proceedings after reversal in the circuit court of appeals, we should say, "unless otherwise directed by the circuit court of appeals." That is all we have to say. We can lay down the rule as to what should be the case "unless otherwise directed by the circuit court of appeals", but we certainly should not have a rule that would create a conflict between it and the circuit court of appeals, which is there to do justice on the entire case, by some ironclad rule that we draw here in ignorance of what the situation is. Make it all subject to "unless otherwise directed by the circuit court of appeals."

PROFESSOR CHERRY: There are two matters, aren't there, in what you suggested, Mr. Chairman? One is the wording of this, to make sure that there is no inconsistency between this action and the mandate; and the other, which I think is more vital, is as to whether there should be any such provision at all.

On the wording, it seems to me that a relatively simple modification here would take care of that. Instead of saying in 40 to 42 "and shall be effective only in the event", say "shall not be effective unless the judgment is reversed and the mandate permits", some such wording. That is the negative and not the positive.

THE CHAIRMAN: That is just the way of getting at the

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thing. That is one of the points I am making about the draftsmanship. I am worried that there may be a lot of other things like that that we haven't seen.

PROFESSOR CHERRY: I think there is a great deal to that other. It is entirely unrealistic to expect the trial judge, who has heard the argument on the law as applied to the evidence taken in this case and concluded to grant a directed verdict and that there should be judgment, to go on and take care of one of these many branched, many headed motions for new trial, with all the grounds involved in them. It is a moot question, as Mr. Sunderland suggested, for that is what he would regard it as being, to give serious consideration to what is going to happen if he is reversed on a thing he thinks is so clear that he is ready to order judgment and to have that stand, even if the mandate permits it, because he just isn't in most cases going to give serious consideration to the things you mentioned--newly discovered evidence and all the other grounds for a new trial. If he says, "It is clear beyond peradventure to me that there should be judgment," that is going to stop it. If, as Mr. Justice Roberts indicates, we are going to make him say, "I also pass on the new trial motion," I don't think he is going to do it on those other grounds.

THE CHAIRMAN: That is what the opinion of the Supreme Court is supposed to do.

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PROFESSOR CHERRY: I think he may on the one ground, on the weight of the evidence, because he has been considering that in considering the motion for judgment notwithstanding, but these other things (whether there has been a fair trial, misconduct of parties, misdirection of judgment, and all the rest of it) are entirely alien to that. I just don't think it is realistic to expect him to go into all those when in his view anything of that sort isn't necessary.

MR. DODGE: Did the Supreme Court suggest in that case that, if the judge below had denied the motion for new trial, that was conclusive on them and they could not order a new trial?

JUDGE CLARK: Oh, no, and I hadn't supposed that this suggested it. I mean, I didn't suppose there was anything inconsistent with the mandate even suggested.

MR. DODGE: Why not? You say his action on the motion is effective if the judgment is reversed; that is, if a verdict was improperly directed.

JUDGE DONWORTH: It should say, "unless otherwise directed by the appellate court."

JUDGE CLARK: As I was suggesting a few minutes ago, I would suppose that would be understood, anyway. I don't know that there is any objection to putting it in. What I suggested was, "is remanded by the appellate court for further proceedings, without other direction", or the language that

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Judge Donworth suggested, but I would suppose that it would always be understood that if the appellate court has made a direction, that controls.

THE CHAIRMAN: When did that decision in Montgomery Ward come down? Do you know the date of it?

JUDGE CLARK: Yes, it is in here, 1940.

THE CHAIRMAN: It has been there five years, and we haven't had any rule. I think the lawyers can get just as much instruction out of Roberts' decision as to how to do it as anybody can get out of this draft. They have been going to his decision for instructions about this alternative motion business for five solid years. Unless we are going to do a workmanlike job on this thing, a perfectly safe one that we all have confidence in, why not let them go on and use Roberts' decision as their chart instead of a rule? It is all well enough to say that we think it must be assumed that the order of the district court on the motion for new trial is not going to be effective if the mandate of the appellate court is inconsistent with that, but we don't say so, and when we find a provision which on its face is so ineffective that you have to read something into it that isn't there, then that begins to make me wonder how many situations there are under this confounded practice that we haven't visualized and haven't covered.

SENATOR PEPPER: Would the difficulty that you have

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in mind be met at all if this rule were to read somewhat as follows? I am referring now to line 38.

"If the motion for judgment is granted by the district court, the court may in its discretion either dispose of the motion for a new trial or decline to do so. In the latter event, [that is, if he declines the disposal of the motion for new trial, so that it is still pending] if on appeal the judgment is reversed, the trial court may then dispose of the motion for a new trial, unless the appellate court shall have otherwise ordered."

JUDGE DONWORTH: That is good.

MR. LEMANN: Suppose he does dispose of the motion for new trial. You have covered the case where he may elect not to.

SENATOR PEPPER: I don't think you have to provide that if he refuses a new trial and enters judgment on the verdict, then the appellate court may reverse that judgment.

PROFESSOR CHERRY: That isn't the situation. He has granted the motion.

MR. LEMANN: He has granted the motion for new trial.

PROFESSOR CHERRY: He has granted the motion for judgment and denied the motion for new trial. That is the situation you have in mind.

MR. LEMANN: No. I was thinking of the case reported here, where he has granted the motion for a directed verdict

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and has also granted the motion for a new trial.

THE CHAIRMAN: In other words, he has said what he would do with a motion for new trial if the judgment doesn't stand.

MR. LEMANN: Yes, but Senator Pepper's formula would not cover that case.

SENATOR PEPPER: If his judgment is that there shall be judgment on the verdict and no new trial, then it is perfectly clear that the appellate court may set aside the judgment on the verdict and instruct him to grant a new trial or enter judgment without a new trial. You don't have to provide that. That is a matter of appellate procedure. They have that power. What we are trying to do is to provide what the district court's duty should be, and I say that "the court may in its discretion either dispose of the motion for a new trial or decline to do so. In the latter event"--that is where he has declined because the first event, his judgment, goes up and stands, is reversed, or is modified according to the judgment of the appellate court. But if he has declined to grant a new trial and the judgment is reversed, "the trial court may then dispose of the motion for new trial, unless the appellate court shall have otherwise ordered."

THE CHAIRMAN: That is repeating the Roberts' decision.

SENATOR PEPPER: Is it?

THE CHAIRMAN: Yes. Roberts said he shouldn't simply deny the motion for new trial because he has granted judgment, but that he must consider the motion for new trial and dispose of it simultaneously on a condition, to wit: "I have granted judgment, but if that doesn't stand, this is what I would do with a motion for new trial. I would make an order that, if the judgment doesn't stand, then a new trial is granted." That is what Justice Roberts wants him to do. So, he does pass on it in the alternative; that is to say, on the condition that his best judgment about the case is wiped out.

SENATOR PEPPER: I agree that that isn't a realistic way of dealing with it, and it does seem to me that if we submit to the Court a rule which clearly makes it optional with the trial court to dispose of the motion for a new trial when he enters his judgment or to decline to do so, that is a reasonable discretion to give him, because then when the case goes up to the Supreme Court, the Supreme Court may either make an order that is consistent with the new trial, in which case the motion is pending and can be disposed of, or make an order inconsistent with the new trial, which is final.

THE CHAIRMAN: I suppose I am prejudiced against it. I hate to see the double action that Justice Roberts' opinion calls for embodying in this rule, because this alternative motion business is a common thing out in the country I came from. You have it in Minnesota, and a great many of the code

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states have it. It is just as simple as daylight. In the forty years that I practiced out there, if you made a motion in the alternative, and the court granted judgment notwithstanding the verdict, declining to rule on the motion for new trial, if that judgment was reversed on appeal and the case was of such nature that the appellate court didn't dispose of it the other way on a question of law, it would just simply remand the case for judgment on the verdict, unless the court on consideration of the motion for new trial--

SENATOR PEPPER [Interposing]: That is precisely what I provided here.

THE CHAIRMAN: Justice Roberts doesn't like it. In the decisions that were cited in his opinion of the state practice that this thing was taken from, they did it just that way. There was no such thing as the hypothetical disposition of the motion.

MR. LEMANN: As I understand it, notwithstanding Justice Roberts, non obstante, if you were writing the practice, you would say that if the motions were made in the alternative, the trial judge shall never pass on the motion for new trial if he grants the motion for judgment, but he shall simply hold that alternative motion for new trial in abeyance until the appellate court has acted and then take such action as the opinion of the appellate court directs him to take with respect thereto. That is the way you would write it, as I

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understand it, if you do, you are telling Justice Roberts he was wrong, and maybe we shouldn't do that, but, query: If we are agreed to do it, and if that would be the simplest way of directing the practice, ought we to do it?

SENATOR PEPPER: And isn't there the other alternative to leave it optional with the court whether he will dispose of the motion for new trial or not?

MR. LEMANN: No, if you do that, Senator, I think you are leaving open this Pandora's box or conjuring trouble, because if he exercises his option, you have all these difficulties.

SENATOR PEPPER: I don't see the difficulty, if he exercises his option and refuses the new trial.

MR. LEMANN: Suppose he grants it.

SENATOR PEPPER: I want to take them in the alternative. He refuses the motion for a new trial and enters his judgment. The thing that comes up for review is that double action. The court above either can affirm altogether or may reverse the judgment which has been entered and reverse the decision not to grant a new trial and send it back for a new trial. We don't have to give the appellate court that power. It has it. What we have to do is to provide for the contingency in which he exercises his option not to rule on the motion for new trial, which leaves it pending, in which case the normal provision is that when the case comes back with a reversal on

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the directed verdict, the court may then dispose of the motion for new trial, unless the appellate court has otherwise ordered. It does seem to me that that is clear.

JUDGE DONWORTH: I agree with Senator Pepper. I think the main vice is in lines 40 to 42, where we undertake to lay down a rule today as to what the mandate of the circuit court of appeals is going to mean in a certain case. We say there, "shall be effective only in the event that the judgment is reversed and the case is remanded by the appellate court for further proceedings." That is none of our business.

