P R O C E E D I N G S

ADVISORY COMMITTEE ON RULES

FOR CIVIL PROCEDURE

Vol. 4

April 30 - May 2, 1945
Supreme Court of the United States Building
Washington, D. C.

The MASTER REPORTING COMPANY, Inc.
Law Stenography · Conventions · General Reporting

CHICAGO
540 NORTH MICHIGAN AVENUE
Superior 3255

CLEVELAND
STANDARD BUILDING
Main 0894

NEW YORK
51 MADISON AVENUE
AShland 4-1827

WASHINGTON
NATIONAL PRESS BUILDING
National 8558

TABLE OF CONTENTS

TUESDAY AFTERNOON SESSION

May 1, 1945

The meeting reconvened at 1:50 p.m., Mr. William D. Mitchell, Chairman of the Committee, presiding.

THE CHAIRMAN: I am going to Rule 41 in order to go back as far as we have to go back. There are two drafts before you on that, two suggestions which have to do with involuntary dismissal at the close of the plaintiff's case under Rule 41(b) One of the suggestions is:

"In an action tried by 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 other draft is:

"In an action tried by the court without a jury, the court shall weigh the evidence as the trier of the facts and, if the motion is granted, shall make its findings as provided in Rule 52(a)."

JUDGE DOBIE: The first one spells out the alternative that is before him, and of course the bar would know that he wouldn't have to render judgment then. I think it is a good thing to spell it out as Senator Pepper has done. The only objection that I have to his statement is, again, that I don't

like "he" in referring to a court.

SENATOR PEPPER: You can say the court grants it.

JUDGE DONWORTH: Then, "it" instead of "he".

SENATOR PEPPER: Yes. That ought to be, "If at either stage it grants", not "he".

PROFESSOR SUNDERLAND: You don't need "his" there.

MR. DODGE: The court is referred to as "it" in the very next sentence.

MR. LEMANN: If at the final stage the court grants judgment in favor of the plaintiff, should he make any findings then?

THE CHAIRMAN: Oh, yes.

MR. LEMANN: How about the implication? I am just wondering if there is an implication from the second sentence that if at the second stage he does not grant judgment against the plaintiff but grants it for the plaintiff, then the requirement of findings is not a part of it.

JUDGE DONWORTH: Then it comes under the general rule.

PROFESSOR SUNDERLAND: I think there is an uncertainty there.

MR. DODGE: If the court grants judgment at that time, it shall make its findings as provided in 52(a), because the other is covered by 52(a).

THE CHAIRMAN: We have already said in 52(a) that at the close of the evidence, findings must be made, and the

point was made here that we didn't need to repeat that here.

MR. DODGE: Why isn't that the answer to it? Rule 52(a) covers it anyway.

JUDGE DOBIE: We just want to make it perfectly clear to the bench and bar, I think, that this proceeding does come under 52(a). I think it is helpful to spell it out as he does in the first sentence, although I think most of the lawyers and judges would work that out anyhow.

THE CHAIRMAN: How would it do if it read this way in the first part?

"In an action tried by 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 the court grants judgment against the plaintiff, it shall make its findings as provided in Rule 52(a)."

Say nothing about making findings at the close of the evidence for either one party or the other, because that is already covered by 52. All we need to do here is to deal with what findings the court makes on this motion after deciding this motion. Don't you think so?

SENATOR PEPPER: Yes, I think so. I just thought that to spell it out might call attention to both courses that he might follow, but I think it would be simpler just to say, as you suggest, "If the court grants judgment against the

plaintiff".

JUDGE DOBIE: Cut out "at either stage".

SENATOR PEPPER: Cut out "at either stage".

THE CHAIRMAN: And say "the court" instead of "he".

SENATOR PEPPER: Oh, yes.

THE CHAIRMAN: "it shall make its findings as provided in Rule 52(a)."

SENATOR PEPPER: Or, "make findings". I don't think you need any pronoun, do you?

THE CHAIRMAN: That is right, not before "findings". "it shall make findings as provided in 52(a)."

SENATOR PEPPER: Somebody suggested this second thing, and maybe it is better. Monte, wasn't that yours?

MR. LEMANN: I think perhaps I dictated that later. It is just a little shorter.

MR. DODGE: It leaves out the express option.

THE CHAIRMAN: I object to the last one because I think it is compulsory. It seems to force the judge to decide the case on very evenly balanced evidence. It denies him the right to exercise his discretion (at least, on the face of it it does) until he gets more convincing proof one way or the other. That would be the difficulty there.

JUDGE DOBIE: I think it is helpful to spell out the two situations.

SENATOR PEPPER: I have accepted the amendment

suggested by the Chair of striking out "at either stage" and, of course, "the court" should be substituted for "he". With those changes, to bring it before the Committee, I move the first paragraph on this sheet of suggested amendments.

JUDGE DOBIE: I second that.

THE CHAIRMAN: Is there any further discussion?

MR. DODGE: It makes it read a little better to put in your words, "without a jury", after the word "court" the first time, among other things to keep from repeating the word "court".

SENATOR PEPPER: Yes. "In an action tried by the court without a jury". Yes, that makes it unnecessary to repeat "court" right away.

MR. LEMANN: How about putting in "may" before "decline" in line 3?

SENATOR PEPPER: Yes. I will read it as perfected.

"In an action tried by the court without a jury, the court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court grants judgment against the plaintiff, the court shall make findings as provided in Rule 52(a)."

MR. DODGE: I move the adoption of that.

JUDGE DONWORTH: I second it.

PROFESSOR CHERRY: Do we elsewhere in the rules talk

about the court rendering judgment?

SENATOR PEPPER: I don't know. I suppose really it ought to be "renders" instead of "grants". You can't grant a judgment.

PROFESSOR CHERRY: Order judgment.

SENATOR PEPPER: The court orders judgment.

JUDGE DONWORTH: The rendition of a judgment is a definite thing, and it is all right.

PROFESSOR CHERRY: You don't use it that way.

SENATOR PEPPER: May I suggest to the stenographer that, instead of reading back, he change the word "grants" to "orders" where it occurs.

PROFESSOR SUNDERLAND: Isn't "renders" still better?

THE CHAIRMAN: You mean render, don't you? Is the word "grant" in the rule?

PROFESSOR CHERRY: In line 4 it is "grant"; in line 3 it is "render".

SENATOR PEPPER: Oughtn't it to be "orders" in both cases? How about that, Mr. Cherry?

PROFESSOR CHERRY: I think so.

SENATOR PEPPER: Yes.

JUDGE DONWORTH: Oftentimes a court makes a provisional order that judgment be entered, and so forth, and then if it isn't entered, the judgment itself is different from the order of judgment.

JUDGE DOBIE: Put "orders" in all three places?

MR. LEMANN: "directs judgment"?

JUDGE DONWORTH: I think "renders" is a good old word. I can't see any objection to it.

JUDGE CLARK: The expression that we use elsewhere is "direct the entry of judgment". I don't know that it is necessary.

SENATOR PEPPER: Let's keep that.

THE CHAIRMAN: Here we want to cover both. There is some particular reason for talking about the direction for entry in one rule, as distinguished from the actual entry.

JUDGE CLARK: Yes.

THE CHAIRMAN: But here we want to go whole hog and say, cause judgment to be entered, render judgment. Whether it is two motions or one, it is all the same to us.

SENATOR PEPPER: "render" is a good old word in that connection, isn't it?

THE CHAIRMAN: Yes.

SENATOR PEPPER: But I do think that down below we ought to repeat the word, instead of "grants".

JUDGE DOBIE: All right, leave "render" in and change "grants" to "renders".

SENATOR PEPPER: That is right. So, it will read: "In an action by the court without a jury, the court as trier of the facts may then determine them and render judgment

against the plaintiff or may decline to render judgment until the close of all the evidence. If the court renders judgment against the plaintiff, the court shall make findings as provided in Rule 52(a)."

JUDGE DOBIE: That is before us, isn't it?

THE CHAIRMAN: If there is no objection, that is agreed to.

Now we pass to Rule 50 and Senator Pepper's redraft of this business about alternative motions for new trial.

SENATOR PEPPER: I have accepted an amendment suggested by Mr. Lemann, if he feels like reading it.

MR. LEMANN: In line 5 of Senator Pepper's draft I suggest putting in after the word "has", the word "also", and in the same line, after the word "granted", the words "in the alternative". In line 11, change the last word from "may" to "shall".

SENATOR PEPPER: So that in the first case the sentence beginning "In case" would read how?

MR. LEMANN: "In case the motion for new trial has also been granted in the alternative and the judgment is reversed on appeal, the new trial shall proceed".

SENATOR PEPPER: Yes.

THE CHAIRMAN: That is fine. I was trying to work in the same idea.

JUDGE DOBIE: And "may" at the end of line 11 becomes

"shall". Is that right?

MR. LEMANN: That is right.

SENATOR PEPPER: I have accepted those amendments.

JUDGE DOBIE: I move the adoption of that.

MR. DODGE: I second it.

JUDGE CLARK: Senator, this is mere form, a rather small point. Might it not be a little better at the end of line 2 to say, "the court in its discretion may"? I think it was Mr. Velde or somebody who said to try not to separate verbs too much.

SENATOR PEPPER: Oh, I see. Yes. "the court in its discretion may".

THE CHAIRMAN: As you drafted it, until Monte put in his addition, it was assumed that the judge would grant judgment by an order and then at the same time grant an absolute judgment for a new trial without saying that it was conditional on the judgment's being vacated. That is what caused the trouble when they said the second order wiped out the first one.

SENATOR PEPPER: Yes.

THE CHAIRMAN: Now he has cured that in line 5 by pointing out that the granting of the new trial has not wiped out the other, but is in the alternative. That is a good expression. Why shouldn't that same thing be in line 3? "the court may in its discretion rule upon a motion for new trial or decline to do so." Maybe that is all right.

SENATOR PEPPER: I think that is all right.

THE CHAIRMAN: It is cured in the next sentence, isn't it?

SENATOR PEPPER: Yes, it is cured in the next sentence. "In case motion for new trial also has been granted".

JUDGE DONWORTH: I am wondering, in view of the fact that in line 3 we speak of ruling upon the motion for new trial when the determination is going to be conditional, whether in line 4 it would be any improvement to say, at the end of line 4, "In case such ruling is for granting a new trial and the judgment is reversed".

We don't expect the court really to grant the new trial. We expect it to make an order indicating his ruling, but if he granted a new trial, then it would be ipso facto effective, I suppose. I am not sure whether there is anything in my thought.

SENATOR PEPPER: I couldn't get what the language was that you suggested.

JUDGE DONWORTH: At the end of line 4 the new sentence begins, "In case". My thought is to make that read, "In case such ruling is for granting a new trial and the judgment is reversed on appeal".

MR. DODGE: I shouldn't think that was necessary, because ruling upon the motion for new trial is either granting or denying.

JUDGE DONWORTH: Not in our line up here.

MR. DODGE: Why not?

THE CHAIRMAN: You certainly aren't granting it, Bob, if you just grant an order for judgment. You are telling what you would do if that order for judgment is granted.

MR. DODGE: It is granting judgment for new trial. It is a ruling upon the motion.

JUDGE DONWORTH: If he grants the new trial, Mr. Dodge, then the new trial is granted.

THE CHAIRMAN: I get the idea by an insertion I have suggested. It is a very clumsy one, but I tried to bring that idea out in lines 2 and 3. "If the motion for judgment is granted, the court may in its discretion either rule upon the motion for a new trial by determining whether it should be granted if the judgment is thereafter vacated, or decline to do so."

That is the thought, isn't it, because he is ruling on the motion for a new trial. His order on the motion for new trial is not an absolute order directing a new trial, but it is a statement, conditionally, as you said, in the alternative, that if the judgment which he has just ordered is vacated, then at least he will or will not direct a new trial.

MR. LEMANN: It might be well to take the language you suggest in addition to the amendment I suggested in 5. I wasn't very clear as to what Judge Donworth thought his

amendment would accomplish beyond what we had done by the amendments.

THE CHAIRMAN: I think he arrived at the same thing I did in the same sentence, although he did it only in a few words, and I wanted to spell it out.

MR. LEMANN: He puts it in the next sentence, not in your sentence. He puts it in the same sentence in which, as I understand, we have just voted to put in that the motion is granted in the alternative.

SENATOR PEPPER: It was in line 4, the sentence beginning "In case". I think his thought would be met if it read, "In case the motion for a new trial has also been granted conditionally". Would that be your thought?

JUDGE DONWORTH: Why wouldn't it be all right to say, "In case such determination"? The Chairman's language is going to use the word "determination" in lines 2 and 3. So, why not in line 4 say, "In case such determination is for granting a new trial"?

JUDGE DOBIE: "in the alternative"?

SENATOR PEPPER: Yes, the rest of it would be.

MR. DODGE: Wouldn't it be simpler to say, "a new trial is granted", rather than "the determination is for granting"?

THE CHAIRMAN: The point we are trying to make, Bob, is this: The whole supposition is that the judge orders

judgment notwithstanding the verdict and renders an order. Our point is that, in the face of the judgment that he has just ordered for the defendant, his order for new trial isn't an order for new trial. He doesn't grant a new trial, because he doesn't intend that there shall be any. The judgment has been entered. All he does under Roberts' position is to say, "I have granted judgment for the defendant, and that is the end of it, but if my judgment is set aside hereafter, then at least I will grant him a new trial." That isn't an absolute order granting a new trial.

MR. DODGE: We have incorporated the words "in the alternative".

THE CHAIRMAN: That helps some.

SENATOR PEPPER: Isn't it common to have an order granting a new trial with a condition, granting a new trial unless the plaintiff files a remittitur of so much? It seems to me that for all intents and purposes you can speak of it as an order granting a new trial, if you decide that you will put in Mr. Lemann's suggestion, which I think is good, that it is clearly marked as an alternative course.

MR. DODGE: What was the Chairman's suggested language after the word "trial" in the third line?