SENATOR PEPPER: That is right.

JUDGE DONWORTH: The effect of it, as far as the mandate of the circuit court of appeals is concerned, is for that court to determine and not for us to say now when that shall be effective at all. The whole case is in the circuit court of appeals, and they are there to render a just decision.

MR. DODGE: You would come pretty near Justice Roberts' views if you simply struck out those last two lines, wouldn't you, Judge?

MR. LEMANN: Stop with the word "appeal" in line 40.

MR. DODGE: "its contemporaneous ruling on the motion for new trial shall be conditioned upon the outcome of the proceedings on appeal."

JUDGE DONWORTH: That would be all right.

THE CHAIRMAN: What you mean is that, if you are

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going to give the district court power or compel him to rule on the motion for new trial after he has granted a motion for judgment, the ruling on the motion for a new trial is to disclose the disposition he would make of it if his judgment doesn't stand. That is, he should make an order on the new trial motion, intended to be effective if his order of judgment doesn't stand. But it doesn't say so anywhere in the rule.

MR. DODGE: I think the first question is whether we want to follow the Supreme Court's decision or whether we should make this rule what we think it ought to be, which is quite different from that, I think.

MR. TOLMAN: Can't we do both by following him and then supplementing to fill that gap? It seems to me that is possible.

MR. DODGE: You come pretty near doing that if you just strike out the last two lines.

JUDGE CLARK: That would be one way of doing it, Mr. Dodge. There isn't any doubt of it. Let me say that there has been confusion. If you will look back at page 57 of this pamphlet, you will see that two circuit courts have gone opposite ways after the decision. One of them, the Third Circuit, held that one order cancelled out the other and that there was nothing to appeal from, so they couldn't do anything about it. I might add, too (I don't know how important this is), that Justice Roberts thought that this language was fine.

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THE CHAIRMAN: I would like to cross-examine him. [Laughter]

Here it says, "A motion for a new trial in the alternative may be joined with a motion for judgment, and the court shall dispose of the alternative motion for a new trial when ruling on the motion for judgment."

That is all there is about that. If you apply that strictly, if the judge grants the motion for judgment and says, "Now, what's the use? I am granting judgment notwithstanding the verdict, and there is no question of a motion for new trial," so he says, "I deny it." Yet, if he were asked to decide on the motion for new trial on the assumption that his judgment notwithstanding the verdict isn't going to stand, he might take the other view, and this rule doesn't state that he is to deal with the motion for new trial hypothetically on the theory that his judgment which he has granted may not stand.

PROFESSOR CHERRY: That is the whole thing.

THE CHAIRMAN: That is another case where I say we don't visualize the realities here. I think it could be done, if you want to write this all over and make it much longer and deal with every kind of situation that you can visualize that might happen with all these different combinations of fact and law that may confront you. That is where I think it is a pretty difficult thing to do. That is why I felt timid about

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it.

JUDGE DONWORTH: I wouldn't try it.

PROFESSOR CHERRY: What about Senator Pepper's suggestion?

THE CHAIRMAN: I think we should decide the question whether we ought to go back on Justice Roberts to the extent of leaving it to the district judge to say whether, if he grants the judgment notwithstanding the verdict, he shall hypothetically dispose of the motion for new trial. Under Justice Roberts' decision he hasn't any option. He is supposed to do it.

PROFESSOR CHERRY: Ought not this Committee to give the Supreme Court its best judgment about what the practice ought to be, for whatever it is worth? I think it is quite clear that Justice Roberts didn't visualize a number of the things that have been discussed here today.

SENATOR PEPPER: Don't you think there is something really unfair to the losing party in requiring the court to dispose of the motion for new trial when he is entering judgment on the verdict? His whole mind is focused on the question involved in the motion for directed verdict, and he comes to the conclusion that there ought to be a judgment. Just as a matter of psychology, he is very rarely then in a position to give attention to all the questions which in that event are, as far as he is concerned, moot, and yet they may be questions

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of the utmost moment to the losing party if the court has erred in entering judgment on the verdict. It seems to me the only purpose of having disposal of the motion for new trial when entering judgment on the verdict is to give the appellate court a kind of hint as to what the mind of the trial judge is on the state of the record, on the supposition that there is not going to be a judgment on the verdict. If the fact is that there is nothing illuminating to be found in the attitude of the court on that subject because his whole mind is full of the judgment that he has entered, it seems to me that there is an element of injustice in binding the litigant by that decision, as you would do if you compelled him to make a pro forma order, "I dismiss the motion for new trial because I have entered judgment on the verdict." It doesn't seem to me to be justice.

MR. DODGE: I think that is entirely sound, and there is the further point that in one case the Third Circuit Court of Appeals have said that if the judge contemporaneously orders a new trial, that renders the motion for directed verdict nonappealable. You have to have a new trial anyway, and you can't raise your question of law until after another trial--an unfortunate result.

MR. LEMANN: Why leave the judge any option? If we are not too timid about overruling Justice Roberts, why not put it this way? "If the judge refuses the motion for a

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directed verdict, he shall dispose of the alternative motion for new trial. If the judge grants the motion for directed verdict, he shall withhold action on the motion for a new trial until the appellate court has acted."

PROFESSOR CHERRY: I think there are two answers to that, Mr. Chairman. In the first place, you don't need it as strong as that. In the second place, you may have a situation where he is able to deal with the two, where you don't have any of these things--misconduct, misdirection, or newly discovered evidence--and he is ready to rule on both of them. I don't see why he should be prevented from doing it, if he feels that he wants to. The difficulty with the proposed rule is that we would make him do it in situations where it is wholly unrealistic to expect him to do it.

THE CHAIRMAN: The case where it is realistic is the case where he grants judgment notwithstanding the verdict on the ground that there is not sufficient evidence to support the verdict, and then he says, "Well, if I am wrong about that, and if there was some evidence sufficient to go to the jury, I think the jury's verdict is so contrary to the weight of the evidence that I am going to set it aside." There I have visualized a case which is simple.

My own preference would be to draw the rule to provide that in case alternative motions are made and the motion for judgment is granted, the district court need not dispose

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of the motion for new trial, but if the judgment is afterward set aside or reversed on appeal, the district court may then consider the motion for new trial, unless that action is inconsistent with the mandate of the court of appeals. There you have it. That is the practice in all these states. There is a raft of decisions in the state courts under this very alternative system that we would have.

PROFESSOR SUNDERLAND: I can't see how that is discourteous to Justice Roberts. He was ruling on a situation that had no rule covering it. Now we are going to put in a rule covering it. I don't see how there is anything antagonistic to his ruling.

THE CHAIRMAN: Of course, his opinion all goes on the theory that somehow or other you are going to save time and save double appeals and everything if you do it his way. I never could quite reason that out.

SENATOR PEPPER: I think you are more likely to save time if you leave an element of discretion to the trial judge than if you put him in a straitjacket and compel him to, in which event you are almost certain in a hotly contested case to get an unjust snapshot ruling on the motion for the new trial end of it, if his mind is obsessed with the idea that he has a great question of law to decide and has decided it by entering judgment notwithstanding the verdict.

Just to bring the thing to a head, I think the best

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thing to do is to see how the mind of the Committee works. I move that the material in lines 35 to 42, inclusive, be stricken and that there be substituted the following:

"A motion for a new trial, as an alternative, may be joined with a motion for judgment. If the motion for judgment is granted by the district court, the court may in its discretion either dispose of the motion for new trial or decline to do so. In the latter event, if on appeal the judgment is reversed, the trial court may then dispose of the motion for new trial, unless the appellate court shall have otherwise ordered."

MR. LEMANN: What are you going to do then if the court exercises its discretion to pass on the motion for new trial and grants it?

SENATOR PEPPER: I don't think we have anything to do with that, because it is the judgment that goes up to the circuit court of appeals, and the circuit court of appeals can do as it is of a mind to.

MR. LEMANN: In one circuit they said there was no appealable order now, and they dismissed the whole proceeding. That is at the top of page 57.

SENATOR PEPPER: That is because the rule didn't provide that there was an appealable order. We are providing here that where the motion is in the alternative, the court has the option which it will do. Then there is a provision for

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an appeal, which clearly means--

JUDGE CLARK [Interposing]: May I ask a question, Senator Pepper, somewhat along the same line that Monte is bringing up? You know, in our other rule, Rule 59, we haven't said directly, I think, but we have put in a footnote what is a well settled rule that a motion for new trial suspends the time for the running of appeal. Are we negligent in that rule or are we doing it effectively enough so that people will know it? As you gave the statement, the court declines to rule on the motion for new trial and, if the ordinary rule referred to in the footnote to Rule 59 still applies, there never will be an appealable order until he does rule.

MR. DODGE: Why can't we put that right in this rule?

SENATOR PEPPER: That can be taken care of.

JUDGE CLARK: The question I was raising was whether your draft has done that.

SENATOR PEPPER: I don't think it has done that. If it is desirable to spell that out, it can be done this way: "A motion for a new trial, as an alternative, may be joined with a motion for judgment. If the motion for judgment is granted by the district court, the judgment so entered is appealable---"

MR. DODGE: "notwithstanding the pendency".

SENATOR PEPPER: "---notwithstanding the pendency of the motion for a new trial. The court may in its discretion,

having entered judgment on the motion for judgment, either dispose of the motion for a new trial or decline to do so. In the latter event, if on appeal the judgment is reversed, the trial court may then dispose of the motion for a new trial, unless the appellate court shall have otherwise ordered."

MR. LEMANN: "if the court exercises its discretion."

MR. TOLMAN: I have one other question there. Wouldn't it simplify that if you put in the words "would apply" or "ruled upon" instead of "dispose of"?

THE CHAIRMAN: Gentlemen, I suggest that the whole trouble here has come from the fact that we have adopted the state laws in some states that when you make a motion for judgment, you hook on to it in the same motion paper an alternative motion for new trial. If you wipe that out in the alternative, it isn't necessary. A fellow can make a motion for judgment and make a separate motion for new trial. He can bring the one on first and, if he loses, he can bring the other one on second. He can bring them on the same day, if he wants to. The judge can render judgment if he wants to on the motion for judgment, and the other motion just falls by the wayside. It is absurd to say that the pendency of that motion prevents the finality of the judgment, because the only motions that destroy the finality of judgment are motions to set the judgment aside, and the fellow who has made a motion for a new trial is the fellow who has the judgment notwithstanding the

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verdict. So, I can't understand why the motion for new trial, separately made or alternatively made, operates to stay the time for appeal on a judgment that the motion for new trial doesn't seek to set aside. It is a motion that attacks the judgment or the findings on which it is based that destroys its finality.

So, I believe I would just strike out this whole paragraph about alternative motions. Let them go ahead and make a motion for judgment, if they want to. You can also make a motion for new trial. You can make them in any order you want to make them, separately or alternatively.

SENATOR PEPPER: At least you would want to provide that, wouldn't you, because otherwise you would leave the situation uncovered by rule? You at least would want to provide that, notwithstanding the refusal of a motion for judgment, the moving party should have the right to move for a new trial?

THE CHAIRMAN: There is no estoppel. When you have lost a motion for judgment, there is no law or rule or practice that prevents you from making the other. The motion for new trial will have to be made within the time specified, and of course if your motion for judgment isn't disposed of until the time for making motion for new trial, you are out. So, you have to make the motion for new trial, but you don't just make them in the alternative.

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SENATOR PEPPER: But they would treat them as alternative motions if made within the time.

MR. LEMANN: They are bound to be, aren't they, if you have two motions pending from the same party at the same time, whether he puts it on the same sheet of paper or two sheets of paper. I don't think you would solve the difficulty, Mr. Chairman.

THE CHAIRMAN: I think you would, because it is only because of the fact that they are necessarily hooked together and both are heard and disposed of at the same time that you get into this mess here. Suppose I make two motions, that I make one for judgment notwithstanding the verdict, and then I am afraid that it won't be granted, so I make a motion for new trial. Then I bring on the motion for judgment, and nothing is said about the other; it just lies in the files. I get licked on the hearing, and I bring up the other one. If I win the first one, the other one just lies there, and nothing is ever done with it.

MR. LEMANN: Might not.

THE CHAIRMAN: If the judgment is reversed on appeal, and I have a motion for a new trial that is lying there pending, seasonably brought and never disposed of, then I bring it up and say, "Well, we got knocked out on our judgment, but here is our application for discretionary order on a motion for new trial." Unless the mandate of the upper court orders some

other disposition of the case, you could do it.

MR. DODGE: What is the difficulty with Senator Pepper's motion? It seemed to me it covered it very well.

MR. LEMANN: I think he left uncovered the case where the district judge exercises his option by granting a motion for directed judgment and also the motion for new trial.

SENATOR PEPPER: I will try to cover that.

MR. LEMANN: He could add a sentence to cover that.

SENATOR PEPPER: Let's see if we can do that.

JUDGE DOBIE: The two orders would be inconsistent.

MR. LEMANN: That is what some judges are doing.

PROFESSOR CHERRY: That is to make one conditional.

MR. LEMANN: If he leaves the option which he wants to do, he is permitting that inconsistency to occur.

JUDGE DONWORTH: Not if he puts a hypothesis in it.

THE CHAIRMAN: That is the point, to get the order about the new trial to make it clear on its face that what the court orders to be done is in the event that the judgment is afterwards set aside. It might not be set aside on appeal. It might be vacated in the district court instead of being set aside on appeal. You could say "thereafter vacated", couldn't you?

MR. LEMANN: Yes, you could do that. I think the addition of a sentence to Senator Pepper's suggestion might cover that.

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JUDGE DOBIE: Suppose we let the Senator take a crack at it and then pass on it after lunch.

SENATOR PEPPER: Let's pass on to something else and see if we can come back to this.

THE CHAIRMAN: You get it up and hand it to the reporter, and during the noon hour he may be able to type it up.

JUDGE DONWORTH: Mr. Chairman, there is an incidental question here that bothers me a little. It is not connected with what we have been discussing. I call attention to the new matter in lines 30 and so forth.

"The making of a motion for judgment in conformity with the motion for a directed verdict shall not be necessary for the purpose of raising on review", and so forth.

Just before that we say, "the court on motion made within 10 days after the jury has been discharged [that is in the case of no verdict] may direct the entry of judgment".

When we say that the motion may be made within 10 days and then go on to say that no motion at all is necessary as the basis for an appeal, isn't that inconsistent? A motion may be made within 10 days in the case of no verdict, but the making of a motion in conformity shall not be necessary for the purpose of raising on review.

THE CHAIRMAN: The thing here is worded, as I understand it, in this way: If you are going to ask the district court to reconsider and grant judgment notwithstanding the

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verdict, you have to do it within 10 days, but if you don't think you will get anywhere with him on that and you just want to raise the question on appeal, then you don't make the motion before the district judge and, under this rule, you don't have to, to raise the question on appeal. When you get up there, the upper court can decide whether he should have granted the motion for directed verdict.

JUDGE DONWORTH: Within 10 days you must make the motion in the case of no verdict, if you are going to make any. You deprive the lower court of the right to enter final judgment in the case of no verdict unless a motion is made within 10 days, a time limit. Then down below you say that no motion is needed.

MR. LEMANN: Why not omit the words in lines 27 and 28, "on motion made within 10 days after the jury has been discharged"? I understand the situation is this: The defendant has moved for directed verdict, the judge denies the motion, sends the case to the jury, and the jury can't agree and is discharged. The point is that the judge may change his mind, without a new motion, and direct a verdict, or you can go on appeal from the fact that he didn't direct a verdict, without renewing the motion.

THE CHAIRMAN: For final judgment.

JUDGE DONWORTH: The appellate court can reverse the lower court, although the lower court himself couldn't have

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done it because the 10 days expired before the motion was made.

MR. DODGE: You couldn't appeal without a motion if there had been a disagreement of the jury.

PROFESSOR CHERRY: No.

MR. DODGE: Without a motion favorably acted upon, there wouldn't be any appealable question. Your only remedy in case of a disagreement is to move in the trial court. The last sentence really applies to the whole preceding part of the section, and not merely to that disagreement part. In fact, it can't apply to the immediately preceding sentence.

THE CHAIRMAN: Judge Donworth, if the verdict is returned against you under line 15, you have to make your motion for judgment notwithstanding the verdict within 10 days after the reception of the verdict, and, consistent with that, if the jury is discharged, then you have to make your motion for judgment within 10 days after the jury has been discharged. The reason there is a time limit on it is that, if you don't make the motion, then the case goes ahead; it is put on the calendar again and brought up for trial a second time. If you haven't any time limit, you could wait until the case got up on the second trial and then make a motion for judgment and interrupt the orderly course of procedure. In disposing of this case where the jury disagrees, if you are going to get judgment for the defense or on the motion, you want to get it right away so as to know whether the case is coming up again or

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whether it is going to be appealed or whatnot.

JUDGE DONWORTH: Perhaps you don't get my point. My point is that the motion is not at all necessary in the appellate court to get a reversal, but it is necessary and within 10 days in the lower court, as stated here.

MR. DODGE: If there is a disagreement of the jury, there is no appealable case.

JUDGE DONWORTH: Oh, yes.

THE CHAIRMAN: If there is no judgment, you can't appeal.

JUDGE DONWORTH: No judgment, no, but if the judge decides, "The jury have disagreed, but I am satisfied now that I should have granted the motion for directed verdict for the defendant," he can still do that.

MR. DODGE: Yes.

JUDGE DONWORTH: When he enters that judgment for the defendant, the case is appealable.

MR. DODGE: True, but aren't lines 30 to 34 really applicable only to the earlier part of the rule and not to the immediately preceding three lines? Of course, the making of the motion is necessary if there is a disagreement.

PROFESSOR CHERRY: You could transpose those sentences, couldn't you, Mr. Dodge, to take care of that?

THE CHAIRMAN: It isn't necessary for the purpose of raising your question on review. There can't be any review.

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There is no final judgment.

PROFESSOR CHERRY: Wouldn't it be clearer if you transposed those two sentences? Take the sentence from lines 30 to 34 and put it before the sentence that now precedes it, which talks about if no verdict was returned, lines 27 to 29.

THE CHAIRMAN: You would take lines 27, 28, and 29, and place them after line 34?

PROFESSOR CHERRY: That is right.

MR. DODGE: Yes.

PROFESSOR CHERRY: Then you have all together the situation where there has been a verdict, and he makes his motion, and so on. He doesn't have to in order to appeal. Then, having disposed of that, we come to this other situation, quite separate, of what he can do after the jury has been discharged without agreement.

MR. DODGE: I think that is all right.

JUDGE CLARK: Isn't there a gap then? At least, may you not think that there is a gap? As I understand it, you want to have the thing operate automatically where no new step is taken at all.

PROFESSOR CHERRY: But it can operate automatically where no new step is taken only if there has been a verdict and can be a judgment.

JUDGE CLARK: Why? I mean, why, theoretically?

PROFESSOR CHERRY: Because if there has been no

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verdict, there is no judgment.

JUDGE DONWORTH: Oh, no.

MR. DODGE: Just the same as if the case hadn't been tried.

THE CHAIRMAN: No appeal because there has been no final judgment.

MR. DODGE: I second Mr. Cherry's motion for the transposition of those two sentences.

THE CHAIRMAN: Is there any objection to that? The Reporter has none. Well, it is agreed, then, that lines 27, 28, and 29 of the draft of Rule 50(b) should be transposed and placed immediately after line 34.