THE CHAIRMAN: You see, I don't recommend my own language. It is clumsy. I am just dissatisfied with this draft because it doesn't make clear that the order on the

motion for new trial is a conditional one to take effect only if the judgment is vacated. I added these words: "If the motion for judgment is granted, the court may in its discretion either rule upon the motion for a new trial by determining [that is the nature of his ruling] whether it should be granted if the judgment is thereafter vacated, or decline to do so."

PROFESSOR CHERRY: Why not add Mr. Lemann's phrase, "in the alternative", to that sentence that you have been speaking of? "in its discretion may either rule upon the motion for a new trial in the alternative or decline to do so."

THE CHAIRMAN: Do you think that sufficiently points out that the order for new trial is conditional on the judgment's being vacated?

PROFESSOR CHERRY: I thought it was accepted when it was put in line 5. I would think it better to put it where we first deal with this idea of his ruling on both at the same time.

MR. LEMANN: Now the judge may do the following things, may he not, if he grants the motion for judgment? One, he may say, "I won't pass on the motion for new trial." Two, he may say, "I will pass on it alternatively." Under 2, he will either (a) say that "If my judgment is reversed, I will grant a new trial" or (b) say that "If my judgment is reversed, I will refuse a new trial." Is that a correct statement of what the judge might do?

THE CHAIRMAN: I think so. It is a clear statement of what he has to do to make the thing work.

MR. LEMANN: We could spell all that out just like that in more condensed words, and then go on to say that in any of these events the judgment is appealable, and then go on with the language as it now stands.

THE CHAIRMAN: I had forgotten to object to the reference to the appealability of the judgment. The question of appealability is one to be determined by the nature of the judgment and not by the label to be attached to it. If it is not the final disposition, we can say that it is appealable, but it isn't under the statutes.

MR. LEMANN: What we could say is this: "If the judge undertakes to pass in the alternative upon a motion for new trial, his action in so doing shall not deprive the judgment of finality."

THE CHAIRMAN: Yes, I know, but my point is that, if you have in there the alternative provision that you suggested, it doesn't deprive it of finality. The thing that wiped out the finality of the judgment was the unconditional granting of a new trial right after he granted judgment.

MR. LEMANN: That is right.

THE CHAIRMAN: Then he says, "I am not disturbing that judgment at all. I never intended to. My order on the motion for new trial isn't what disturbs the judgment. If the

upper court disturbs it, then my order will be operative." But I don't think that deprives that judgment of appealability, and I don't think it is our function to state an ipse dixit as to whether a judgment is final or whether it isn't final. That is to be determined by the nature of the judgment, whether it finally disposes of the case, and all that sort of thing.

SENATOR PEPPER: We have been declaring certain judgments final right along. Before lunch we were doing that.

THE CHAIRMAN: Where did we say it was final? We said it finally disposed of the case, but that is a different way from saying that it is appealable.

PROFESSOR CHERRY: You can leave out the word "appealable".

MR. LEMANN: If we make it plain that the ruling on the new trial business is in the alternative, then we don't need to have the sentence in line 4 that the judgment is appealable.

THE CHAIRMAN: That is my theory. In other words, you mean we make it perfectly clear that the order granting the new trial is an order which by its terms doesn't grant it unless and if and until the judgment is vacated by the upper court. That covers it.

MR. LEMANN: How about this suggestion, then? Retain the first two sentences of Senator Pepper's draft. Then proceed with a new sentence: "If the court rules upon the

motion for new trial, its ruling shall be in the alternative--"

JUDGE DONWORTH [Interposing]: You must define that alternative.

MR. LEMANN: "--and shall not be effective if the motion for judgment is affirmed."

MR. DODGE: That is accomplished by the language suggested by the Chairman.

JUDGE DONWORTH: Yes.

MR. DODGE: Then we provide that if the motion is acted upon as aforesaid and the judgment is reversed, and so on.

MR. LEMANN: That would do it, too. Why not adopt the Chairman's suggestion and retain the language that we put in line 5?

SENATOR PEPPER: That seems to me the clearer way to do it. I think you will find that works out all right.

MR. DODGE: Inserting the Chairman's words?

SENATOR PEPPER: Yes. Inserting the Chairman's words in line 3 and inserting Mr. Lemann's words in line 5.

MR. LEMANN: Suppose we have it read by the Chairman as it then would stand.

THE CHAIRMAN: I am ashamed of it, but I will read it. This is the way it would read, as I understand: "A motion for a new trial, as an alternative--" The language is "in the alternative".

SENATOR PEPPER: No, I copied it the way it was in

the draft here.

MR. LEMANN: Why not change it to "in the alternative"?

THE CHAIRMAN: Where is our original rule?

SENATOR PEPPER: I don't know what that was.

THE CHAIRMAN: What rule are we talking about?

JUDGE CLARK: Rule 50(b).

MR. LEMANN: It is "in the alternative", isn't it?

THE CHAIRMAN: "in the alternative". "a new trial may be prayed for in the alternative." That is the language of the rest of Rule 50.

SENATOR PEPPER: That is all right. I just followed what was in this copy before us. "A motion for a new trial in the alternative".

THE CHAIRMAN: That is the way it is worded in the rest of the rule. I don't think there is any preference for either.

JUDGE CLARK: I wonder if that is quite so. It isn't prayed for here in the alternative. It is prayed for as an alternative.

SENATOR PEPPER: I think so. I think "as an alternative" is more accurate.

PROFESSOR CHERRY: What is the difference?

JUDGE CLARK: In the alternative, you are praying either for this or for that, aren't you?

THE CHAIRMAN: Let's let it go.

JUDGE CLARK: I think you changed this before.

SENATOR PEPPER: The prayer for alternative relief is in the alternative. This is "as an alternative".

JUDGE CLARK: That is it.

THE CHAIRMAN: "A motion for a new trial, as an alternative, may be joined with a motion for judgment. If the motion for judgment is granted, the court in its discretion may either rule upon the motion for a new trial by determining whether it should be granted if the judgment is thereafter vacated, or decline to do so."

If he makes a ruling at all, it is to decide whether, in the event the judgment is vacated afterwards, a new trial should be had.

SENATOR PEPPER: Don't you think it ought to be "reversed", showing that it is not for him to vacate but for the appellate court?

THE CHAIRMAN: I did it deliberately the other way because I can imagine this district judge vacating his own judgment. Do you think it always ought to be on appeal?

PROFESSOR CHERRY: Put it both, vacated or reversed.

THE CHAIRMAN: Suppose he vacates the judgment himself and takes the back trail.

SENATOR PEPPER: All right.

THE CHAIRMAN: "If the motion for judgment is granted,

the court in its discretion may either rule upon the motion for a new trial by determining whether it should be granted if the judgment is thereafter vacated, or decline to do so. In case the motion for a new trial has been granted--"

SENATOR PEPPER [Interposing]: "in the alternative".

THE CHAIRMAN: Those are the words I was just going to put in there. "In case the motion for new trial has been granted in the alternative". That is the way you had it.

MR. LEMANN: I had "also" in there. I don't know that you need it, but I had "also" in there.

PROFESSOR CHERRY: You don't need it.

MR. DODGE: You don't need it.

SENATOR PEPPER: You don't need it.

MR. LEMANN: I think you can leave it out.

THE CHAIRMAN: "and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court shall have otherwise ordered. In case the new trial has been refused and the judgment is reversed, subsequent proceedings shall be in accordance with the order of the appellate court. If the district court, when entering judgment on the motion [is that the motion for judgment or the motion for a new trial] has declined to rule upon the motion for a new trial--"

MR. LEMANN [Interposing]: Motion for judgment.

THE CHAIRMAN: Oh. "when entering judgment on the motion has declined to rule upon the motion for a new trial

and if on appeal the judgment is reversed the district court may then--"

SENATOR PEPPER [Interposing]: "the district court shall".

THE CHAIRMAN: That is right. "shall then dispose of the motion for a new trial unless the appellate court shall have otherwise ordered."

I think the result of this is going to be that the judges are never going to pass on a motion for new trial. You are getting right back to where I said it ought to be all the time.

PROFESSOR CHERRY: And yet we haven't gone directly counter to Mr. Justice Roberts' opinion.

SENATOR PEPPER: That is right. It is a compromise.

MR. LEMANN: If they pass on it, they are doing it in the alternative, which is what he says it would be if they did pass on it.

PROFESSOR CHERRY: Yes.

MR. DODGE: What we contemplate ordinarily is a reversal of the judgment by the higher court. The higher court enters an order vacating the judgment.

THE CHAIRMAN: "if the judgment is thereafter set aside". Those are pretty good words, aren't they, on that phase?

SENATOR PEPPER: To set aside is the act of the court

that reverses.

MR. LEMANN: "vacated or reversed". How is that?

THE CHAIRMAN: You are all dead sure that there will never be a case where a district judge, after granting judgment non obstante, sets it aside himself?

MR. LEMANN: That would be vacating, wouldn't it?

MR. DODGE: He vacates the whole thing.

THE CHAIRMAN: You want to limit this to set aside on appeals, as I understand.

MR. LEMANN: No. Vacating wouldn't do it.

THE CHAIRMAN: You say my language isn't broad enough.

MR. LEMANN: That is right.

THE CHAIRMAN: It should be granted if the judgment is thereafter vacated or reversed. Is that what you mean?

MR. LEMANN: That is the point.

THE CHAIRMAN: Set aside or reversed.

MR. LEMANN: Either one.

JUDGE CLARK: Which is it? Is it set aside or is it vacated?

THE CHAIRMAN: I think "set aside" is better than "vacated".

MR. HAMMOND: You use "vacated" up above, don't you, in line 25?

THE CHAIRMAN: What do you think about it as I read it?

MR. DODGE: I move its adoption.

JUDGE DONWORTH: Second.

THE CHAIRMAN: Do you guarantee that we have covered every possible situation?

MR. DODGE: I think it covers it all.

THE CHAIRMAN: Certainly, as you say, we have opened the door for the district judge absolutely to refuse to pass on it as a waste of time, until he knows whether his judgment is going to be reversed; and if it is reversed, then he can take it up and pass on it unless the upper court tells him not to.

SENATOR PEPPER: That is right.

THE CHAIRMAN: That is just what Roberts said he ought not to do. He said he ought to pass on it simultaneously

PROFESSOR CHERRY: As against that, the kind of case that you brought up this morning can be pointed out in a note, which will satisfy Judge Roberts that there are some things that he didn't have in mind in that opinion, but we are not directly asking the Court to reverse that opinion.

THE CHAIRMAN: It has been moved and seconded that this draft be adopted. I think the reporter has it in his minutes. All in favor say "aye." That seems to be agreed to.

Now we have Mr. Morgan's draft. We go on to Rule 54, where we were before lunch, Judgment at Various Stages. Do you all have before you Mr. Morgan's draft?

JUDGE CLARK: I might say just in passing that I get

some pleasure out of this because the draft as I presented it here is Mr. Velde's draft. We now have Dean Morgan saying that Mr. Velde is ungrammatical.

PROFESSOR CHERRY: Why not?

THE CHAIRMAN: Is there any objection?

SENATOR PEPPER: That is a cross-claim as far as we are concerned.

JUDGE CLARK: I think Morgan's is pretty good. Major Tolman said he didn't like "a judgment or judgments". He thought we ought to say just "judgments". That would be in line 4.

JUDGE DOBIE: He could enter two of them, couldn't he?

JUDGE CLARK: Two?

JUDGE DOBIE: I mean two judgments. He could allow one and disallow the other.

JUDGE CLARK: No. It may be a single judgment, or it may be more than one.

JUDGE DOBIE: That is what I say.

JUDGE CLARK: I don't object to this. I think it is a little clearer to have it in, but the Major thinks that if you say the plural, you include the singular.

MR. DODGE: Why do you say "final judgment" in (b) and not in either (a) or (c)?

JUDGE DOBIE: That has that clause in there that "the court determines that there is no just reason for delay and

expressly so orders".

MR. LEMANN: I think "final" ought to come out. A judgment is final, I should suppose, if it is a judgment. Don't we say the word "judgment"--

THE CHAIRMAN [Interposing]: (a) brings out the finality and describes it in another way. Instead of saying, "a final judgment", it says, "a judgment or judgments adjudicating them and terminating the action". That is one way of calling it a final judgment. The next paragraph just simply calls it a final judgment.

MR. DODGE: Won't that lead to confusion if we differentiate in language? Why don't we say in (a), "a final judgment or judgments adjudicating them", and stop there?

MR. HAMMOND: You don't want to use the word "final" there, do you?

MR. DODGE: If we use it in (b).

JUDGE DONWORTH: One objection to this draft is that clause (c) covers the whole thing and imposes no conditions at all. You might just as well say that if the judge wants to render judgment on part of the claim, he can do so without assigning any cause therefor.

JUDGE DOBIE: (a) deals with where you take all the claims arising out of a transaction or occurrence and says you can adjudicate them. (b) says that where you have some, but less than all, if, but only if, the court determines that

there is no reason for delay, then you can enter upon some, but not all. Then, (c) says that if judgment is entered upon some, but less than all, those not decided have not been adjudicated.

JUDGE DONWORTH: But there are no conditions under (c).

JUDGE CLARK: Judge Donworth, (c) is not complete in the Morgan draft. Morgan wants to go right on, and you will see that when he goes on, it is merely a provision for staying. The rest of (c) is only that the court may stay the enforcement.

JUDGE DONWORTH: I am probably in error. I hadn't noticed that.

JUDGE CLARK: The other alternative is to be what he calls (d), and that begins in line 24 of the original.

THE CHAIRMAN: Look at line 21 on page 45 of the Reporter's draft, and you will find the rest of what is to be added to (c) in Morgan's draft.

JUDGE CLARK: On Mr. Dodge's point, I suppose it may be confusing to have it different. We can do it either way. We can put in "final" before the first one.

MR. DODGE: I still don't like those words "but only if".

JUDGE CLARK: They may not be necessary. That he "expressly so orders" may be sufficient.

MR. DODGE: "If" always means "only if".

THE CHAIRMAN: I think we ought to strike out "but

only if".

SENATOR PEPPER: The Reporter pointed out that what they really meant to do was to accentuate or italicize the "if". It is to call the court's attention to the importance of the condition.

JUDGE CLARK: That is correct.