MR. HAMMOND: I wonder whether the transposition would take care of it or whether you had better make it in the form of an exception.

PROFESSOR CHERRY: I understood Judge Donworth to say it doesn't.

JUDGE DONWORTH: That is my impression.

MR. HAMMOND: In line 27, a very minor thing, "If no verdict was returned" should be "If no verdict is returned". It is a minor matter.

THE CHAIRMAN: Isn't that right, Charlie?

JUDGE CLARK: Yes.

THE CHAIRMAN: The word "was" is changed to "is" in line 27.

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JUDGE CLARK: What is the other point, Mr. Hammond, about making an exception?

MR. HAMMOND: I was just wondering if the mere transposition of the last sentence, moving it up, would take care of the point. Even if you put the sentence in lines 27 to 29 afterwards, the language in lines 30 to 34 is still broad enough to cover the case where no verdict is returned, isn't it?

PROFESSOR CHERRY: No, because we haven't mentioned that case yet.

MR. HAMMOND: I see.

PROFESSOR CHERRY: It can't apply there because you can't appeal.

MR. HAMMOND: I see.

THE CHAIRMAN: Have we anything further now on this rule, except to await the draft that Senator Pepper is to produce this afternoon? If not, we will go on to Rule 52. Has anybody any changes to suggest in Rule 52(a)? It looks all right to me. If not, has anybody any suggestion as to Rule 52(b)?

MR. LEMANN: Do I understand that under 52(b) the 10-day period starts from the notice of the filing, whereas under 73(a) the appeal time starts from the entry, without the notice, and notice is unimportant? Lack of notice doesn't extend your time for appeal, but lack of notice would extend

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your time for moving to amend or for moving for a new trial. I am asking to be sure. It says in the note: "The new amendment in Rule 52(b) starts the running of the 10-day period from notice of filing and not from entry of judgment. It is proposed to amend Rule 77(d) so as to provide for service of such notice." I had understood that, while 77(d) makes it the duty of the clerk to give the notice, in the case of the appeal we were going to provide that if he didn't give the notice, that didn't extend your time for appeal, save to the limited extent provided.

I first ask whether my understanding is right. If it is right, then I ask whether the positions are consistent.

JUDGE CLARK: They are consistent unless you say that you can't treat these differently. This was the Chairman's suggestion. He may want to speak about it some more. I think what we have done is to carry out what the votes were, which were that you have to have notice of all these intermediate steps, and the service is there made by the parties. For the appeal the notice is given by the clerk as before, and for the appeal there is the provision that it must be within 30 days except that the court, if it finds lack of notice through excusable neglect, and so on, can add another 30 days. That is the scheme. That is what we talked over before.

MR. LEMANN: If you don't get any notice, you can move for a new trial, for amendments, at any time. If you

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don't get any notice, you can't appeal after 60 days.

JUDGE CLARK: That is it.

MR. LEMANN: Of course, it seems a strange result because the appeal is the more important remedy. After 60 days you can't appeal if you didn't get any notice, although you could have come in and asked for a new trial at any time.

MR. DODGE: Have we required notice to start the period for a motion for a new trial?

MR. LEMANN: Yes, so I understand. This does now.

JUDGE CLARK: Yes. If you look at Rule 59, it does now.

MR. LEMANN: It did not require it before. It does now. But when we got down to appeal, on account of that Hill case, I think we sort of went out of our way to emphasize the fact that notice isn't a condition to the starting of the time for appeal.

JUDGE CLARK: Of course, Monte, I suppose you might have this interesting situation: Suppose that a fellow finds he hasn't taken his appeal in time, and he thinks he can get away with claiming he can make a motion for a new trial. I don't know whether he could still--

MR. LEMANN [Interposing]: Maybe the time for appeal hasn't begun to run, but there is no motion for new trial pending. He didn't have to make it because he never got notice. According to that, you never would have any finality of the

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judgment on that theory. If there was no notice given, the judgment is never final because the delay for a new trial has not run because of the absence of notice.

THE CHAIRMAN: I can't remember that I had any special interest in this thing at all.

JUDGE CLARK: Oh, yes. It was your general suggestion. You went into this quite a good deal.

THE CHAIRMAN: I was interested in the question of appeal, but this thing--

JUDGE DONWORTH [Interposing]: In answer to Mr. Lemann's suggestion, I don't understand that the fact that you file a motion for new trial ipso facto suspends the running of the time for appeal. It is the actual doing of something in reference to a new trial that extends the time, and we have given deference to Hill v. Hawes here, as I understand it, to the extent of giving the defeated party 30 extra days if he didn't get notice. Am I right about that?

JUDGE CLARK: That is right.

JUDGE DONWORTH: For appeal.

JUDGE CLARK: The judge may order it. You have to ask for it and get it from the judge, but you can get it in the proceedings here.

THE CHAIRMAN: The time originally runs from the date of entry of the judgment and not from the date of notice of it, but there is a provision for extending the time where you don't

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in fact get notice.

PROFESSOR CHERRY: Isn't the point of Mr. Lemann's suggestion that, if he hasn't had notice of anything, he hasn't been required to make a motion for new trial? If he gets his notice, he may go to the judge and get 30 days more within which to appeal. Suppose he just makes a motion for new trial, which he is now entitled to do, beginning with the time when he gets notice, then that automatically suspends the running of the time within which he can take an appeal. As I understood it, that was Mr. Lemann's suggestion. It is not that he has the right to make the motion, but that he exercises it at that later date with reference to the time when he gets notice, and that time is such that it carries him well beyond the 30 days for appeal. I understood that to be Mr. Lemann's difficulty.

THE CHAIRMAN: Is it your point, Monte, that this new provision in 18 that you can make a motion for new findings amending the judgment within 10 days after notice of filing the findings, provides that if you don't get any notice of the filing of the judgment or anything else until after the full 60 days have gone by for appeal, and that if then somebody gives you notice of the filing within 10 days, that abrogates the finality of the judgment?

MR. LEMANN: The same thing comes under 59(c). That is the difficulty. It seems to me the difficulty is in one case requiring notice and not requiring it in the other,

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requiring it in two cases, I should say, in 52 and 59, and not requiring it under 73.

THE CHAIRMAN: I may have had something to do with the phraseology of this thing; somebody else made the suggestion, and I said something about the wording of it, but I haven't the slightest dent left in my brain of ever having seen it before. I certainly didn't have an ax out about it, because there are a lot of things that I remember very distinctly.

JUDGE DOBIE: That notice of the filing of findings of fact will ordinarily be given by the clerk, won't it?

JUDGE CLARK: Yes, and it can be given by any individual.

MR. LEMANN: These changes were not in the thing that went out to the bar. It came up apparently in our January meeting.

JUDGE CLARK: Yes. If I may bring this up, I don't want particularly to bring forth alibis or anything like that, but this wasn't my idea, and I don't believe it very much. I would rather have the old practice of the thing dating from entry, not from notice. The way it came up was the suggestion for shortening the time for appeal, and then the question was raised that the times for taking these various proceedings were very short, 10 days for a new trial, and so on. As I recall, I think there has been some outside suggestion of that kind.

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I think Mr. Walter Armstrong raised a question. Then the next development was that the time was long enough, if you were sure there was notice, but that the time might be too short if you weren't. Perhaps that is all I should ascribe to the Chairman, but at least he did say we should separate the two ideas. That is, the time for appeal should be treated on the basis of finality, just as it always had been done, and this should be treated differently. That, I think, is the background.

Query: Might it not be a little sounder to make the 10 days, 15 days in the new trial, rather than from notice?

THE CHAIRMAN: Are we talking about subdivision (b)?

JUDGE CLARK: It is all the way through here.

THE CHAIRMAN: I have to stick my nose down on something concrete here.

MR. LEMANN: It comes up under 52.

THE CHAIRMAN: I don't stand back of that at all.

MR. LEMANN: It comes under 52(b), Mr. Chairman, and also under 59(e).

THE CHAIRMAN: 59(e)?

JUDGE CLARK: 59(b), too.

MR. LEMANN: 59(b) and (e) on page 49. In other words, it comes up under a motion for new trial and under the findings. Really, it is perhaps more troublesome under the new trial provision. I brought it up here because this is where it first appeared.

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JUDGE CLARK: I think we have almost got to treat the findings the same as we treat the new trial because of the Leishman case in the Supreme Court, until we try to overrule that, too. The Leishman case did treat it the same, held that motion for directed findings did have the same effect as a motion for new trial.

THE CHAIRMAN: I don't remember this. I overlooked it. The effect of Rule 59 is undoubtedly this: You have a right to make a motion for new trial not later than 10 days after the notice of entry of the judgment, and if the judgment has stood there for 60 days and you haven't had notice of it, the time when the court might extend the time for appeal having gone by, under this rule if you heard about the judgment a year later you could come in and, within 10 days after learning about it, make a motion for new trial and start running anew the time for appeal.

MR. DODGE: I should doubt that. After the time for appeal has expired, it wouldn't be a case of suspension by the pendency of the motion. I think the party's rights would be solely those of the motion.

THE CHAIRMAN: How do you read into (b) a provision that you shall not have the 10 days after notice of the judgment, if the time for appeal has expired? It doesn't say so. I think that if you want to place another limitation on that and say that you can't do it after the time for appeal has

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expired, you ought to say so in the rule.

MR. LEMANN: There would be a certain inconsistency even then. That would remove that particular ambiguity, but it seems to me there would be a certain inconsistency if we start the time from notice of motion for new trial and not require it for appeal.

MR. DODGE: How about Judge Clark's suggestion that we make this 15 days and strike out the notice?

MR. LEMANN: I think we ought to stop to consider whether we should make any change, because under our original rules, which we haven't had any trouble about, the 10 days run from notice. I am used to a practice which says that you have to keep up with your cases and inquire, and you have to make your motion for new trial in 3 days. We have been used to that for a hundred years, and I thought 10 days was rather liberal without this requirement for notice. I was just wondering how we happened to put it in. It came only in January. It wasn't in when we sent this draft out to the bar.

The Reporter has the advantage perhaps of reading the transcript, so he knows all ours sins and errors. It doesn't make any difference, really, except to be sure we are not overlooking something that was brought out in the earlier discussion. I don't think it makes any difference.

THE CHAIRMAN: Here is something that disturbs my mind about this thing. It wasn't an attempt to extend the time.

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It was to shorten it. The motion for amendment or for new trial originally could be made any time after judgment, 10 days after judgment. Now sometimes the findings are filed and the lawyer knows all about them, but the judgment may not be entered for six weeks. Under our rule as it originally read, even though you knew all about the findings, you didn't have to make a motion to alter them until after the judgment was entered.

My statement in the record here is: "Sometimes the judgment may not be entered, but if the findings are filed, he ought to go ahead and make a motion." In other words, it was to cut his time and not to extend it that this change was made.

MR. LEMANN: You didn't have anything about motion in this suggestion.

JUDGE CLARK: Oh, yes.

THE CHAIRMAN: "Don't you think so? Anyhow, before we decide it, let's go on with the rest, but I would offer here now the suggestion, to be considered later in connection with this rule, that Rule 52(b) be amended to provide that the motion for amended findings be made not later than 10 days after notice of the findings have been filed," with a view to shortening the time and hurrying the thing, instead of extending it. I didn't consider and didn't think about this question of setting aside the finality of judgment.

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MR. LEMANN: I think your notice thought was sort of inadvertent. Don't you think so?

JUDGE CLARK: I don't want to make too much of it and of course it is unimportant, but, you see, I am a little in this situation: I come here as though I were preferring something that I really opposed, but it comes up from the floor and by the time it comes up now, the proponent has a little gone back on it. That is all right. About all I can say is that this wasn't my idea, and I wasn't very strongly for it. It came up over and over. Here on page 792:

"Mr. Lemann: Did we put in something about notice yesterday?

"The Chairman: Yes. My point is that we did. On the motion for new trial and the motion for amended findings, we tentatively adopted the rule that it would be 10 days after the notice of entry of the judgment or after the filing. I made the point yesterday that there is no direct connection between doing it that way on these intermediate motions. It does not mean that we have to be consistent and do the same thing on appeals.

"Mr. Lemann: I can just see that lawyers (I don't mean the ones on their toes, but others) might be likely to be misled if they knew they had notice in one place and didn't stop to realize that they wouldn't have it in the other place," and so on.

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MR. LEMANN: I am surprisingly consistent. I fully expected to find that I advocated this.

THE CHAIRMAN: I had a one-track mind. I was thinking of hurrying the thing up and cutting the fellow down. I didn't think about any of these other things.

PROFESSOR CHERRY: Not having been here in January but listening to this record, it seems to me the Chairman had in mind clearly in that statement the case where judgment isn't entered.

THE CHAIRMAN: Yes.

PROFESSOR CHERRY: But these rules now proposed don't say anything about that.

THE CHAIRMAN: You are right.

PROFESSOR CHERRY: So, I don't think the wording now reported carries out what seems to have been in the mind of the Chairman at the time of that meeting and adopted by the meeting.

THE CHAIRMAN: I was just taking for granted that there wasn't any judgment and that we ought to make him act after notice of the findings and not wait for the judgment.

PROFESSOR CHERRY: That is right.

THE CHAIRMAN: Of course, that kind of motion would not vacate any time for appeal because it hadn't started to run yet, no judgment being entered.

PROFESSOR CHERRY: These two rules don't do that.

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THE CHAIRMAN: The way they are worded, they don't take account of that. Why don't we go back and make it from the date of the entry of the judgment?

MR. LEMANN: Why don't we just go back to the entry of the judgment and entry of the findings? I think 10 days is long enough, and I think a fellow should keep up with his case. Of course, we have a provision in here that the clerk is supposed to give you the notice, as I understand it, so the normal case would be that you would get the notice, but our rules are framed on the theory that if the clerk falls down on his job, that doesn't extend the time. You have to rely on two things: first, your own diligence in keeping up with your case; and, second, that the clerk does what he is told to do, which ordinarily he does. If you are not protected by both those things or one of them, you are just out of luck, if you don't get around to it in 10 days. We have been getting along with that for a long time, and nobody has kicked. I don't see why we need do anything other than either to go back to our original language in 52(b) or to cover what the Chairman had in mind, changing the words originally appearing in 52(b), "after entry of judgment" to "after entry of the findings".

PROFESSOR CHERRY: You have two limitations, as I take it, that it was decided in January to put here. I wouldn't suppose that there ought to be any abrogation of the 10 days after entry of judgment but, as I understood your

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statement, Mr. Chairman, you wanted to have this further limitation that if judgment isn't entered, then there are 10 days--

THE CHAIRMAN [Interposing]: After notice of findings.

PROFESSOR CHERRY: Why shouldn't those two be stated as both limiting the time?

MR. LEMANN: I don't think we ought to put the word "notice" in at all.

PROFESSOR CHERRY: To take care of the one case that the Chairman had in mind where there is a delay in the entry of judgment.

MR. LEMANN: The findings are entered, aren't they?

PROFESSOR CHERRY: I know.

MR. LEMANN: Why not leave it, the entry of the findings?

MR. DODGE: Are findings always entered before judgment?

THE CHAIRMAN: Not always. One of the things I said in that conversation in the record was that the findings might not be filed for six months.

MR. LEMANN: Then you certainly wouldn't help by this amendment, because this amendment speaks of notice of filing, and if they are not filed, you couldn't have notice, so you wouldn't be able to leave that.

THE CHAIRMAN: If it is agreeable with the rest of the Committee, I would like to see subdivision (b) right back

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where it was before, and make no change in it. I don't see any point about the 10 days. Nobody has complained that that is too short. We haven't had any squeal about that from anybody, from any lawyer around the country.

JUDGE DOBIE: Suppose you had a case like this. Suppose you put it back that it shall be made not later than 10 days after entry of judgment, and suppose that 10 days after the entry of judgment the judge hasn't made his findings.

MR. DODGE: The findings are not filed until 10 days after the judgment.

JUDGE DOBIE: Yes. Then the rule is nonsense, isn't it?

THE CHAIRMAN: I brought that out in what I was reading from the record. I said it was nonsense. I used that very word.

JUDGE DOBIE: That may very well happen. The judge may enter judgment, and it takes a long time. In some of these patent cases I have known some of these findings to run up as high as fifty printed pages and more than that.

MR. LEMANN: The judge enters his findings at the time he renders judgment.

JUDGE DOBIE: Ordinarily I think he does, and I think a good judge ought to.

MR. LEMANN: I never had a case where that wasn't done.

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JUDGE CLARK: What was that, Monte? I didn't hear it.

MR. LEMANN: Whether it ever happened that the judge did not enter his findings until long after he had entered his judgment. The answer I am given is that it sometimes happens that he doesn't enter his findings until a considerable period after he has entered his judgment.

JUDGE CLARK: Of course, almost anything may happen as to findings because they do all sorts of things, but I can't remember a case in my experience where that was ever done. I wonder if you really could do it under our practice without doing something to the judgment.

MR. LEMANN: I would think it sort of funny, because if there is no requirement here to enter findings when he enters judgment, there is no requirement that he enter his findings at any time, and he might not enter them until the 60 days for appeal had gone by. It seems sort of foolish. Of course, under our rules you don't have to object to findings in order to appeal, anyhow.

JUDGE CLARK: And under our rule it would be a violation of 52(a) for the judge not to have done it the other way. That is, he has filed his findings, and he then directs the entry of the appropriate judgment in 52(a).

MR. LEMANN: Yes.

JUDGE CLARK: I hadn't supposed you would have it after that. Sometimes you will have it after the moment of

judgment, of course, but I didn't suppose you had it later. On (b), if you put it back to the time of filing--

THE CHAIRMAN [Interposing]: Entry of judgment, you mean.

JUDGE CLARK: That is the point I am going to come to. I don't think it should be entry of judgment, anyhow. I think it should be the time of the filing of the findings.

MR. LEMANN: Which might be before the judgment.

JUDGE CLARK: Which might be before or after the judgment, but either way it should be from the time of the filing of the findings, because otherwise what unfortunately may happen is this: There often is a most surprising gap, a period of time, after the filing of findings and the entry of judgment. I don't know why. It seems to me to be a violation of our rule (I think it is our Rule 58) which implies that it should be done at once, but they don't do it. I don't know just why. I have sometimes asked the lawyers, and they have said that somebody was in Arizona or something like that.

MR. LEMANN: You think that 10 days after entry of judgment might be too long to object to findings?

JUDGE CLARK: Oh, yes. That is going to hold it up some more. Suppose there has been six months or a year between the filing of the findings and the entry of judgment, why should they be able to come in 10 days after that lengthy period?

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JUDGE DOBIE: Why not make it 15 days and make it after the filing and cut out the notice?

JUDGE CLARK: I would like to cut out the notice. I would like to make it after the filing. While I personally would agree with Monte, I think, that 10 days is enough, I would settle for 15, perhaps.

MR. LEMANN: I don't think we ought to extend the time when there has been no request from the bar.

MR. DODGE: Your suggestion would take care of the rare case where findings were filed after the judgment.

JUDGE CLARK: Yes, that would operate the same way, if it can be done. I still wonder if it is a part of the judgment then or if it isn't just extraneous. If it is, it is 10 days after the actual operative facts, so to speak. What you are interested in is the findings.

MR. LEMANN: It would be anomalous that you would have a judgment entered on the first of the month and that your days for new trial would run out on the tenth. If the judge didn't file his findings until the fifteenth, you couldn't object to the findings, and you couldn't move for a new trial. It seems very unrealistic.