MR. DODGE: We have a great many if's in the rules which are emphatic and would equally require that emphasis.

THE CHAIRMAN: Let me ask you this, Charlie. It says "If the court determines that there is no just reason for delay and expressly so orders". He expressly orders an order entering judgment. The clerk walks up to the judge with an order, and the judge signs it and it is recorded. He has expressly ordered that judgment be entered and, as far as the record shows, he based that order on the conclusion that there was no reason for delay. Your draft here doesn't say that he must have a hearing, on notice to all the parties, to decide whether this judgment ought or ought not to be rendered or any kind of hearing at all. He has figured it out in his own mind and signed the order, and that is all there is to it. Do you intend that, in order for the court to determine whether there is just reason for delay, he ought to have a hearing with the people interested in the suit?

JUDGE CLARK: I guess the fact of the matter is that we haven't thought much about it, and I guess it should be

considered. My reaction at the moment is that there ought to be a hearing or a chance of a hearing.

SENATOR PEPPER: "If the court, after hearing, determines that there is no just reason"?

JUDGE CLARK: Yes.

THE CHAIRMAN: Of course, that raises all kinds of questions as to how many of these parties with cross-bills and counterclaims and all that sort of thing have to be brought in to the hearing. It might mean everybody. It did seem to me that your purpose was to get the court's attention pinned down on the thing and a sort of record made that he had really considered this question of delay and formed an opinion. Yet, under the literal language of this rule, if he does what you say he does and just signs an order brought in by the clerk directing judgment to be entered, that is the end of it.

JUDGE CLARK: Yes, I think there is a great deal in what you say.

PROFESSOR CHERRY: How about putting the idea of "expressly" with the determination or finding, rather than with the order for judgment?

THE CHAIRMAN: That is what you mean, I guess.

PROFESSOR CHERRY: "If the court expressly determines that there is no just reason for delay, a final judgment may be entered". Then you don't need "if". You direct attention that he has to determine.

THE CHAIRMAN: If he doesn't express the determination in the order or something, he wouldn't comply with the rule, would he? That is obviously where it ought to go. Transpose the word "expressly" before the word "determines" in the previous line.

PROFESSOR CHERRY: Then strike out "but only if".

THE CHAIRMAN: There was some objection to striking that out.

PROFESSOR CHERRY: If you have now made it so direct that he has to make that determination, I wonder if you need the "but only if".

SENATOR PEPPER: Changing the word "expressly" to a position before "determines" accomplishes all the purposes of the clause "but only if", doesn't it?

PROFESSOR CHERRY: That is what I thought.

MR. DODGE: Are you going to put in the words, "upon motion and after hearing"?

JUDGE CLARK: That is what I was going to ask now.

PROFESSOR CHERRY: No. I think then you have, as the Chairman said, to provide how you are going to bring it on and all that sort of thing. I felt that the whole purpose was to focus attention that he has a responsibility somehow to decide that. He doesn't usually do that on his own initiative.

MR. LEMANN: He would do it on motion. You have the machinery for motions already provided, so I don't know

that--

PROFESSOR CHERRY [Interposing]: But if they come in and talk it over with him, and he says, "Yes, it is clear that it should be done," why have the necessity of a motion? Isn't that right, Senator?

SENATOR PEPPER: Yes.

THE CHAIRMAN: I think it is all right without an express provision about a hearing. I raised the point to know whether it was intended. I think if that word "expressly" is put before "determines", the court isn't apt to make the order unless he has conferred informally with the parties and has a hearing. He can make it without that only in a case where it is perfectly clear.

SENATOR PEPPER: Of course, there is one phrase that is used sometimes that can be given an informal meaning. "If the court upon cause shown expressly determines". But I don't think that is necessary.

JUDGE CLARK: I have another little suggestion that Mr. Moore just made that is somewhat along the same line. After the words "final judgment", then, how about putting in something like this: "denominated as such"?

THE CHAIRMAN: I think if on its face it is final, it is final unless the court in the judgment itself reserves the power to alter or amend it. I can't quite get the idea that the label on the judgment is the question that settles the

finality of it.

MR. DODGE: You are going to insert the word "final" in (a), too, aren't you?

JUDGE CLARK: Yes, I should think so. This may not be important, but if the court expressly determines, where does the court expressly determine? Perhaps he does that in a finding of fact, but unless we see it somewhere--

SENATOR PEPPER [Interposing]: The order that you hand up to the judge would be: "This cause coming on to be heard, the court having determined that there is no just reason for delay, it is ordered, adjudged, and decreed ...." That makes your record.

JUDGE CLARK: I guess perhaps it may take care of itself.

SENATOR PEPPER: I think it would.

JUDGE DONWORTH: There is another point. This clause (c) should not be preceded by the letter (c). It is not a subdivision of anything. (a) and (b) are classifications. (c) is generic, relating to all situations where the court takes the action of (a) or (b). I think Mr. Morgan so intended it. Strike out the letter (c), and then you go on and treat of the general situation, and not a subdivision concerning when the judge may do this.

MR. DODGE: It deals with a different matter. It deals with the staying of the enforcement.

PROFESSOR CHERRY: Not judgment.

JUDGE DONWORTH: It is not a classification at all.

MR. DODGE: "the court may stay the enforcement of any judgment so entered".

MR. LEMANN: He has it as (c). He must have put it in, because it wasn't there before.

SENATOR PEPPER: I don't think it really ought to be there, no, because (a) and (b) are preceded by this language: "may be entered as follows:" Then (a) and (b) come in logically, and (c) doesn't complete the thought about the entry of judgment.

MR. LEMANN: He wants to make a (d), too, you notice.

THE CHAIRMAN: As a matter of fact, you already have a subdivision (b) to Rule 54, so the (a) and (b) here ought to be (1) and (2).

JUDGE CLARK: I think so. Then you leave out (c) and (d).

JUDGE DOBIE: Put them in as a new paragraph or separate sentences, without letters in front of them.

THE CHAIRMAN: What will there be to show that what follows the word "occurrence" isn't a part of subdivision (2)?

MR. DODGE: A paragraph. Start (c) as a new paragraph.

THE CHAIRMAN: All right.

JUDGE CLARK: Of course, a semicolon up above

between what is now the (a) and (b), which will become (1) and (2), would show that they are tied together.

THE CHAIRMAN: Would show that what is tied together?

JUDGE CLARK: The first two. He has a colon after the word "follows" in the third line. Shouldn't there be a semicolon after the word "entered"?

JUDGE DOBIE: I think that would make it better.

THE CHAIRMAN: Yes. That also separates what was (c).

SENATOR PEPPER: Mr. Chairman, on this issue as to whether we should use the word "final" in either one or both cases in (a) and (b), is some light thrown upon it by this new paragraph which Morgan labels (c)? Doesn't that show that the judgments that we are talking about are final adjudications, because there has to be a provision to stay them; otherwise, they would be executed. They are judgments which would be executed, and they are therefore final unless there is a step taken for the stay of action.

JUDGE CLARK: That is to a certain extent true, but I should think it would be unfortunate not to have something to distinguish that they are final, because that is an important part, and the last sentence that goes over the page is the non-final one. We want to make the contrast, and I think if we take out all the emphasis, we take away quite a little of the force of it.

SENATOR PEPPER: I see.

JUDGE CLARK: If you look over the page at the non-final one, that raises the question.

THE CHAIRMAN: I have the impression that there is no real inconsistency in using the words "final judgment" in (2) and not in (1). What we have done in (1) is to elaborate a full description of what amounts to a final judgment. We say that a judgment adjudicating these claims and terminating the action as to them may be entered. In (2), instead of repeating all that, we just take a short-cut and say "final judgment". Final judgment may be entered as to one or more of them. Isn't it just another way of describing the same thing, which we have been more elaborate about in (1)?

I want to get clear what you want. If you transfer "final" to (1), then you strike out all this stuff about adjudicating and terminating the action? Is that your idea? Didn't you bring up that question of final judgment?

SENATOR PEPPER: Mr. Dodge brought that up.

MR. DODGE: I thought we could leave out the words, "and terminating the action as to them". "a final judgment or judgments adjudicating them may be entered."

THE CHAIRMAN: Is that agreeable? And leave "final" in the second clause, too?

MR. DODGE: Yes.

THE CHAIRMAN: Is there any objection to that?

JUDGE DONWORTH: Is that inserting "final" in (1)?

SENATOR PEPPER: "a final judgment or judgments adjudicating them may be entered."

THE CHAIRMAN: Insert "final" before "judgment" in (1). "a final judgment or judgments adjudicating them may be entered." Is that the way you want it?

MR. DODGE: Yes.

THE CHAIRMAN: We would strike out the clause, "and terminating the action as to them". That reconciles the two. We leave "final" in (2).

JUDGE DORIE: Delete "adjudicating them and terminating the action". "a final judgment or judgments as to them may be entered." Is that right? In other words, "final" takes the place of "adjudicating them and terminating the action".

SENATOR PEPPER: Leave out "as to them" also. That goes with "terminating the action as to them".

MR. LEMANN: I wonder if it would be a little clearer if you rearranged (2) to correspond with the arrangement of (1). (1) now begins, "When all claims arising out of a single transaction or occurrence have been decided". How about starting (2), "When less than all claims arising out of a single transaction or occurrence have been decided, but the court expressly determines that there is no just reason for delay, a final judgment may be entered".

THE CHAIRMAN: The point has just been made that a

final judgment or judgments may be entered on certain claims not adjudicating the claim but holding that the court has jurisdiction or something of that kind. That isn't adjudicating the claim.

JUDGE CLARK: That is what he is raising. He wants to do it the other way around.

THE CHAIRMAN: So, "final judgment or judgments upon them may be entered" does necessarily--

PROFESSOR MOORE [Interposing]: "or terminating the action as to them".

JUDGE CLARK: Take out the adjudicating, then, and leave in the other. That is his idea.

THE CHAIRMAN: Oh, I see. Do you get the point?

SENATOR PEPPER: I don't quite get that.

THE CHAIRMAN: He says that using the expression "final judgment or judgments adjudicating the claims" supposes that those claims are adjudicated on the merits, and instances may arise where the final judgment throws the claims out of court on the ground of lack of jurisdiction or something, and there is nothing to adjudicate. So, he doesn't like the phrase, "adjudicating the claims", because the judgment may not always do that. He wants to leave it this way: "a final judgment or judgments terminating the action as to them may be entered." I suggest an even shorter cut and would say, "a final judgment or judgments on those claims may be entered."

MR. DODGE: Why isn't that enough? "on those claims."

THE CHAIRMAN: You often speak of judgment on claim or judgment on cause of action. It doesn't necessarily mean that you have decided it on the merits, does it?

MR. LEMANN: "may be entered on those claims."

MR. DODGE: "a judgment or judgments on those claims may be entered."

MR. LEMANN: How about "may be entered on those claims"?

MR. DODGE: I shouldn't think that was a material change.

THE CHAIRMAN: "a final judgment or judgments may be entered on those claims." I will have to read it now.

JUDGE CLARK: "on those claims", then a semicolon.

SENATOR PEPPER: Then Mr. Lemann had a suggestion for rephrasing (2) so as to harmonize it with (1).

MR. LEMANN: I thought it through so it would contrast and leap to the eye a little more quickly.

THE CHAIRMAN: What is it you want done to (2)? I have it this way: "If the court expressly determines that there is no just reason for delay and so orders, a final judgment may be entered upon one or more, but less than all".

MR. LEMANN: I would just suggest for consideration a rearrangement of clause (2) without any change in substance, so it would read as follows: "(2) When one or more

but less than all, claims arising out of a single transaction or occurrence have been decided, and the court expressly determines that there is no just reason for delay, a final judgment may be entered upon such claims."

JUDGE CLARK: That is, you put the last clause up first in (2).

MR. LEMANN: That is right, to make the contrast between the two kinds of classes.

JUDGE DOBIE: Start them both as "when" clauses, and the first line shows exactly the situation.

MR. LEMANN: That is the difference between the two clauses. It is just a stylistic point.

JUDGE DOBIE: I do think that is better.

THE CHAIRMAN: Is there any objection to the draft just dictated by Mr. Lemann?

SENATOR PEPPER: I move it.

THE CHAIRMAN: If there is no objection, it is agreed to.

JUDGE CLARK: That finishes that, I guess.

MR. TOLMAN: Mr. Chairman, have you finished that one paper? I was out when this came up, and there is one thing I want to say about it.

THE CHAIRMAN: About Rule 54?

MR. TOLMAN: This draft, if it is 54. In the original rules we had many cases where this expression,

INTENTIONAL BLANK

judgment or judgments, man or men, person or persons, was used. We went through and struck out all of those duplications and, since we were making rules for multiple cases, many cases for the future, we used the plural. If you re-commence this matter of judgment or judgments, this reiterative business, you have to be consistent and use it many times. This rule will be just as clear if you say "judgment may be entered" or "judgments may be entered", and not use that double-barreled form of expression. It isn't used in literature anywhere. It is one of the lawyer's faults, and I think it ought not to be here.

THE CHAIRMAN: Is there any reason that we shouldn't strike out "or judgments" appearing twice here? Have you any objection to it?

JUDGE CLARK: No. I was just trying to settle with Mr. Moore whether it should be "a final judgment" or should be "final judgments".

THE CHAIRMAN: The question of singular or plural. It might be either. You can't tell what the judge will do.

JUDGE CLARK: Yes, it might be, or you might put it all on one paper.

PROFESSOR SUNDERLAND: If you don't say "a judgment" but just say "judgement may be entered", that is generic.

JUDGE CLARK: We are putting "final" before it.

PROFESSOR SUNDERLAND: You don't need to say "a

judgment"; just "final judgment".

JUDGE CLARK: I guess that would do. Leave out the "a".

PROFESSOR SUNDERLAND: And leave out the plural.

JUDGE CLARK: Yes. "final judgment may be entered". I guess that is all right.

THE CHAIRMAN: Then we will strike out in line 2 of Mr. Morgan's draft, the words "or judgments", and in line 4 we will strike out the word "a" before "final" and then strike out the words "or judgments".

JUDGE CLARK: Yes.

THE CHAIRMAN: Is that all we strike?

PROFESSOR SUNDERLAND: In 7 you strike out "a".

THE CHAIRMAN: No, because there is a single claim that he is going to end.

PROFESSOR SUNDERLAND: But we are talking about "final judgment" as a generic process.

MR. LEMANN: There might be more than one.

JUDGE CLARK: I believe we should strike it out there too.

THE CHAIRMAN: All right, we will strike out "a" in line 7. I don't see any other case for it.

PROFESSOR SUNDERLAND: There are a couple of a's that need to go out in the part that isn't copied into the redraft.

JUDGE CLARK: In line 31 we may need to take out "or judgments".

PROFESSOR SUNDERLAND: In 28 the "a" goes out, and in 31 "a" and "or judgments" go out.

THE CHAIRMAN: In line 31 we strike out "a" and "or judgments".

PROFESSOR SUNDERLAND: And in 28 strike out "a".

THE CHAIRMAN: Yes, that is right.

JUDGE CLARK: All right.

MR. DODGE: I move that the rule as thus amended be adopted.

SENATOR PEPPER: Second.

THE CHAIRMAN: Do I hear any objection? Without objection, it is agreed to.

Now we are up to 56.

JUDGE CLARK: On 56 Mr. Morgan suggests--and I should think this was a good change, that the time limitation in (a) be put at the beginning so that it would be this: "At any time after the expiration of 20 days after the commencement of the action, a party seeking to recover", and so on.

JUDGE DOBIE: Start the sentence with "At".

JUDGE CLARK: Yes.

PROFESSOR SUNDERLAND: That has one defect. In 56(b), which isn't set out here in our sheets, it begins the other way. There is no time limit. It begins with another form. If we

stress the time limit in (a) and have no time limit in (b), it seems as though we were stressing something that doesn't need to be stressed.

JUDGE CLARK: I don't care. I just bring it before you. That is Morgan's suggestion.

MR. LEMANN: Why wouldn't it be good to stress it, because there is an important difference between the position of the plaintiff and the defendant, isn't there?

PROFESSOR SUNDERLAND: If we do stress it in (a), it seems as though (b) ought to say "At any time". If we are going to start out with a stressing of time, with a 20-day limit in (a), we should start out (b) by saying, "At any time a party against whom a claim", and so on.

MR. LEMANN: You have "at any time". You just transpose it. It is in line 3 of (b).

PROFESSOR SUNDERLAND: We could transpose that, then. If we have one at the beginning, we ought to have the other at the beginning.

MR. LEMANN: It wouldn't be symmetrical to have one beginning with a time limit and the other not. Why not leave it as the Reporter has it? That will save the trouble of reprinting all of (b) just to make a slight change.

JUDGE DOBIE: You just want to move "at any time" up.

JUDGE CLARK: I don't believe it is important enough. If it is going to raise any question, I should think we should

let it stand.

MR. LEMANN: I so move.

THE CHAIRMAN: Then, you make no change in Rule 56(a) as shown in the Reporter's draft on page 47.

MR. DODGE: What effect does the filing of such a motion by the plaintiff have upon the defendant's duty to file an answer?

MR. LEMANN: He can't file it until 20 days from the commencement of the action. The answer is then due.

MR. DODGE: The answer is due 20 days after service, maybe a day or two later.

MR. LEMANN: I don't think it would have any effect.

JUDGE CLARK: What was your point, Mr. Dodge?

MR. DODGE: Does the filing of a motion by the plaintiff have any effect upon the duty of the defendant to plead?

THE CHAIRMAN: I shouldn't think so.

JUDGE CLARK: I thought we decided that it wouldn't have. We were discussing that yesterday, and I thought we decided it wouldn't have.

MR. DODGE: Or to file his motions.

PROFESSOR SUNDERLAND: If his time for pleading ran out before his motion for summary judgment was disposed of, he simply would have to file his answer.

MR. DODGE: That is what I thought.

PROFESSOR SUNDERLAND: That is what we decided

yesterday.

PROFESSOR CHERRY: Unless he got an extension.

PROFESSOR SUNDERLAND: Yes, if he got time.

MR. DODGE: And he also would have to file his various motions, wouldn't he, if he had any?

PROFESSOR CHERRY: Unless he got an extension.

MR. DODGE: Unless he got an extension.

JUDGE CLARK: When this is over, when you get to (c), I have something on (c).

THE CHAIRMAN: Is there anything more on 56(a)? If not, we will pass to 56(c).

JUDGE CLARK: On 56(c) I had an additional idea which may or may not be bright, but I will bring it up. I have distributed a new draft of (c). It was put on your desks this morning. It contains an additional provision which you may or may not want to include. I might say that Senator Pepper suggested a little change in the wording of this new draft, if you want to adopt it, but of course the first thing is to decide whether you want to or not.

It is in effect that whenever either side moves for a summary judgment, the court may give the final judgment as it determines it should be, or, in other words, it may in effect give the judgment, if it wishes, when there is not a cross-motion. The genesis of this idea comes from the New York rules The New York provisions on summary judgment have been steadily

expanded over a period of years, and one of the latest of the expansions they have made is this provision, which is that without regard to the party which has made the motion, you can give the final judgment.

The kind of case where it may be of some importance is a case that we had a little while ago. That was whether a lighter captain was a seaman under the Fair Labor Standards Act. The trial judge ruled one way, and we ruled another. It is a little quicker to settle it that way. The question came up to us: Can we do it? The plaintiff had failed to make a cross-motion and, as the rules then stood, could not make a cross-motion because there was no answer filed. You see, the defendant had made its motion for a summary judgment and went out in the trial court, and then it came up. We finally decided that probably all we could do would be to send it back another time.

Judge Hutcheson sat with us and, so far as I could see, without giving consideration to the point, in a somewhat similar case he gave judgment the other way.

That is the idea. Do you want to do something about this or not? If you will look at the language, you will see that this what this is intended to bring before you.

THE CHAIRMAN: I see. Here is a question that I would like to ask. Suppose I am on one side of the case, and I make a motion for summary judgment. I have a certain theory

about a certain point and put in affidavits and go ahead on that. Suppose I don't get away with that. The other fellow hasn't made a motion for summary judgment against me, but I am in court and, under this rule, on the whole record, he has no dispute but has a question of law and wins the case against me. I haven't had the foresight, and I am caught in court that way. Maybe I haven't prepared with affidavits and whatnot to meet his counter position. I am wondering if there is any chance that that works out unfairly.

JUDGE CLARK: I don't know that we can answer that specifically yet. Of course, you are in that position in New York State now. You New Yorkers want to watch out for that.

THE CHAIRMAN: Is that by statute?

JUDGE CLARK: All the New York material is by rule of court. They have continually expanded the rules, and just within the last year they made an expansion of various kinds. I might say that one way they have expanded is to provide for the use of affidavits very generally on all sorts of motions.

THE CHAIRMAN: All sorts of motions disposing of the merits?

JUDGE CLARK: On all sorts of motions. It is so complicated, and there are so many different motions, I wouldn't want to say without studying it out. I suppose you have had to struggle with that. It isn't like our motions to strike out, and things of that kind. They have completely revised motion

practice and added to it in New York. One of the things they have done is to provide that on a motion for summary judgment, the court, if it thinks there is only a question of law, may give a judgment whichever way without respect to who has asked for it.

MR. DODGE: If it is only a question of law.

JUDGE CLARK: Yes.

SENATOR PEPPER: Isn't that simply an application of the old common law rule that on demurrer the court will examine the whole record and give judgment in favor of the party who on the whole appears to be entitled to it?

JUDGE CLARK: It is certainly similar.

THE CHAIRMAN: Where plaintiff demurs to an answer, under that rule he is hoisted by his own petard.

SENATOR PEPPER: Yes, and at any stage of the game the result of the demurrer may be final judgment in favor of the other fellow, the fellow who didn't demur.

PROFESSOR SUNDERLAND: There you are dealing with the face of the record only. Here you may be dealing with matters that are not on the record. It is a much simpler situation, whereas the old demurrer was considered to be the basis for any kind of judgment that ought to be rendered on the record.

SENATOR PEPPER: You are right.

MR. DODGE: Plaintiff sues in tort, the defendant sets up a release as his only defense, and affidavits are filed

on motion by the defendant for summary judgment. Those affidavits make it perfectly plain that that release is invalid. Can the plaintiff be granted a summary judgment? There is no other issue of fact.

JUDGE CLARK: If you want to knock out the release and give judgment to the plaintiff, you have to have something establishing his right.

MR. DODGE: Surely. All the affidavits show only the release, and there is no additional fact as to the validity of the release. Isn't that the kind of case you have in mind here?

JUDGE CLARK: I should think, from what you give of the facts, that that is the way it would operate. The kind of case where I have seen it come up is the case that I gave. The case that I had was whether these fellows who are on lighters--those are barges without power.

MR. DODGE: They were the plaintiffs?

JUDGE CLARK: They were the plaintiffs suing for extra pay under the Fair Labor Standards Act. What they did was settled by the affidavits, and so on, and really wasn't in dispute. Everybody knew what they were doing. They called themselves captains until they came to ask for extra pay, but then they forget the title of captain. The question was whether they were just laborers. For example, they went on the boat during the daytime and went home at night, and all that sort of thing. The Fair Labor Standards Act does not apply to

seamen.

MR. DODGE: The defendant had moved for summary judgment?

JUDGE CLARK: The defendant had moved for summary judgment. The plaintiff had not, and the plaintiff could not under our present rules because the defendant, you see, also refrained from filing an answer.

SENATOR PEPPER: What happened?

JUDGE CLARK: The trial judge gave judgment that they were seamen and granted the summary judgment. We reversed that and, after considering it, finally decided that the only thing we could do was to send it back for further proceedings, presumably for a trial. But, as I said, Judge Hutcheson was sitting with us and had a somewhat similar case involving the Railroad Retirement Board and the application of the Railroad Retirement Act, and he seems to have gone ahead and given judgment for the other side without any detailed discussion of our point.

SENATOR PEPPER: Was the point that unless they were seamen, they were not entitled to the benefits of the Act under which they were suing?

JUDGE CLARK: If they were seamen, they were not entitled, because the Act doesn't apply to seaman. If they were not seamen, they were entitled to it. That was the only question.

MR. LEMANN: You reversed because of the absence of such a provision as this proposed provision?

JUDGE CLARK: That is right.

MR. LEMANN: You said you couldn't give judgment---

THE CHAIRMAN: Against the fellow who made the motion.

MR. LEMANN: ---against the fellow who made the motion. You couldn't give judgment to a fellow who hadn't made motion for it, and this would have permitted you to do it.

JUDGE CLARK: Yes.

MR. LEMANN: If the defendant comes in and makes a motion and the plaintiff doesn't, the plaintiff would be getting the judgment, although the defendant asked for it.

JUDGE CLARK: You see, in this case there wouldn't have been any essential unfairness if we had done it, except for the absence of a rule. I mean the real question was one essentially of law as it came up, or the application of the law to the facts in issue. It was either one way or another.

THE CHAIRMAN: If there is another question in the case, if the fellow against whom the motion was originally made under this kind of rule comes back and says, "If you can't get your summary judgment, I want mine, on an entirely different point," what becomes of all this stuff in our rules that if you make a motion you have to state the ground for it and notify the other fellow of what your points are? It allows a counter motion by a fellow who hasn't made one, without any

statement in advance that he is ever going to make it, without specification of law points, and without putting the other fellow on warning as to what his affidavits are going to be. This case was a case where obviously there wasn't any other question in the case.

MR. LEMANN: Of course, if the fellow wants to get a summary judgment, all he has to do is ask for it. If the plaintiff asks for it, and the defendant thinks he is the guy who ought to have it, there is nothing to keep the defendant from filing his own motion. Then he wouldn't need this. Where did we get the suggestion on this?

JUDGE CLARK: New York.

THE CHAIRMAN: New York is said to have adopted this system.

MR. DODGE: How about this case? I had a tax case, a suit to recover from the tax collector, and the defendant moved for summary judgment. It developed that there was nothing in the case except a question of law. Suppose that the circuit court of appeals decides that the motion for summary judgment should not have been allowed and that the plaintiff is entitled to recover on the law, there being nothing else there but the law. What is the circuit court of appeals going to order in a case like that?

THE CHAIRMAN: Remand for further proceedings in the court. There is nothing for the district court to do but enter

judgment accordingly.

MR. DODGE: It occurs to me that I have that exact case now pending in the circuit court of appeals. I wondered vaguely if the circuit court of appeals could enter a final judgment in my favor in the remote event that they should decide the question of law my way.

JUDGE CLARK: Here is the issue right before you, I think, and we decided that we could not, although, as I say, I think it has been done. In this case of Judge Hutcheson's he seems to have done it, and nobody has kicked about it. Apparently nobody there was worried about it.

THE CHAIRMAN: Couldn't you have said in your opinion enough to show that it was perfectly clear on the law that one side wasn't entitled to judgment and the other was, and, instead of remanding the order for judgment, remanded with instructions to proceed in accordance with that opinion. Then when the district judge got the case--

JUDGE CLARK [Interposing]: I dare say that that was the import of our opinion, all right, but actually we didn't say anything either way. I mean, we discussed the law of it and ended up by putting in just what you said there. "The case is reversed and remanded for further proceedings consistent with this opinion."

THE CHAIRMAN: What becomes of all our rules about furnishing affidavits within a certain length of time? I can

see that this works very nicely where there is only one point in the case. If one fellow loses on that point, then the other fellow has to win it, and that settles the case. But suppose there are two points or three points in the case. The defendant has some. If he makes a motion for summary judgment and raises his points, he has to put in affidavits, and the other fellow has a certain length of time to reply to them. If he gets nothing, if he loses out, if he gets in the district court and can't make his motion for summary judgment stick, the other fellow whips right around on him, without any notice, without any affidavits on his point at all as far as the innocent defendant is concerned, and springs a motion on him in court for summary judgment. I suppose the fellow who made the original motion could yell his head off and say he didn't know anything about the point and that he ought to have time to furnish affidavits and all that.

MR. DODGE: How could it appear there that there was no genuine issue as to any material fact?