JUDGE DOBIE: Charlie, is it the practice up there for the lawyers to draw the findings, or do the judges make their own?

JUDGE CLARK: The lawyers have done it in the past a

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great deal. The circuit court, my court, has fought that all we can, and we have had some lawyers to comply, and we have had quite a few of the judges to comply. Of course, in the original draft here I wanted to make it a little stronger. The New York state statute requires that you submit your findings before you submit the case but, you remember, at the January meeting that was struck out because some district judges objected. I still think that is the proper way. We have suggested that in our opinions right along, that we don't care anything in particular about the lawyers' findings.

JUDGE DOBIE: If the lawyers do submit the findings, that is all the more reason for making it from the time of findings rather than from notice, because then they know about it.

JUDGE CLARK: Yes. But the best findings we get are really by the judge, without the lawyer. They are shorter, and they are more direct, and we know what they mean; but when the lawyers get to drawing the findings, they are just argument.

THE CHAIRMAN: Who has ever complained of the fact that you can make a motion for amended findings within 10 days after judgment instead of only 10 days after the findings have been filed? Who has ever raised any question about that?

JUDGE DOBIE: I will compromise on 10 days. I have the same feeling that I think Monte has, and that is, I think

unless there is something essential about it, I don't like that notice thing. We all went into that in great detail. I think 10 days after filing of findings is enough.

THE CHAIRMAN: Why should we make it filing of the findings instead of entry of the judgment?

JUDGE DOBIE: Because we said some judges enter judgment without making findings; some, findings without judgment. The two have no essential relation to each other, although I think the good judge ordinarily would do both at the same time. You can't object to findings until they have been handed down. He enters his judgment, 10 days go by, and there are no findings.

MR. DODGE: In the absence of any complaint, I don't believe that we ought to change the rule as it was originally. Let's make them both 10 days after judgment and leave out notice. I move that.

JUDGE CLARK: Of course, I agree with everything except that I still don't see why it is made after judgment. The question was raised why any change was made. I can't tell in full detail, but I think the idea of question arose after the Supreme Court's decision in the Leishman case. The motion for changing the findings now, under that decision, operates to destroy the finality of judgment, and hence, when you make the motion after the entry of judgment, that is one way of holding off the finality of the judgment and, as I say, if you

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have already had six months to consider it, it seems a little too bad that you get this extra time.

MR. LEMANN: Ten days? You mean 10 days more?

JUDGE CLARK: Ten days more after the judgment. That is, you could sit back and say nothing about the findings although they have been in your office right along for all this period, and then when the judgment is entered you knock it out again.

MR. DODGE: That wouldn't happen often. Ninety-nine cases out of a hundred, the filing of the findings is very close to the date of entry of judgment, isn't it?

JUDGE CLARK: I wish it was, and I don't know why it isn't but, rather curiously, in New York it is not. In New York it is not because the clerk never works until somebody puts something in his hands. He won't draw a judgment himself, which again I think is a violation of the rule, but he is an old hand at it, and you can't do much with him. So, he never moves until somebody gives him something to move on, and the lawyers just don't give him the formal judgment. When it comes in, he sends it to the other side, too, and submits it to the judge, and one thing and another, so it takes time.

THE CHAIRMAN: Just trying to get this in my own mind, what would be the harm in making the rule read that the motion for amended findings and all may be made not later than 10 days after the filing of the findings?

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JUDGE DOBIE: That is what I would want.

THE CHAIRMAN: You strike out notice, and if the findings are filed before the judgment, your time runs from the date of filing of findings, not from the date of the judgment, which may be postponed for six or eight months, as the Reporter just pointed out. If the judgment was rendered before the findings, we remove the absurdity in the present rule requiring a man to make a motion within 10 days after judgment to amend findings which haven't yet been filed. It really shortens a man's time.

MR. LEMANN: You are saying that we take judicial notice of the fact that the requirements of our rules are being violated, because our rules require that the judgment be entered right after the filing of the findings, and we are saying in an explanatory note that we find that there are a great many cases or a number of cases, a substantial number of cases, where judgment isn't entered until long after findings, and that we think therefore we had better change this rule, although there has been no request for it. It seems to me that is an unfortunate thing to do, that it rather takes notice--

JUDGE CLARK [Interposing]: I don't quite see why we have to do all that.

MR. LEMANN: We didn't even have this up in the pamphlet which we sent to the bar.

JUDGE CLARK: We just say that the important time

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here is the time of findings and, therefore, the time should run from it. I don't know that we need to say one thing or another, although if we need to make more justification, we can say that the judgment may be delayed after the filing of the findings.

JUDGE DOBIE: There is another thing there. Sometimes whether a man is going to appeal or not will depend a great deal on the findings. He will appeal on certain findings, and he won't on others. I think it is very important that you get those findings in shape pretty soon, and I know of cases in which one man appealed the findings of another. If they change those findings, the fellow will say, "On those findings I know I have a good chance."

JUDGE CLARK: Another thing, Monte. It isn't very realistic to make a motion to change the findings after entry of the judgment, because the judgment ordinarily won't have the findings in it. The findings are a separate document. When the entry of the judgment comes in, you have to hunt around somewhere for the findings.

MR. LEMANN: Let me ask you what will happen if you put in findings as your test for the beginning of your time, and the judgment is filed on the first of March and the findings are filed on the fifteenth of March. You can't move for a new trial any more, but you can move to amend the findings.

MR. DODGE: For purposes of appeal that may be

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important.

MR. LEMANN: So, the judge changes his findings. Conceivably you have an important point on the findings, and the judge amends the findings and destroys the basis of his judgment, which he can no longer change.

JUDGE CLARK: Monte, all I can say on that is that I think that means in law that, if those findings are actually incorporated, the judgment is now on the fifteenth. It has to be that, I think. The Leishman case, you see, says that any request for change in the findings is a request for a change in the judgment.

MR. LEMANN: It is too late to change the judgment after 10 days from the judgment.

JUDGE CLARK: Then I should think that the later document has no effect whatsoever. I don't see how you could get on a judgment already entered something later to bolster it up. Perhaps you can modify the judgment by bringing in something now that you didn't have in before.

THE CHAIRMAN: I wonder where all this trouble came about this rule. Are we just conjuring up a situation that hasn't, so far as we know, been the subject of trouble in the courts? Is that what we are trying to do, or are we trying to meet a situation where the courts have found the rules are not satisfactory and aren't working well? Is there any decision that causes this worry about what is going to happen?

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I can see that if you visualize the possible foolish situations, but I want to know whether it has ever occurred.

JUDGE CLARK: It seems to me, as I suggested before, it is a question of trying to make a quicker and more direct finality of judgment. Under the Leishman case, the filing of this motion holds up the judgment, and if it has already been held up for quite a period, it seems to be an unnecessary further step.

THE CHAIRMAN: I had the feeling that the committee, while it had adopted the principle that the expiration of the term was the basis for finality of judgment, was specifying time limits that had to be lived up to. On the other hand, seeing that principle, we were talking about extending the time under 60(b) for excusable neglect from six months to one year, and with the time for motion for new trial at 10 days, we are at pretty short shrift on the thing to start with. If we screw a man down to a few days with a very short time limit, and then if something happens from which he ought to be relieved and his time has gone by, we are hitting pretty hard.

However, I repudiate my previous support of the amendment to subdivision (b) of 52. I didn't know what I was doing. I was thinking in terms of a case where the judgment hadn't been entered.

MR. LEMANN: If Mr. Dodge will adhere to his motion, which I seconded, I would like to ask for a vote.

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JUDGE DONWORTH: May we have that motion read?

THE CHAIRMAN: The motion is to let subdivision (b) of Rule 52 stand as is, without change, striking out this proposed new matter in it; in other words, to let the rule stand as it is in the present Federal Rules.

JUDGE DOBIE: Ten days after entry of judgment.

THE CHAIRMAN: Yes. If there is no further discussion, I will submit the motion. All in favor of leaving subdivision (b) of Rule 52 to stand as in the present rules, say "aye"; opposed.

Let's have a hand vote. All in favor of leaving the rule to stand as it is raise their hands.

[Seven hands were raised.]

THE CHAIRMAN: It is carried. Now we will pass on, if there is nothing more.

MR. HAMMOND: Under this rule several Los Angeles, California, Ninth Circuit committees suggested that if the parties stipulated to waive findings or, as one of them said, whenever the parties stipulate that there will be no appeal, there wouldn't have to be any findings.

THE CHAIRMAN: Certainly we will not adopt an amendment that the parties can waive the findings, even though there is going to be an appeal.

MR. HAMMOND: No. How about the other suggestion?

THE CHAIRMAN: Do we need any rule on that? The

parties stipulate that they are not going to appeal and consent that no findings be filed, and the judge stipulates that he will not file findings in the face of those stipulations. If he does, what happens? Nobody can review him.

MR. DODGE: I think the district judges can take care of that.

THE CHAIRMAN: I think you can report to them that on a stipulation of no appeal they can do that sort of thing today. I can't see the district judge insisting on filing the findings when both lawyers say he needn't and they agree not to appeal.

If that is all on 52, 54 is the next.

JUDGE CLARK: On 54 Mr. Morgan has sent in a rephrasing which I should think is pretty good. I will give it to you in full in just a minute. You may remember that we did make one change in this. This rule on the whole is quite interesting. As it went out in our original draft, it was very widely approved. There seemed to be a feeling that I thought was rather pleasing.

SENATOR PEPPER: Which one is this?

THE CHAIRMAN: We are on 54(b). Is that what you are talking about?

JUDGE CLARK: Yes.

THE CHAIRMAN: And you are talking about the underlined new material in lines 12 to the end. You say we have

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approval from the bar. It is a redraft.