THE CHAIRMAN: On the record as it stood, because one man's affidavits would happen to cover the point.

MR. DODGE: You certainly can't make that finding only on defendant's affidavits on one point.

THE CHAIRMAN: You can in a summary judgment case if the other fellow doesn't refute them. If I go in on a motion for summary judgment, if I have an affidavit that a

certain fact is so and I have witnesses to prove it and, if so, it settles the case, and if the other fellow doesn't produce any affidavit on the subject showing that he has any witnesses who can testify the other way, the only affidavit is mine and I can get a summary judgment.

MR. DODGE: If he files an affidavit that he hasn't any witnesses but he can cross-examine your witnesses out of court, that shows there is a genuine controversy of fact. But in the ordinary case where the defendant merely files a motion on one point, with supporting affidavits, that certainly can't be used as a basis for finding that there is no material controversy on other aspects of the case.

THE CHAIRMAN: Suppose the other side has slipped in some affidavits that cover the other side's point, and the fellow who made the motion is not aware that he is going to encounter them and that these additional facts are covered by the record somewhere, and he doesn't attempt to refute them or to show that he has any witnesses on the subject. What is going to happen unless in court he gets down on his hands and knees and prays for more time to come back in a week or two with some more affidavits?

MR. LEMANN: The only way this comes up is where it is perfectly plain and conceded by both sides that the case is fully developed on the applications of the parties asking for summary judgment, that that is the only point in the case,

and that the affidavits cover it. You have that situation, and there isn't anything more to be developed. I guess that is the only kind of case in which this thing would ordinarily happen, because in the case you put the court would be bound to afford opportunity to bring in affidavits and develop other facts.

THE CHAIRMAN: You would be bound by the rules of justice, but not by this. There is not a word said here or anywhere in the rule about that. I am not against it. It is something new to me. I wanted to know.

MR. LEMANN: I am inclined to leave well enough alone on it. There has been no outcry for it.

JUDGE CLARK: I won't say that I am definitely pushing it. It is an interesting idea. I have seen cases where it might be helpful, and so on. Of course, we like to be in the forefront of reform. Here is New York getting ahead of us.

PROFESSOR SUNDERLAND: We really don't need it. We get along very conveniently without it.

THE CHAIRMAN: The other fellow can counter with his own motion and get it set down for hearing the same way.

PROFESSOR SUNDERLAND: You can always do that.

SENATOR PEPPER: If you could be sure that every case would be as clean-cut and simple as the one Charlie specified, there would be a potent reason for this, but it really does give you pause when you think of a case with various issues, where the moving party has selected one on which to stand for

the purpose of that issue and then is suddenly confronted with a motion for summary judgment, supported by affidavits, which he has had no notice of and which he has no chance to answer. Then you put him in the position of having to pray the indulgence of the court for a continuance until he has time to meet the case against him. I am afraid that there is danger in judging from a single case that is simple, without clearly having in mind the complicated cases which might be injuriously affected.

JUDGE CLARK: Of course, it is to be said that there will be less chance of trampling the plaintiff with our change. You see, before, the defendant had an advantage. The defendant could make his motion, and the plaintiff could not make a cross-motion.

SENATOR PEPPER: Yes.

JUDGE CLARK: But with our change, if the plaintiff waits 20 days, he can make it.

SENATOR PEPPER: He can make his motion, all right.

JUDGE CLARK: Before, it was a little too bad because you had the defendant moving, and you just couldn't let the plaintiff move.

MR. LEMANN: How is that in New York? When can they move?

JUDGE CLARK: I think they can move at any time, can't they? Can you tell me?

MR. DODGE: I don't think it is important enough to undertake to bother with that.

JUDGE CLARK: I am not pushing it. I bring it up as something of interest.

MR. LEMANN: You move that we adopt the amendment to 56 as it appears on page 47 of the draft we have before us. Is that your motion, Mr. Dodge?

MR. DODGE: Yes.

MR. LEMANN: I will second that.

THE CHAIRMAN: As this stands now, you are going to leave it so that the defendant can make his motion right after the suit is started, and the plaintiff can't make his until 20 days after the suit is started.

MR. LEMANN: That is right.

JUDGE CLARK: They don't quite overlap.

THE CHAIRMAN: We think they will as a matter of practice.

JUDGE CLARK: I don't think anything ever will happen in 20 days. I would like to see a case where it did except by agreement by the parties. Once in a while when the parties are ready to agree on speed, it might happen.

THE CHAIRMAN: How do you figure this out? It says in this draft that judgment shall be rendered if the affidavits "show that there is no genuine issue as to any material fact and that either the claimant or the defending party or both is

entitled to a judgment as a matter of law." How can they both get it? Do you mean on different claims?

JUDGE CLARK: That would be partial judgment either way.

THE CHAIRMAN: Different causes of action. On Rule 56(c) do you want to put in this automatic counter motion, or do you want to leave it as it is?

MR. LEMANN: Mr. Dodge's motion is to leave it as it is, with the one sentence added that is shown on page 47 of the present draft.

JUDGE CLARK: That is, not to include that?

MR. DODGE: Which is in substance what we sent out before.

MR. LEMANN: Yes.

THE CHAIRMAN: Do you want to leave 56 as it appears on page 47 of the Reporter's present draft?

MR. DODGE: Yes.

THE CHAIRMAN: If there is no objection, that is agreed to.

Rule 58.

JUDGE CLARK: We haven't made any changes from the other draft on 58.

THE CHAIRMAN: I see. Did you get any comments from the Southern District of New York on line 14?

JUDGE CLARK: No, we didn't, rather curiously. I

don't know why.

MR. DODGE: How does the judgment read with reference to costs in such a case?

JUDGE CLARK: It can be either blank costs taxed at blank, or it may be a notation on the bottom of the judgment, "Costs taxed at so-and-so."

MR. DODGE: I move that it be adopted.

THE CHAIRMAN: Then, 58 stands as on page 48 of the Reporter's last draft.

Rule 59?

JUDGE CLARK: Rule 59 in (b) brings up somewhat again this question of notice. This was a new suggestion that was voted last time. We book out "notice of" before in Rule 52(b). Wouldn't you probably make the same change here?

MR. LEMANN: I so move.

THE CHAIRMAN: If there is no objection, we strike out the words "notice of" in line 2 of the Reporter's draft on page 49.

JUDGE CLARK: In the first place, as to (e), we want to strike out the notice there, I take it, and make that not later than 10 days after entry, if we have it at all.

MR. DODGE: Yes.

JUDGE CLARK: To make it uniform. The idea of putting this in was to give the court power as in the Boaz case which is cited in the footnote here. The Boaz case is that

case where after a couple of days they wanted to make a change from a dismissal with prejudice to without, or have I got it the wrong way around?

PROFESSOR MOORE: Vice versa.

JUDGE CLARK: To make it without prejudice from with prejudice.

MR. DODGE: After two days?

JUDGE CLARK: Yes.

MR. DODGE: Why couldn't it be entertained within two days after?

JUDGE CLARK: What would it come under? They entertained it, you know, and said it was in the same term, with one judge dissenting. They were worried about it.

THE CHAIRMAN: There is no federal rule that hits the particular case.

MR. DODGE: Nothing on it at all.

JUDGE CLARK: In 60, the rule that is coming next, you can correct mistakes, and you can also move for inadvertence, and so on, and perhaps you could pool this under one of those, but they weren't either one directly applicable.

MR. DODGE: Then, there is a gap in the rules, and this fills it all right, apparently, doesn't it, with the words "notice of" struck out?

THE CHAIRMAN: This conforms the motion as to time and everything with the motion for additional findings, doesn't

it?

JUDGE CLARK: Yes, if we take out the "notice of".

MR. LEMANN: I wonder about this "alter or amend". I am thinking a little bit aloud how broad that is, whether you can alter a judgment in some important respects without a new trial. I suppose the answer is that you treat it as a motion for a new trial if it is a very extensive alteration within the scope of the record as it then stands. You would have to construe that.

MR. DODGE: I think so.

MR. LEMANN: The worst that could happen would be to treat it as a motion for new trial, if it did involve anything substantial. It would be within the same time limit.

THE CHAIRMAN: You make a motion for new trial within 10 days after entry of the judgment, and this is exactly the same limit. So, you don't care whether it overlaps or not.

MR. LEMANN: That is right.

MR. DODGE: I would like to ask one question about paragraph (b). In view of our cutting down the length of time for appeal from 90 days to 30, we are shortening up to a tremendous extent the time for a motion for a new trial on the ground of newly discovered evidence.

MR. LEMANN: Are we?

MR. DODGE: Yes. It was limited to the appeal period.

MR. LEMANN: You mean by the other limitation.

MR. DODGE: Yes. There isn't any other rule dealing with newly discovered evidence motions, is there?

JUDGE CLARK: No. Rule 60(b) is quite extensive, but of course that really doesn't cover newly discovered evidence.

MR. DODGE: Inadvertence. Wouldn't that?

JUDGE CLARK: Possibly. I don't know.

MR. DODGE: It is a pretty short time for a newly discovered evidence motion, isn't it?

MR. LEMANN: From 90 to 30.

THE CHAIRMAN: We have cut it down now to 30 days. The only alternative would be to strike out in (b) this limitation about the expiration of the period for appeal time and simply state a longer period, 90 days.

MR. LEMANN: We will receive a howl from the bar on cutting down this appeal from 90 to 30 days. I will be very much surprised if you don't meet some vociferous objections to reducing this time for appeal. Of course, this came from the Conference of Senior Circuit Judges.

THE CHAIRMAN: Oh, yes. We just stuck it in and put the Conference in our note, and then just stand back and watch the fur fly.

MR. LEMANN: I think the fur will fly.

THE CHAIRMAN: We will put the fur up to the Judicial Conference after we have collected it.

MR. LEMANN: That is right.

MR. DODGE: Wouldn't it be better to leave the 90-day limit on newly discovered evidence?

JUDGE CLARK: I am afraid that on the time for appeal my own brother is going to make some fur fly, too. He has objected somewhat. Mr. Hammond's division, the Tax Division, don't like it very much.

MR. LEMANN: I have a case now where they have gotten extensions twice to answer in an ordinary tax case. They had 60 days, and the 60 days are up and now they are getting four months to answer a plain little petition. Mr. Dodge, if we did what you suggested, wouldn't that extend the appeal time? If you let a fellow wait 90 days to come in with a motion for new trial along with newly discovered evidence, wouldn't that extend the appeal time?

THE CHAIRMAN: The time has actually expired, but you make the motion, and that raises the question. If the motion is granted, you are all hunky-dory, but suppose it is not. After the time for appeal has expired, can you then appeal? In other words, this isn't suspending the time for appeal. It is reviving it, really.

MR. LEMANN: It seems to me there is confusion on the appeal.

MR. DODGE: There must be a showing of due diligence, and evidently a conviction must be established in the mind of the judge that very likely there has been a miscarriage of

justice.

MR. LEMANN: Have you ever had cases of newly discovered evidence, Mr. Dodge?

MR. DODGE: I think so. I don't know.

MR. LEMANN: There are mighty few.

MR. DODGE: Not many, no.

MR. LEMANN: You see, if you keep this open, and then have your rule that the time for appeal doesn't run while you delay for new trial, and then you have a case where your delay for new trial isn't running on that particular ground. I can see somebody arguing that.

MR. DODGE: This motion, if not filed until after 30 days, wouldn't suspend the time for the appeal.

JUDGE DOBIE: Charlie, suppose the time for appeal has gone by without any negligence at all, and you discover very vital new evidence. Is it too late?

JUDGE CLARK: I suppose it would be if the rules stand as they are, unless you could make 60(b) apply. That is the inadvertence, mistake, or excusable neglect.

JUDGE DOBIE: Oh, yes, 60(b) would take care of that.

JUDGE CLARK: You might have some interesting questions. Suppose you extend this to 90 days. I suppose this motion, if the court allowed it, would also suspend the judgment.

THE CHAIRMAN: Vacate it.

JUDGE CLARK: Yes. That is what I was going to raise. Suppose after your time for appeal has expired---

MR. LEMANN: I just said that.

JUDGE CLARK: ---you go to the judge and say, "I have some newly discovered evidence," and prevail upon him to hear you. I guess it must vacate the appeal if we are going to put it in.

THE CHAIRMAN: I don't think it vacates the appeal to make the motion, because the thing is closed. As I understand it, on these motions that operate to toll the running time for appeal, that rule is applied where the time is still running but hasn't expired, and then it destroys the finality of the judgment temporarily until the order is filed, and so on. In this case, the finality of the judgment is running in full effect up until the end of the time for appeal, and the time for appeal has expired. I would say that if the rules allowed you to make a motion for a new trial on the ground of newly discovered evidence six or eight months after the time for appeal from the judgment expired, you were out of court unless you succeeded in your motion. If your motion was denied, there is no ground for appeal, and if it was granted, that operates under our rules to vacate it.

MR. LEMANN: Suppose at the end of 30 days or within the 30 days you took an appeal, and then, adopting Mr. Dodge's tentative suggestion, at the end of 60 days you found some

new evidence. You have taken an appeal. You have found the judgment wrong, anyhow. So you go in to the judge of the district court and say, "I would like a new trial." He says, "This case is on appeal." You say, "I know, but I have some new evidence. I want a new trial." How would you work that?

THE CHAIRMAN: I don't understand that any rule we have allowed a motion for new trial in the district court while the case is pending on appeal in the circuit court of appeals. Do you?

JUDGE CLARK: No.

MR. LEMANN: I don't think Mr. Dodge committed himself to the adoption of that suggestion, but he just inquired. He said that now you are cutting down your appeal time to 30 days, and you are cutting down your time for newly discovered evidence equally. So, maybe we ought to extend the time for newly discovered evidence, and I don't see how you could do it and leave your appeal limit, without running into a lot of complications.

THE CHAIRMAN: If you are going to extend the time for making a motion for new trial on the ground of newly discovered evidence, it does seem to me it is perfectly wrong to place a 10-day limit and a 30-day outside limit on the discretion of the judge. As it is, if we reduce the time for appeal to 30 days, the 30 days is the outside limit. Suppose we do say that a motion for new trial on the ground of newly

discovered evidence can be made within 10 days after the entry of the judgment or in such additional time as the trial court may grant, provided he can't extend the time more than six months from the date of the judgment, without regard to whether the time for appeal has expired or not. Just say flatly that if that motion is granted, the court should vacate the judgment. It destroys the finality of the judgment if he grants the motion, but the mere pendency of the motion would not, if the time for appeal has gone by. You could so provide in the rule.

MR. DODGE: Would you put it in 60(b)?

THE CHAIRMAN: No, because this is the place where no trial on the ground of newly discovered evidence is dealt with. That is where it ought to go. If he has some ground for setting aside a judgment under 60(b), that is all right. Newly discovered evidence is one of the principal grounds for a bill of review in equity, and this new trial on the ground of newly discovered evidence prescribed by our rule and by many codes is a substitute for the old bill of review way of getting a new trial for newly discovered evidence. It is just different practice, and the right is just the same.

I do think that 10 days unless you get an extension, and 30 days if you do get an extension on the ground of newly discovered evidence, this being the only rule that gives relief on this ground unless he gets some additional reason under 60(b),

is pretty short shrift.

JUDGE DOBIE: Would that come under 60(b)? Would you say that was mistake, inadvertence, or surprise?

PROFESSOR SUNDERLAND: It would be surprise, wouldn't it?

THE CHAIRMAN: No, that doesn't come under that. Mistake, inadvertence, surprise, and excusable neglect are words of art, so-called, taken from the statutes, and they have nothing to do with motions for new trial.

JUDGE DOBIE: So that motion for a new trial on the ground of newly discovered evidence is absolutely barred when the appeal time goes by?

THE CHAIRMAN: Under our rules today, the court can allow him three months after the judgment to dig up his newly discovered evidence.

JUDGE DOBIE: Now we are giving him 30 days.

THE CHAIRMAN: Of course, it would be under 60 if there was some fraud, deceit, or misconduct of the adverse party that defeated or prevented his getting hold of the newly discovered evidence.

JUDGE DOBIE: I mean, you discover something like an old will, for example, that nobody knew anything about. You discover an old will in a Bible or something like that, and you are absolutely out, are you? That certainly buttons it up and makes for finality of judgments. I don't know whether you

may not hear some howl about that from the lawyers.

JUDGE DONWORTH: Entirely aside from the question of the finality of the judgment for appeal purposes, how much time have we under the existing rule to apply to the district court for a new trial?

THE CHAIRMAN: On the ground of newly discovered evidence?

JUDGE DONWORTH: Yes.

THE CHAIRMAN: We have a rule that says it must be within 10 days after entry of the judgment, but the court has power to extend that time and grant leave to file it later, unless the time for appeal has expired.

JUDGE DONWORTH: What do we propose to say?

THE CHAIRMAN: It is 90 days for appeal under the existing law. So, that allowed 10 days absolute time to make your motion, and three months if the court would allow you that much. Now we propose to cut the time for appeal down to 30 days, and that would leave it 10 days absolute right to make a motion on newly discovered evidence, and the court might extend that time to as much as 30 days after the entry of judgment, but no more. I think it is too tight.

JUDGE DONWORTH: It seems to me that disregarding the question of the running of the appeal entirely, when you are throwing yourself on the discretion of the district court, you should have more time than you have stated in answer to my

question. It seems to me that the district court should have more latitude about allowing a new trial for newly discovered evidence, without any bearing whatever on the question of appeal.

JUDGE CLARK: I wonder if it wouldn't be desirable, if the motion is to be made at a later date, that that provision go in 60(b), because there is already a machinery that it shall not extend the time for appeal, and so on. If we don't do it that way, I think it has become clear through the discussion that we have got to make special provisions in 59(b) to cover this question of appeal, and so on. It is an important thing. Why wouldn't it be possible to allow 59 to cover the ordinary motion for a new trial made in 10 days, presumably made for newly discovered evidence there? It wouldn't prevent its being made there. Then put in 60(b) as an additional ground, "newly discovered evidence, if not brought under 59(b)", or something like that.

JUDGE DONWORTH: I suppose most of us have had cases that have gone to the circuit court of appeals and have been affirmed or disposed of, and then you wish later on to move for new trial in the lower court and apply to the upper court for permission to file such a motion. As the rules now stand, as I understand it, you couldn't do that because the district court wouldn't have authority to grant a new trial, even though the appellate court said, "Go ahead."

THE CHAIRMAN: Right.

MR. LEMANN: What do you do in your practice? Go to the appellate court for leave?

JUDGE DONWORTH: If the case has been affirmed, you must do that.

THE CHAIRMAN: If a mandate has come down.

MR. LEMANN: The case has been disposed of.

JUDGE DONWORTH: Yes.

MR. LEMANN: A sues B, and there is a judgment against B. B appeals, and the case is affirmed. A year later, A finds some new evidence. Then A goes to the court of appeals and says, "I have discovered some new evidence, and I think this case ought to be reopened. I want your permission to appeal to the district judge to reopen this."

JUDGE DONWORTH: All the circuit court of appeals says in that particular case is, "We remove any restriction on the district court, and it is free to go ahead"; but that has nothing to do with any limitation.

MR. LEMANN: How long can you do that? For what period?

JUDGE DONWORTH: In a case at law you could do it in our conformity practice within a year from the judgment.

MR. LEMANN: How would you have done it in a case in equity?

THE CHAIRMAN: By a bill of review. You could have

gone to the appellate court and asked for leave to file a bill of review in the district court.

MR. LEMANN: We have reserved the bill of review to direct action in our redraft of 60(b).

THE CHAIRMAN: That isn't a bill of review. It is an independent, original action.

MR. DODGE: Bill of review wasn't applicable to actions at law.

THE CHAIRMAN: No. It had several functions, but one of the chief ones was to get a new trial for newly discovered evidence in an equity case.

MR. LEMANN: Are you clear that that wouldn't be in lines 22 and 23 of Rule 60?

MR. DODGE: That has been abolished by our rules.

MR. LEMANN: "This rule does not limit the power of a court (1) to entertain an original action not limited to relief of an ancillary nature to relieve a party from a judgment, order, or proceeding--"

JUDGE CLARK [Interposing]: Monte, I don't know that it will be absolutely clear, but two great authorities have spoken on it. My colleague Judge Frank in Wallace v. United States rules that this was a substitute for the former action, that 59(b) was a substitute, and therefore you couldn't bring it up later. I understand that Professor Moore reached the same conclusion. Do you say that in your book?

PROFESSOR MOORE: Yes.

JUDGE CLARK: It is somewhat a matter of interpretation. It wasn't absolutely clear, you see.

MR. LEMANN: Rule 60(b) as it now stands wouldn't cover it.

THE CHAIRMAN: You can't rely on it, and it is really intended--

MR. LEMANN [Interposing]: We have two questions. The first question is, Is 30 days too little for newly discovered evidence? Assuming that it is, then how are we going to extend the time? Are we going to extend the time by getting a new trial even after an appeal has been taken?

JUDGE DONWORTH: That is a different question.

MR. LEMANN: We are up against that now because we are dealing with the rule on new trials.

THE CHAIRMAN: I think so. I should think, if we want to extend the time, we should be allowed to go to the court of appeals after their mandate has gone down and ask leave to file our motion in the district court. They would say, "As far as we are concerned, you are at liberty. We give consent to have the district court disregard our mandate and entertain your motion." Then you go to the district court and file your motion. That may be six months after the judgment was affirmed or reversed.

MR. LEMANN: Then you would have at least to provide

in your appropriate rule that this possibility should not interfere with the running of the time for taking an appeal. If you put in your motion for new trial, as your setup now is, there might be an argument that the possibility of getting a new trial suspended the running of the time for appeal. You would have to negative that, if you could.

THE CHAIRMAN: No. If the motion is made before the time for appeal expires, obviously it stops the running.

MR. LEMANN: That is right.

THE CHAIRMAN: You are thinking about a case where the time for appeal has gone by.

MR. LEMANN: That is right.

THE CHAIRMAN: You are talking about the pendency of the motion renewing the right for appeal. You might say in the rule that a motion of this kind made after the time for appeal has expired doesn't revive it.

MR. LEMANN: I think that would be desirable.

THE CHAIRMAN: But the case may be dealt with by the district court as if no appeal had been taken.

MR. LEMANN: Then, would the proposal be to provide in Rule 59 that an application for new trial on the ground of newly discovered evidence might be presented within 90 days? That is all we gave them before.

MR. DODGE: Or put it in 60(b), as the Reporter suggested.

THE CHAIRMAN: I object to two rules on the motion for new trial on the ground of newly discovered evidence. It doesn't seem to me right to split it up.

MR. DODGE: How would there be two?

THE CHAIRMAN: Because Rule 59 now deals with it, and you are not going to abolish that, are you?

MR. DODGE: Exclude it in 59(b).

THE CHAIRMAN: That is the motion for new trial on the ground of newly discovered evidence. Now you say that we put it also in 60, and Rule 60 would give you more time than Rule 59 does.

MR. DODGE: I had in mind the possibility of excluding all reference to it from Rule 59(b). "A motion for new trial, other than on the basis of newly discovered evidence, may be served not later". Say nothing about it there, beyond that.

THE CHAIRMAN: Oh.

MR. DODGE: Then deal with it in 60(b) as analogous to mistake and inadvertence. It is the Reporter's feeling that it should go in 60(b), isn't it?

JUDGE CLARK: I thought there was a whole machinery to cover these late filed motions, and you could fix it up easier. If you kept it in 59, you would have to make a similar machinery, at any rate, to take care of the field, and so on. That was my only thought.

JUDGE DONWORTH: I favor making (b) here in Rule 59 so that on the ground of newly discovered evidence, the defeated party will have the same time under the new rule as he has under the existing rule.

MR. LEMANN: Ninety days.

JUDGE DONWORTH: That is, that the cutting down of the time for appeal shouldn't deprive him of this nearby remedy which he gets right at home.

MR. LEMANN: What would you think of putting it in 60(b) and giving them six months?

JUDGE DONWORTH: I wouldn't object to six months.

MR. LEMANN: You see, if you put it in 60(b), you have a provision to give them up to a year now. We had it six months originally. The argument is that the analogy is pretty close between newly discovered evidence and excusable neglect, mistake, inadvertence. Just take it out of 59 and put it all in 60(b). Then you avoid the necessity of making a statement on the appellate rules.

MR. DODGE: I would just as soon give them a year for the use of that lost will that turns up eleven months after the trial.

JUDGE DOBIE: He has to make a good showing.

MR. DODGE: He has to make a showing of diligence and all that.

JUDGE DONWORTH: Of course, a year is a longer time

than it used to be. So many things happen. I would favor six months, I think.

MR. LEMANN: This is of course within the judge's discretion. One year would be merely the maximum that he could give them. I never had a case of newly discovered evidence. I don't remember ever hearing of one. Has anyone ever had one?

MR. DODGE: I don't recall distinctly now, but I know I have been faced with them.

THE CHAIRMAN: I have had some, where the other fellow made a motion on me, and the court denied the motion on the ground that the new evidence wasn't newly discovered, but newly manufactured.

JUDGE DOBIE: We had a case on appeal, Monte, in which the lower court ruled against it, and we held it not abuse of discretion. They are not frequent.

JUDGE CLARK: I run into a good many applications of one kind or another. I do not remember one being granted. I suppose it must be granted once in a while.

MR. DODGE: The common ground for denying them is that the new evidence is merely cumulative.

JUDGE CLARK: That is it, and also it may be that there wasn't diligence in discovering it.

JUDGE DONWORTH: Quite often.

MR. DODGE: On the other hand, occasionally a great injustice to a client is remedied by the use of that application.

THE CHAIRMAN: You could provide in 60(b), then, that if the time for motion for a new trial as specified in 59 has lapsed, then the court in 60(b), on a proper showing, but not more than six months after the judgment (or a year), may allow a motion to be presented and disposed of for a new trial on the ground of newly discovered evidence. Is that the idea?

MR. DODGE: That is, the time under our proposed new Rule 60(b) is one year. Did you mean to shorten up the newly discovered evidence to six months?

THE CHAIRMAN: No. One year is all right on a proper showing.

MR. LEMANN: You would simply have to expand the title of 60 and the caption of 60(b), wouldn't you, and use some phrase to bring the newly discovered evidence into the category of things you have there.

MR. DODGE: You wouldn't have to change the title of Rule 60. You would have to add certain words to the heading of (b).

JUDGE DOBIE: Mistake; Inadvertence; Excusable Neglect; Newly Discovered Evidence.

MR. LEMANN: Perhaps you would want to say in 59 "Relief on the ground of newly discovered evidence shall be claimed under Rule 60", just to give an easy reference.

THE CHAIRMAN: You ought to allow 59 to make a motion

as an absolute matter of right in 10 days on any ground. So, you just simply strike out the exception here about newly discovered evidence. Then 59 would allow you to make a motion for new trial on any ground, including newly discovered evidence, within 10 days after the entry of the judgment. Then you would go over to 60(b) and say, "A motion for new trial on the ground of newly discovered evidence after the time fixed in 59 may be made under certain conditions, with leave of the court, the pendency of which will not affect the finality of the judgment."

That is the mechanics of it. I don't know whether there is any objection to that.

MR. DODGE: Why isn't that the best way to handle it? What does Judge Clark say to that?

JUDGE CLARK: That is what I was suggesting.

MR. DODGE: I move that that be dealt with in that way.

JUDGE DONWORTH: Making it one year or six months?

MR. DODGE: Making it whatever we put for the other things in 60(b).

MR. LEMANN: Which is now one year.

MR. DODGE: That will please the bar.

MR. LEMANN: Especially when they know Judge Clark approves it.

THE CHAIRMAN: Then, 59(b) as it will stand in our

new rule: Strike out the words, "except that a motion", in line 3, and all the rest of the subdivision down to the word "diligence."

JUDGE DONWORTH: Under that suggestion, wouldn't there be a conflict between the proposed new Rule 59 and the proposed new Rule 60? I mean, isn't there a positive limitation in our proposed 59?