JUDGE CLARK: It got approval in the form we had drafted. In January we added one thing that is quite important, and I should think it would work out. I am just calling your attention to that so that you may have it before you. That is the perhaps little addition in lines 16 and 17: "except that upon a determination that there is no just reason for delay the court may by express direction enter a final judgment". We have provided, where the entire matter isn't completely settled, whereas before we provided in effect that the judgment would not be final, that the district judge may by this express finding end it that way.

May I give you Mr. Morgan's language? He is only revising the language.

MR. DODGE: Which lines are those you have just been speaking of?

JUDGE CLARK: What I shall read you is a substitute for from 11 down through 20. Beginning at 20, he takes what we have, as you will see when I read it. This is the substitute for the first part. Shall I read it now? As I understand it, this is just a change in form. He thinks that what we have is a little awkward in expression.

THE CHAIRMAN: I forgot about this rule. Could you tell me in a few words what we are doing by the draft we have, what our point and object are?

JUDGE CLARK: I should say that our whole point in drafting this was to try to clarify what we had done originally. I don't think that we are really changing the sense from the original that we had in 1938. There has been, however, a good deal--quite a little difficulty in working out when a judgment is final and when it isn't. Of course, a great deal of the difficulty has to exist anyhow. In the old days the Supreme Court had been quite insistent that whatever was in the case must be decided before it was final. There were decisions by Justice Brandeis and others to that effect. When we made our action so widely inclusive, it would be obviously unfair then to require that your action of libel and your action on a promissory note, defendant's cross-claim, and one thing and another all must be decided before anybody could get any benefit of the judgment, if it was an entirely separable thing.

So, our original idea was to try to make what would be called a split judgment, a part being the thing that was already settled and a part keeping the rest of the case alive. The problem was to try to give a line of demarcation between what might be termed the final and what might be termed only a provisional judgment. The difficulty is accentuated by the fact that district judges usually don't pay much attention to this, because this is not a matter that troubles them. They will pass all sorts of orders eliminating this claim and that,

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and under our rule any order is a judgment. Therefore, there might be a claim, if they made only a pleading judgment striking out this part of the complaint, as to whether that would be a final judgment or not. So, we tried to define or to mark out a line of division between the complete judgment so to speak terminating the action, and the partial one, and the line of division we worked out was in general "all claims for relief arising out of a single transaction or occurrence".

Then the suggestion was made at our last meeting that there would still be cases where in the judgment of the trial court the matter was so thoroughly settled, even though it might not come within the exact terms of the single transaction, and so on, that it ought to be considered final. So, we put in this provision that I have just read and stressed the one "except," "except upon a determination [that is, by the trial judge] that there is no just reason for delay the court may by express direction enter a final judgment as to any one or more of such claims".

Now I shall read Mr. Morgan's language.

MR. TOLMAN: That is for what?

THE CHAIRMAN: Line 11, the underlined matter. This is a substitute, as I understand it, for the new matter that we have in lines 11 down to---

JUDGE CLARK: Line 20. In other words, this is right at the beginning of the rule, because the rule as we

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draft it begins at 11.

"When more than one claim for relief is presented in an action, whether as claim, counterclaim, cross-claim, or third-party claim, judgment or judgments may be entered as follows: (a) When all claims arising out of a single transaction or occurrence have been decided, a judgment or judgments adjudicating them and terminating the action as to them may be entered. (b) If, but only if, the court determines that there is no just reason for delay and expressly so orders, a final judgment may be entered upon one or more, but less than all, claims arising out of a single transaction or occurrence. (c) If at the time judgment is entered upon any claim, any other claim or claims, whether or not arising out of the same transaction or occurrence, have not been adjudicated,"

Now going on down to line 21, "the court may stay the enforcement of any judgment so entered", and so forth as in line 22.

Then he would insert, to carry out his scheme of division, (d) in line 24 before the word "If".

SENATOR PEPPER: Then following (d) would be just as is?

JUDGE CLARK: That is it.

MR. DODGE: Do you like that "If, but only if"?

JUDGE CLARK: I think it is rather desirable to say that. You have to make a stress, or else you are going to have

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a good deal of confusion. Before, in this draft we said, "The court may by express direction". It is an attempt to emphasize that in that eventuality some affirmative action by the trial judge is required.

SENATOR PEPPER: What kind of case would be one where there would be an "if" and then it were not the only "if"? It is like this where we have "When but not until". "When" means "not until", doesn't it? Doesn't "if" mean "only if"?

JUDGE CLARK: I think that this more of an attempted admonition to the trial judge to be exact. Of course, you can say that maybe it isn't necessary, but usually, you know, the trial judge signs any orders that are presented to him, and it is always a little doubtful to know on this point of finality what he means, because he has never given it a thought. I mean that seems to be the appearance. Naturally he wouldn't give it a thought, because it doesn't affect him very much.

SENATOR PEPPER: I see.

JUDGE CLARK: This is only an additional admonition. Maybe it isn't necessary, but at least--

JUDGE DODGE [Interposing]: Probably there are a lot of other cases in the rules which need it as much as it is needed there.

SENATOR PEPPER: What we mean is: "If--and when we say 'if' we mean it ..."

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JUDGE CLARK: That is it. While it is true that there may be a lot of cases in the rules, this happens to have come up, and there have been a lot of troublesome district court cases of that very kind. I mean we think of it the more because we can think of the actual cases.

THE CHAIRMAN: It sounds like this traffic sign which says, "Full stop, and then go ahead." "Stop" isn't enough.

You have it here now that it is possible for a judge in his discretion, upon claims arising out of the same transaction, if some of them are decided, to enter a final judgment on some of them, although there are others. That forces an appeal if you are going to review. Staying the execution of that judgment doesn't help any of that, does it?

JUDGE CLARK: That is right.

MR. DODGE: The substance of this has gone out to the bar. Were there any adverse comments?

JUDGE CLARK: Of course, you understand that this last provision, this extra power to the district judge, is something new.

MR. DODGE: The three lines in the middle there?

JUDGE CLARK: Yes. That has never gone out. What went out was the rule in substance without it. As I say, the rule before raised quite a surprising amount of approval. I say surprising because I thought it was a technical point which either would be overlooked or they might wonder what it

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all meant. Apparently it was practically unanimous among those who commented on it. They said they thought it was a good thing and clarifying.

JUDGE DOBIE: Do you prefer the Morgan draft of this one?

JUDGE CLARK: I think the Morgan draft is good, yes.

JUDGE DOBIE: It spells it out a little more clearly.

JUDGE CLARK: Yes, and it divides it, (a), (b), (c). I rather think so, yes.

THE CHAIRMAN: Charlie, I remember there were cases in your court that you and I had some correspondence about several years ago, in which partial judgments had been entered.

JUDGE CLARK: That is right.

THE CHAIRMAN: They were final judgments, all right, and an appeal was taken. Meanwhile, there were some other claims involving the same transaction, common questions remaining undisposed of, and this judgment, if not reversed, might be estopped by judgment, if not estoppel. We got into a mess about it. I think I took the view then (whether or not I was right is another thing) that where there were a lot of claims connected in such a way that the judgment in one might be a bar or estoppel to a verdict in another, the judge ought not to enter the partial judgment until all the other claims were disposed of, and he wouldn't be controlled by that judgment. I remember that I thought you were inclined to agree with me

that that was the way to do it.

As I understand this proposed addition that you have in here about the judge entering the single judgment on one of the claims that he thinks there ought to be no delay about, you are giving him authority to do that very thing, to enter a judgment on one claim when there are others connected and related and undisposed of. If that judgment is final, an appeal has to be taken on it, and if it is not, it is going to muss up the remaining claims connected with the same litigation by estoppel.

Why do you think now that we ought to allow the district judge to enter a partial judgment in a case like that? Do you think he ought not to enter it, and get you in position where you consider your final judgment as indirectly disposing of a whole lot of other claims that happen to be in the case?

JUDGE CLARK: This wasn't my suggestion, and I am not particularly crazy about it, but I can explain how it came up. There may be places where it may seem harsh if you don't do it. That is where it really came up.

MR. DODGE: Are you talking about lines 16 to 19?

JUDGE CLARK: That is it.

THE CHAIRMAN: It gives the court power to enter judgment on part, where there are a number of them, all arising out of the transaction, and only one has been litigated.

MR. DODGE: Give him the right to enter judgment and

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go on and say, "except that".

JUDGE CLARK: Let me give a little of the background of how this took place. First, I did agree with you thoroughly and I agree with you now that district judges in general ought not to do it. What I was searching for was some way whereby they wouldn't do it. You see, it is a little too much to expect of them that they won't if you just admonish them not to, because of what happens. They will have a hearing on some objection. A typical case is a complaint where the same cause of action is stated in different counts and different theories. There will be a motion directed to one, and the judge will file a memorandum saying, "I think that is insufficient, and I strike it out," whereas with practically the same factual situation as in the other counts, if the clerk were to enter an order on that, it would be a final judgment. Actually what happens is that the winning party usually in our bailiwick runs around with an order which the judge signs almost as a matter of course.

Of course, I suppose that if there were a circuit judge over his shoulder saying, "Please don't do that because that is going to raise a lot of trouble," he might not do it. Of course, that doesn't happen. It is the most natural thing in the world that the judge just signs the order, and then the other fellow begins to get puzzled and asks, "Is that a final order or is it not?" In order to be safe, he takes an appeal,

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and then they get up before us with their record all made up on that sort of thing.

So, I was trying to look for something that would help to prevent that. I don't think you can make this mechanical. I don't think anything will completely solve it. It is just to help out some. One suggestion I made to the committee before was that it be required that every judgment be labeled whether it was final or not. I mean that the judge should definitely have to pass on that issue and put it in his direction for entry.

MR. DODGE: Do you distinguish between "a judgment or judgments adjudicating them" and the final judgment?

JUDGE CLARK: Oh, yes. That is what we are trying to do. The courts have ruled that a judgment adjudicating only one count, leaving alternative counts, is not a final judgment. You see, they haven't settled all the same claims.