THE CHAIRMAN: That is what I am striking out.

JUDGE DONWORTH: All right. I didn't get that.

THE CHAIRMAN: Then we are leaving 59 so that within that 10 days as a matter of right he can go to the court and make a motion for new trial on the ground of newly discovered evidence or any ground. He doesn't have to ask leave for it.

Then in 60 you say, "The motion for new trial on the ground of newly discovered evidence can be made after the time limited in 59 has expired, by leave of court" and with all these conditions attached.

JUDGE DONWORTH: I wouldn't oppose the one year, if that is the judgment of the Committee.

JUDGE CLARK: I should think, if you wanted just to consider what you will do in 60(b), that something like this might do in (b). You see, as we now have the suggestion, we have (1) and (2) in 60(b). We could leave (1) as we have it and put in a new (2) between the previous (1) and (2), and we could say, "(2) or on the ground of newly discovered evidence".

If you wanted to, you could say, "evidence which by due diligence could not be discovered within the time for a new trial under Rule 59", to tie it up that way.

THE CHAIRMAN: Yes.

JUDGE CLARK: That wouldn't seem to conflict with the two. You may build one on the other, so to speak.

MR. DODGE: Let's see. It could not have been discovered by the use of due diligence either before the trial or before the expiration of 10 days thereafter. You have to prove both.

JUDGE CLARK: Yes. That is just a suggestion as a possibility.

THE CHAIRMAN: Charlie, there is no use of our trying to draft that here. It is the kind of drafting job that we couldn't do at the meeting here. Maybe you can tackle it in the day or so that are left.

JUDGE DOBIE: You want to strike out that "except that a motion for a new trial on the ground of newly discovered evidence"?

JUDGE CLARK: Mr. Moore can do that tonight all right.

THE CHAIRMAN: If he can't, then we will have to leave it to the Reporter, with such consultation as he has time to make with anybody nearby, to get it up, because we are not going to meet again before this goes to the bar.

JUDGE DONWORTH: May I ask a question to make this

clear? As I understand it, in order to extend the time for appeal, the motion for new trial must be filed within the time for taking an appeal. Does the court have a right to extend that and thereby to extend the time for taking an appeal?

JUDGE CLARK: I thought we were going to make it even less. I thought the idea was to strike out of 59(b) any special reference to newly discovered evidence.

MR. LEMANN: That could be a basis, though, for applying for a new trial if the application is made in 10 days.

JUDGE CLARK: Yes, that would still be in.

MR. LEMANN: Then the judge could wait; he could hold the motion under consideration without acting on it. By so doing, he would suspend the time.

JUDGE CLARK: That is true, but it would have to be within the 10-day limit.

MR. LEMANN: The application would have to be made within the 10-day limit?

JUDGE CLARK: That is right.

MR. LEMANN: If the application were made within the 10-day limit, the judge by withholding action could extend the time for appeal, but if the application weren't made in the 10-day limit, then it would have to be made under 60 and that would not suspend the time for appeal.

JUDGE CLARK: That is it. That is the idea.

JUDGE DOBIE: Oughtn't there to be some reference in

59(b) to 60, dealing with newly discovered evidence? If you just leave it, "A motion for a new trial shall be served not later than 10 days after the entry of the judgment", and stop there, wouldn't somebody reading that, without reading 60(b), get the idea that that is all-inclusive?

JUDGE CLARK: I should suppose the way to do that would be to put in a footnote and say, "For further provisions [or whatever language you use], see 60(b)." Then, if you use some such formula as I was suggesting, the 60(b) refers back to what happens after 59(b) is exhausted.

THE CHAIRMAN: Now let's go back to 59(b) to get newly discovered evidence. We want to make a motion for new trial for newly discovered evidence, on account of something that happened. Under 59(b), as soon as the judgment has been entered, the 10 days commences to run. You now have Rule 6 fixed so that under Rule 6 he can't enlarge this 10 days. My suggestion is 10 days after the entry of judgment within which to make motion for new trial, with no power of extension by the court, that being the motion on every ground except newly discovered evidence, which now we have put over into 60, is too harsh a limit.

JUDGE DOBIE: Is "served" up here right, or do you mean "filed" in 59(b)?

JUDGE CLARK: That is right, I think.

THE CHAIRMAN: "served", yes.

JUDGE DOBIE: Served on the other party.

JUDGE CLARK: Yes.

THE CHAIRMAN: I would feel that even on ordinary motions without any newly discovered evidence we might properly provide in Rule 59(b) that a motion for new trial shall be made not later than 10 days after the entry of judgment, except that for good cause shown the court may extend the time for such-and-such a period, not exceeding so much. Then, referring back to 6(c), which ties up all these limits, we find that the motion for new trial limit can't be altered or extended under Rule 6(c); it has to be done in such manner as is provided in 59. You see my point. Rule 6 now says that you can't make any extension under this broad power under Rule 6 in the case of certain rules, listing them, and one of them is 59. I wouldn't touch 6. It is all right. Tie it up to the rule limit in 59, but let's enlarge it.

MR. LEMANN: Why? We have had no kick. It has been 10 days since 1939. Nobody has said it was too short. Why extend it without a request? We have three days in Louisiana. He has three days in Massachusetts. I think 10 days, if we checked, would be found to be rather liberal.

JUDGE DOBIE: Don't we give the district judge the power to extend it?

MR. LEMANN: We don't now, do we?

THE CHAIRMAN: No.

MR. LEMANN: Even before the present amendment didn't we have a provision that you couldn't extend the time for motion for new trial?

JUDGE CLARK: That is right.

MR. LEMANN: That has been there since 1939. It has been 10 days.

MR. DODGE: Apart from newly discovered evidence, there isn't, ordinarily speaking, any motion for new trial that can't be framed up very quickly and promptly. There isn't any particular reason.

JUDGE DOBIE: It is all right with me.

THE CHAIRMAN: All right.

JUDGE CLARK: I take it that (e) was adopted, was it?

THE CHAIRMAN: Yes.

PROFESSOR SUNDERLAND: Shouldn't (e) go into 60? It doesn't belong in new trials at all.

THE CHAIRMAN: "notice of" was stricken out.

PROFESSOR SUNDERLAND: Shouldn't (e) go into 60?

JUDGE CLARK: Wait a minute. Edson is asking if (e) shouldn't go into 60.

PROFESSOR SUNDERLAND: (e) has nothing to do with new trials, but it does have to do with relief from judgment or order. It seems to me it belongs to 60. I think the headings are misleading. If you put (e) under 59, then the heading New Trials is misleading.

JUDGE CLARK: New Trials and Amendments of Judgments?

PROFESSOR SUNDERLAND: We will have to do that.

THE CHAIRMAN: Change the title, but leave it there.

JUDGE CLARK: Mr. Dodge, did you have some question?

MR. DODGE: I had assumed that this motion to alter or amend the judgment was not an ordinary attack on the judgment analogous to an appeal from it, but was a motion to amend or alter it to make it in accordance with what was proper on the record. Does it go beyond that?

PROFESSOR MOORE: Yes, it does, Mr. Dodge. In the Boaz case, the court dismissed the action without prejudice, and two or three days later entertained a motion and dismissed with prejudice. It wasn't a case of making a mistake. He reconsidered.

MR. DODGE: That is all right. It was within the record as made up to that time.

PROFESSOR MOORE: That is correct.

THE CHAIRMAN: Ought we not to confine it to that? Ought we to leave the provision in such shape that a fellow can call witnesses and take depositions and put in affidavits, or shall we confine him to the record as it stands?

JUDGE DONWORTH: Didn't the opinion in the Boaz case refer to terms of court?

PROFESSOR MOORE: Yes, sir, it did.

PROFESSOR CHERRY: They hadn't anything else to refer

to.

THE CHAIRMAN: Mr. Dodge's suggestion makes me think that 59(e) ought by its terms to limit a motion to alter or amend the judgment to what the record then contains, and not open the door to taking testimony and affidavits.

MR. DODGE: I construed it that way, but I guess it is expressed too broadly.

THE CHAIRMAN: I don't think it is safe to construe it that way.

SENATOR PEPPER: "A motion based upon the record to alter or amend".

THE CHAIRMAN: Maybe so. The record is a technical thing. You have the idea.

MR. LEMANN: You say it is within 10 days. Mr. Mitchell, we discussed this before. Suppose you gave it a broad scope. As long as it has to be served within the same time that a broad motion has to be served, why limit it? You could serve a motion for a new trial on any ground not limited to the record as it stands, provided you do it in 10 days. So, why do we have to tie this down as long as we have the same time limit in it? Didn't we cover that a little while ago by our discussion?

SENATOR PEPPER: A motion for a new trial, if granted, results in a new trial with all the settled incidents of one, but this proceeding is really a motion for a new trial

of an unformulated sort. You go in and move to amend the judgment and say, "This judgment is wrong, not because it doesn't conform to the record, but I have some affidavits here to show that the judgment ought not to have been just as it was." I don't see what kind of proceeding it leads to, unless it is a mere motion to conform the judgment to the matter in the record.

MR. LEMANN: If it goes beyond that, it addresses itself to the discretion of the judge, anyhow. Within 10 days he certainly can do it if he wants to. A fellow comes in with a motion to alter or amend, and the court says to the lawyer, "Counsel, I think this is much more than a motion to alter or amend. I think this calls for reopening the case." Then all the lawyer has to do is say, "All right, Your Honor, consider it as such. I am within the time. Reopen the case and grant a new trial, if you think that is what, properly construed, this calls for."

SENATOR PEPPER: What I am afraid of, thinking of a certain district judge, is to take a whole flood of affidavits and have a hearing on the amendment of the judgment, without ordering a new trial or making any such cautionary statement to counsel.

JUDGE CLARK: Would that necessarily be out of the way? I suppose that in the case of a judge who never could make up his mind, it might make his mind more unsettled than ever on it. On the other hand, there might be a case where the

judge had just made a plain mistake and ought to have further information, and so on, and perhaps you could avoid an appeal by doing it.

SENATOR PEPPER: To convict him of mistake, it would be necessary to exhibit to him only matter that had been before him. He couldn't be accused of a mistake on the basis of matter which hasn't been brought to his attention, which now comes before him for the first time. For instance, suppose that the court decided that the burden of persuasion resting upon one of the parties had not been met, and he entered a judgment. The unsuccessful party comes in with a motion to amend the judgment, with supplementary evidence on the same point. It is not newly discovered evidence, but evidence which he might have presented at the trial, but which he thought it wasn't necessary to present. He thought he was safe in standing on what he introduced. What is the court going to do with that?

JUDGE DOBIE: That is practically a new trial, isn't it?

SENATOR PEPPER: It is like a new trial and, as Mr. Lemann said, a judge who is alert and plays the game according to the rules would say, "This is in effect a motion for a new trial, and I will grant it because the evidence is after discovered" or "I won't, because you might have produced this evidence, and you just neglected to do so." That is all right on a motion for new trial, but here it is a motion to amend the

judgment, with no criteria as to what the material may be on which the judge can draw to make the amendment. I don't know what to do with it.

THE CHAIRMAN: I was thinking, if this thing, after all, is a motion for new trial, like a motion for additional findings or for amendment of judgment, all of which have to be done within 10 days, why do we stick up a new section, (e)? Why don't we say, "Motion for new trial or motion to amend or alter judgment shall be served not later than 10 days"?

MR. LEMANN: What was the trouble in the Boaz case? Was it done in 10 days?

JUDGE CLARK: Two days.

THE CHAIRMAN: What was the nature of the error that had been made?

PROFESSOR MOORE: The court just concluded that you could properly dismiss the case with prejudice instead of the dismissal without prejudice.

THE CHAIRMAN: It wasn't an error at all. He was asked to change his mind.

JUDGE DONWORTH: The judge changed his mind as to what his ruling should be.

MR. LEMANN: What happened on appeal? What did the appellate court say?

PROFESSOR MOORE: The appellate court said that, the motion having been served within term time, they had inherent

power to correct or to change its judgment.

MR. LEMANN: They could say the same thing now, when they realize that the term time has nothing to do with it. They could say, "This having been served within 10 days, clearly the trial judge had a right to change his mind."

MR. DODGE: If we adopt (e).

MR. LEMANN: Even without adopting (e), I should think, or even, as the Chairman suggests, if we transfer (e) up to the preceding section, (b).

THE CHAIRMAN: Did the lower court think it should vacate the judgment?

PROFESSOR MOORE: The lower court did change its mind.

THE CHAIRMAN: The lower court did, and the upper court reversed?

PROFESSOR MOORE: Affirmed.

JUDGE CLARK: With a dissent.

THE CHAIRMAN: Why do we want a rule about that? They say you can do it.

PROFESSOR MOORE: There isn't any provision in the rule that authorizes it.

MR. DODGE: Has any other case raised any such question in the history of litigation?

JUDGE CLARK: Mr. Dodge, they always would do it before in term time, you know.

JUDGE DONWORTH: I think there are 10,000 cases that

might be cited.

MR. DODGE: On this particular point of amending a judgment?

JUDGE DONWORTH: Oh, yes.

MR. DODGE: Not appealing, not asking for a new trial, not correcting a clerical error.

JUDGE DONWORTH: In receivership cases where allowances were fixed, the judge on reconsideration would sign a new order amending his order of August 1st. Certainly, all those things under the old rule that during the term the thing was changeable. It was frequently changed. All sorts of matters.

JUDGE DOBIE: All in the breast of the court.

JUDGE DONWORTH: Yes.

THE CHAIRMAN: Then why on earth should we make such a tight limit as 10 days?

JUDGE DOBIE: Because we wanted to wipe out all that term time stuff and provide definite limits, which I think is sensible.

THE CHAIRMAN: That is right, but why should we make such a limit as 10 days when ordinarily you might have six months to get a judgment?

MR. LEMANN: You couldn't do it on any ground, could you, Judge? For instance, I suppose that you could set aside an equity case after six months.

JUDGE DONWORTH: Within the term, oh, yes.

MR. LEMANN: That is the only limit. No new trial provision.

THE CHAIRMAN: I don't like this term. The term has gone. We wiped it out.