MR. DODGE: This doesn't make much sense to the casual reader who is not familiar with those decisions. The court may enter a judgment or judgments on them, except that upon a certain determination it may enter a final judgment.

THE CHAIRMAN: You haven't caught the first part of it. It allows the judgment to be entered only when every counterclaim, cross-claim, or third-party claim having any relation to the transaction has been decided. Now the exception allows him to depart from that and enter a partial

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judgment on one of those claims related to the same transaction even though the others have not been decided.

MR. DODGE: I thought the preliminary clause applied to the whole sentence.

THE CHAIRMAN: It does. It says, "until all claims".

JUDGE CLARK: "When but not until".

MR. DODGE: "a judgment or judgments adjudicating them may be entered .... except that .... the court may by express direction enter a final judgment as to any one or more of such claims".

JUDGE CLARK: If I may, let me tell how the "except" clause came in. I might point out that I think that does present some doubt. I am not sure of its desirability, but first how it came in: The suggestion was made originally, when we had "all claims arising out of a single transaction, including counterclaims", that we should put in "cross-claims and third-party claims". I said that it seemed to me perhaps a little harsh, if there were a cross-claim between the two defendants, that the battle on that issue should hold up the entry of the main judgment. So, I suggested that that be stricken out of that provision and that we not hold up the judgment for the decision on cross-claims and third-party claims; but the Committee decided against that on the theory that it was wiser to have a provision that generally that should be in the situation, but that there should be a provision so that the

judge could take care of a special situation of that kind, and that is where this "except" clause developed.

MR. DODGE: Wouldn't it be clearer to put in "except that even where all claims have not been decided, the court may enter"?

THE CHAIRMAN: Yes, that would improve it. That is what he means.

MR. DODGE: I didn't understand it when I first read it.

JUDGE CLARK: That is what it means.

THE CHAIRMAN: The draft is deficient in not saying that, I think.

JUDGE CLARK: Do you think Mr. Morgan's is? His was a little different. You are quite right, Mr. Dodge.

THE CHAIRMAN: How does he word that exception?

JUDGE CLARK: He puts that in a separate provision, (b).

THE CHAIRMAN: Does he change the language of it?

JUDGE CLARK: He says this: "If, but only if, the court determines that there is no just reason for delay and expressly so orders, a final judgment may be entered upon one or more, but less than all, claims arising out of a single transaction or occurrence." He states it affirmatively.

THE CHAIRMAN: "less than all". I remember I had this experience before, of what trouble you have on a batch of

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successive appeals in the same litigation.

JUDGE CLARK: That is it.

THE CHAIRMAN: Partial judgments were entered, and the appeals were taken piecemeal, one claim and then another. When you allow the judge to enter a judgment on one claim arising out of the same transaction, and you hold up the others for further decision, then you take an appeal up on that. Then, when you get around to deciding one of the other claims, involving that same transaction, there is a final judgment and appeal there. I am wondering why the circuit courts of appeal don't jump on this thing and say, "Here, we don't want piecemeal appeals."

SENATOR PEPPER: I was wondering about that in connection with the thing we were talking about on Rule 50. The circuit court of appeals, apparently, in the Third Circuit case said that where there had been an alternative motion for judgment and for a new trial, and the court granted both motions, but then there was no appeal from the order made on motion for judgment. We are proposing to make that final so as to resolve that difficulty and let it be appealable, but I suppose that the circuit court of appeals, in spite of anything we say, may say, "We are not bound by those rules. We don't think this was a final and appealable judgment."

THE CHAIRMAN: Here is the way it came up in the Second Circuit. I had to admit in my own mind that this

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partial judgment was a final judgment, and there was nothing that the court of appeals could do from that aspect but to treat it as such, but I said that I felt that the circuit court of appeals could not deal with the merits, assuming that it was appealable and was a final judgment, but that it could vacate and remand the judgment below on the ground that the district court was ill advised to enter a judgment until the other claims relating to it had all been disposed of. They could do that even though it was a final judgment. They could say, "We think it was a mistake to enter judgment at all before disposing of the other claims," and could vacate the judgment.

MR. DODGE: Is it clear that there is a difference between a judgment adjudicating a claim and terminating the action as to it, and a final judgment as to a claim?

JUDGE CLARK: That is a final judgment. If you have a judgment adjudicating completely the claim and all counterclaims arising out of it, the idea is to make a final judgment. Suppose that you have in the complaint a count on libel, a count on an automobile accident, and a count on a promissory note. You might have all those. Suppose that in that case you have a judgment at once on the note. That would be final as to that aspect of the case. Suppose, on the other hand, that you have an automobile accident and you put in six different counts stating the thing. I don't know how they get

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six counts, but they do that with a good deal of repetition. One very ordinary way of doing it is to put in one count for negligence and one count for willful negligence. That is often done. Suppose the judge should say, "There is no proper allegation here of willful negligence. That count shall go out." The winning counsel runs around and gets him to sign an order that it is out. Is that a final or appealable thing? It ought not to be.

MR. DODGE: I understood you to say that the language in 14 differed from the language in 17 in that respect.

JUDGE CLARK: Yes, it is supposed to. The intent of the exception is to eat on what we have already provided in 14. There is no question about that.

THE CHAIRMAN: In 14 he can't enter any judgment until all claims arising out of the transaction have been disposed of. Then 21 comes along and makes an exception to that and says that the court may enter a separate judgment on just one of those claims, although the rest haven't been decided, if he determines that there is no just reason for delay.

MR. DODGE: Yes. That distinction is perfectly clear. That is a distinction based on the fact that in the excepting clause all claims for relief have not been cited, but is there any distinction (I ask this question again because I am not yet clear) between a judgment adjudicating a claim and terminating the action as to it, and a final judgment as

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to the claim?

MR. LEMANN: Isn't the judgment in line 14 still a final judgment?

MR. DODGE: Yes.

MR. LEMANN: I think it is. It cannot be entered under 14 until all matters have been disposed of, whereas under 17--

JUDGE CLARK [Interposing]: I don't know that I quite follow Mr. Dodge, because I thought what we were saying was that that judgment was a final judgment.

MR. DODGE: I misunderstood what you said sometime ago when I asked a similar question. I guess you didn't understand the question.

JUDGE CLARK: I guess maybe I didn't. That part is a final judgment there. Then when you go down below to line 24, that is the non-final judgment. What you were reading was the final judgment part. The "except" clause is a slight addition, a discretionary addition to the final judgment.

MR. DODGE: The reference to the word "final" would be misleading.

MR. LEMANN: The use of the word "final" in line 17 and not in line 14 is what confuses Mr. Dodge.

THE CHAIRMAN: Line 14 uses different phraseology. "a judgment or judgments adjudicating them may be entered and the action thereby terminates as to them". He says that means

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a final judgment.

JUDGE CLARK: Yes.

MR. LEMANN: Then why not use "final"?

THE CHAIRMAN: Line 17 doesn't use all this rigmarole and says, "may .... enter a final judgment".

MR. LEMANN: Why not use the word "final" in 14, too?

JUDGE CLARK: I don't object. It is meant to be final. I still am wondering a little whether the "except" clause should be in at all.

MR. LEMANN: What you are doing here is introducing a new idea in the rules, the distinction between a final judgment and a non-final judgment. That is what this does later on.

THE CHAIRMAN: No. You don't enter the judgment at all if all the claims haven't been adjudicated.

JUDGE CLARK: Monte, I don't think we are introducing any new idea at all. We may be introducing new language, but what we are trying to do is to make a clearer line of division and admonition. This question was in here from the beginning. It is in here in any case where you start combining a lot of different claims in one judgment. Either you have to say what is going to be very harsh, the old rule that you can't consider anything final until everything is final, still applying that under a very changed situation where it is rather unfair on the whole; or you have to have this kind of split judgment thing. Our original rule had the split judgment and, as I say,

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my own conception is that except for this new "except" clause, what we did was no different than before, only an attempt more clearly to state it.

Somebody asked why the circuit court of appeals didn't take care of this. We are human. We did try to take care of it, but were not greatly consistent. We have sent back quite a few cases. I wrote one myself.

THE CHAIRMAN: You sent them back and told them that they ought not to have entered the judgment, that they were premature in entering it.

JUDGE CLARK: Yes. As it usually comes out, we just dismiss the appeal. We say it shouldn't have been done, and therefore we won't consider it. They are all there, they have their briefs, they have printed the thing, and so on, and there is a little tendency, if we can, to dispose of it. Every time we dispose of it, I suppose that is an invitation to do something more. So, that is an invitation to the circuit courts to add to the confusion.

Again I want to say that I don't believe any mechanical rule is going to settle this finally. All we can hope to do is to try to make a little clearer signpost.

SENATOR PEPPER: But when we decided that you could join libel and an automobile accident, it was foreordained that we had to do something like this.

JUDGE CLARK: That is it.

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MR. DODGE: This rule without the "except" clause apparently has been approved by the bar. It has been sent out. Why did we add the "except" clause after sending it out before?

JUDGE CLARK: I got hoisted by my own petard a little. I raised a particular case that seemed a little harsh. The particular case was that of a cross-claim. A cross-claim, you understand, is a fight between two defendants. I said, Is it wise to hold that up while the main claim is still being fought out, or vice versa? Suppose the main claim has been adjudicated and the cross-claim is not settled and is holding back the main claim while they settle that. My own solution was to leave out any reference to cross-claims, and so on, and to center our attention only on claims and counterclaims. As I said, that suggestion seemed to have some difficulties. I think you all thought that might leave a hiatus. At any rate, having suggested that, I got your minds to thinking about the situation, and you did think it would be a little harsh in that case.

A sues B for an automobile injury. B is now suing the XY Company for insurance. Query: Whether the court will consider those two separate matters and whether the court might say to A, "We are going to hold up your judgment until B and XY have settled." That was the kind of case we were visualizing.

[The meeting adjourned at 1:00 p.m.]

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