MR. LEMANN: If the term had only one day to go, the fellow was out of luck, but if the term had six months to go, he was in luck.

THE CHAIRMAN: That is right. We are providing a fixed limit instead of this term limit. But suppose he made that motion 12 days after?

MR. LEMANN: He would be out of luck. The only answer I can make is that he has been out of luck since 1939, and nobody has squealed.

JUDGE CLARK: Rely on the term to do it.

MR. LEMANN: Term is out.

JUDGE CLARK: At one time after Mr. Moore had written his great monograph on control over judgments, he came in with a provision that was certainly very broad. He put it in 60, and according to that draft, the court would have control over judgments completely for a year. You remember, you were all a little upset by that, but that is what the judge was doing before during term time.

[Brief recess.]

THE CHAIRMAN: Gentlemen, we go back to Rule 59, and I withdraw my suggestion that we incorporate new subdivision

(e) into (b). I think if we are going to adopt (e)--and I guess we are agreed to that--if we put in a new section and cite this particular case under it, it will point out what kind of object we have. If we mix it with the motion for new trial section, then it will be a little more confusing, I think.

PROFESSOR SUNDERLAND: In (b) it says, "A motion for a new trial shall be served". In (e) it says, "A motion to alter or amend the judgment may also be". We should have both of them "shall", I think.

MR. DODGE: "may also be served". Why the "also"?

THE CHAIRMAN: Why should they both be "may"? You don't have to unless you want to.

PROFESSOR SUNDERLAND: On these time limits we always use the word "shall".

THE CHAIRMAN: Do we? All right, then, it is agreed that we strike out "also" and put "shall" in place of "may" in line 9. Isn't that right?

PROFESSOR SUNDERLAND: Yes.

SENATOR PEPPER: Yes, that is right.

JUDGE DOBIE: You are going to end (b) with the word "judgment" and just leave it like that. "A motion for new trial shall be served not later than 10 days after the entry of the judgment."

THE CHAIRMAN: That is all there is left of that.

JUDGE DOBIE: You are going to put something in the note to show that we have taken care of the newly discovered situation over in the next rule.

THE CHAIRMAN: Yes, that is right. That is, newly discovered evidence motions that aren't made within 10 days.

JUDGE DOBIE: Yes. Of course, you could serve motion now for new trial for newly discovered evidence within 10 days.

THE CHAIRMAN: Under this rule, yes, without asking leave to do it.

JUDGE DOBIE: That is right.

THE CHAIRMAN: Now we go to Rule 60(b). I think 60(a) is all right, isn't it? That is an old provision that we have in there now, that we agreed on long before.

JUDGE DOBIE: You are going to put this newly discovered thing under (b), aren't you, and change the title?

THE CHAIRMAN: Shall we agree to 60(a)? Is that all right? If there is no objection, we will pass 60(a) and go to 60(b). We have a revision of 60(b).

SENATOR PEPPER: Do you say docketed <u>with</u> the appellate court or <u>by</u>?

MR. DODGE: Or <u>in</u>?

THE CHAIRMAN: It is "in", isn't it?

SENATOR PEPPER: "in" or "by", but not "with", I should think.

THE CHAIRMAN: You say "filed in court"; you don't

say "filed with the court".

SENATOR PEPPER: I know, but this is a verb here. The appeal is docketed. Did we have that before? If we had it before, let's not change it.

JUDGE CLARK: In the old rule we say, "The record on appeal shall be filed with the appellate court and the action there docketed." That is in the original.

SENATOR PEPPER: All I meant was that the act of filing is the act of the fellow who files it with the court, but the act of docketing is the act of the court itself. It dockets the case. Its clerk dockets it. It is not very important.

MR. DODGE: In 73(g) we say, "filed with the appelate court".

SENATOR PEPPER: That is all right, because that is the act of the fellow who files it.

JUDGE DOBIE: "in" is better, but I don't think it is vital.

MR. DODGE: Just say, "docketed in the court".

JUDGE CLARK: All right, make it "in", then.

THE CHAIRMAN: We have a redraft of 60(b), and of course we understand that that has to be recast to include this business about granting leave to make motion for new trial after the regular time has expired, but we want to go over this and agree on the subject.

JUDGE DONWORTH: Is it your thought, Mr. Chairman, that we need not make a cross-reference from one of these new evidence matters to the other, saying that except in the case of, and so on? You don't think that is necessary? I didn't know whether there would be doubt about which limitation would prevail if we had 10 days in one rule and a much longer limitation in another. There would be, unless in some way you put i. a qualifying clause.

THE CHAIRMAN: As I understand, in that draft we say that a motion for a new trial made after the time fixed for such motions in 59(b) may be filed with leave of court under certain conditions, and so on. That is the way we are going to do it.

JUDGE DONWORTH: All right.

MR. HAMMOND: But you were speaking of having a cross-reference in 59 or an exception in 59, weren't you?

JUDGE DONWORTH: I thought it might be in either rule, as long as one referred to the other.

THE CHAIRMAN: Rule 60 will do it. Rule 59 will be so worded that a motion for a new trial may be made on any possible ground within 10 days. If you want to, you can put a note in stating that that former provision in 59(a) has been stricken out, and that now under 59(a) within 10 days you have, as a matter of right, the right to make a motion for newly discovered evidence; but if you let that time expire, you no

longer have a right, but you have to resort to getting leave of the court under 60(b). I think the Reporter will fix that up all right.

JUDGE DONWORTH: You need not discriminate when you file your motion as to whether you are filing it under one rule or the other, but make it plain that the relief may be granted. In other words, you needn't confine the provision in Rule 60 to after the expiration of the 10 days. Do you get my thought?

THE CHAIRMAN: You are saying that you can get leave to do it at any time up until one year, and that includes the 10 days, if you want to look at it that way, but you would be foolish to apply for leave under 60 when you have it as a matter of right under 59. The difference between the rules is that one is a matter of right, and the other is a matter of leave and discretion with the court whether he will entertain the motion. We can fix that, I think, Judge, after we see his draft.

JUDGE DONWORTH: I think you are right.

THE CHAIRMAN: Have you the redraft of 60(b) before you?

SENATOR PEPPER: Yes, sir, I think we all have.

THE CHAIRMAN: Let's see what we think about that.

JUDGE CLARK: My staff and I have made that. You will notice that on the original draft as it appears here, we raised objections to certain things, and we made this redraft

which we preferred. I don't care which you take up, although we now recommend the redraft, but that isn't quite as voted. We have explained it in the footnotes and elsewhere.

THE CHAIRMAN: There is no difference between the new draft and your regular draft on page 50 down to--

JUDGE CLARK [Interposing]: Line 17.

THE CHAIRMAN: Down to that point the two drafts are alike.

SENATOR PEPPER: This is 60(b)?

THE CHAIRMAN: Rule 60(b).

JUDGE CLARK: In line 17 we suggest that there be stricken out the provision, "or in case of fraud within one year after reasonable opportunity to discover it." We think that if we are going to get any finality of judgment, we ought to have this provision work about as automatically as it can, and if it is a question of not having it operate until the fraud is discovered, of course that is going to be quite up in the air. We think that for late discovered fraud, the separate action is the way to do it. As a matter of fact, as we have suggested, under the provision as originally drawn, many years after the judgment you could get relief, theoretically at least, by simply proceeding in a new action. If you didn't immediately discover where your opponent was, there is one provision that you can serve the clerk. You remember, back under the service of papers, if you don't have the address of

your opponent, you then can serve the clerk in place of him. Isn't it better all around to make this a definite limitation? Then, for anything after that they can bring their separate action, which is retained later on in the rules. That is retained in either draft. It is retained in the main draft beginning at line 21.

SENATOR PEPPER: The one I have has just 17 lines on it.

THE CHAIRMAN: That is right. He has the original draft, and he is making comparisons.

MR. DODGE: Is this a new substitute?

THE CHAIRMAN: That is the last word. He altered it from what the draft was that was distributed to the members a little earlier. That is on page 50 of the Reporter's draft.

PROFESSOR CHERRY: I don't think we have those.

THE CHAIRMAN: The heading of it is "Suggested Rule 60(b)." Suppose we go down the line here instead of hopping around on these things.

The very first thing, as a question that I would like to raise, is in line 3. The reporter thinks we ought to strike out the word "his"; "through his mistake, inadvertence, surprise, or excusable neglect". Of course, those words are taken, I think, from the California statute, but there are many other statutes phrased the same way, and every one of those statutes relates to the applicant's mistake, inadvertence, surprise, or

excusable neglect. We take those words that had an accepted meaning in a lot of statutes and relate wholly to the excusable neglect of the fellow against whom the judgment was rendered, and strike out the word "his" and convert the thing into something quite different from what all these statutes mean. It bothers me a little bit to upset the operation and effect of well-known statutes.

SENATOR PEPPER: What is the argument in favor of omitting it?

THE CHAIRMAN: He says the clerk may make an error or the judge may make a mistake; that if he makes an inadvertent mistake or is surprised or if there is excusable neglect, and the fellow suffers by it, he ought to get relief.

JUDGE CLARK: This was done before. This isn't a particular thing of mine.

THE CHAIRMAN: It was done at the last meeting.

JUDGE CLARK: I think it was done before. "This deletion of 'his', voted by the Committee and reaffirmed at the last meeting, was suggested by the circumstances in Hill v. Hawes (1944) 320 U.S. 520, although it was recognized that this change alone would not alter the result reached in that case. The deletion will, however, permit relief to be granted, if sought within the time prescribed, in situations such as those before the court in New England Furniture & Carpet Co. v. Willcuts," and so on, "where dismissal of the action was due to

clerical error".

JUDGE DOBIE: In Hill v. Hawes it was the mistake of the clerk, wasn't it?

THE CHAIRMAN: The clerk forgot to send the notice of entry of the judgment.

MR. DODGE: Has anybody raised any question about striking out that word "his"?

THE CHAIRMAN: I don't think the bar generally understand the statute. They haven't had to resort to it.

MR. DODGE: How can you take action against a man through his surprise? You take it to his surprise. What does that mean? Through his surprise?

THE CHAIRMAN: As a result of his mistake, inadvertence, surprise.

MR. DODGE: It isn't taken as a result of his surprise. It surprises him when it happens.

THE CHAIRMAN: He may be surprised in court as a result of the judgment that goes against him. He doesn't get surprised afterward.

JUDGE DOBIE: It is a technical term of law, isn't it? It is a term of art here.

THE CHAIRMAN: I have just told you the situation. It is absolutely upsetting anything that you get out of any state decisions as to the operation and effect.

MR. DODGE: Are there a lot of statutes that have this

exact language?

THE CHAIRMAN: I wouldn't say they are absolutely exact, but they all relate to the moving party's own mistake, inadvertence, surprise, or excusable neglect, and not to the court's. You can hardly say that the court is surprised, can you, when he renders a judgment on you? Could excusable neglect of the court be the basis of getting a judgment rendered against you?

SENATOR PEPPER: He inadvertently renders judgment against me instead of against the other fellow!

THE CHAIRMAN: That would hardly be surprise of the court.

JUDGE CLARK: It was said of my distinguished fellow townsman, Noah Webster, that when his wife found him kissing the pretty maid, she said, "Noah, I am surprised!" He said, "No, my dear. We are surprised. You are astonished."

THE CHAIRMAN: That is all I have to say about it. I think that we ought not to take too much for granted about these things. If nobody objects to completely overthrowing the customary meaning of that phrase, that is all right with me.

JUDGE CLARK: I don't necessarily push this as such. I call your attention to the fact that this was in the preliminary draft that went out to the bar. What was the reaction?

THE CHAIRMAN: None at all. They don't understand the point.

SENATOR PEPPER: Oughtn't we really to say "because of" instead of "through", as Mr. Dodge suggests? "proceeding taken against him because of mistake, inadvertence, surprise, or excusable neglect".

MR. DODGE: Even there, that doesn't apply to surprise very well.

SENATOR PEPPER: Doesn't it?

THE CHAIRMAN: I might be completely surprised and astonished that the judgment is rendered against my friend Smith, but the fellow himself must be taken unawares some way. It is all right as long as you have thought about it. The rest of it is all right. "or through the fraud (whether heretofore denominated intrinsic or extrinsic)--"

SENATOR PEPPER: What does that mean?

THE CHAIRMAN: It means this: I had it up in the Black Tom case whether the court could set aside one of its final judgments for fraud. The point was raised against me, and all the decisions were dragged in then. I never knew before that what this meant. The point was made that a judgment can be set aside after it is final only for fraud extrinsic to the record. If it is fraud such as perjury in the trial, you can't, after the judgment becomes final, come back and prove that the witnesses lied. That is intrinsic fraud. The extrinsic fraud is some kind of imposition on the parties or deceit practiced on a party outside of the court room or outside

of the record. Maybe it causes him to lose some rights. Your opponent cheats by letting you think that the case isn't going to be reached on a certain day or does something like that. That is extrinsic fraud.

JUDGE DOBIE: Beguiling a witness away is the case we had.

THE CHAIRMAN: That is extrinsic fraud. The old rule has been that intrinsic fraud (that is, perjury right in the trial) is an issue in the trial. Whether the fellow is telling the truth can't be used as the basis for setting the judgment aside on the ground of fraud after it is final. In recent years the courts are beginning to break over that distinction.

SENATOR PEPPER: I see.

THE CHAIRMAN: The Reporter says so and recognizes it here, but he puts that bracket in there to show that we are modern.

Justice Roberts rode that extrinsic-intrinsic point right down in the Black Tom case. He made no distinction between mere perjury in the case and the outside conspiracies and frauds of one kind or another, much to our delight. I was worried about the point.

I am content, from what little knowledge I have of the thing, to wipe out the distinction between intrinsic and extrinsic. If it is intrinsic, if you find a fellow whose principal witness is a cheat and a fraud, perjured, suborned,

and everything else, I would be perfectly willing to agree to have that as a basis for setting aside the judgment within one year. If there is no objection to that, now we come down to the question of one year or six months. I gather that the inclination of the Committee is to be liberal, isn't it, and to make it one year?

SENATOR PEPPER: I suppose "exceeding" is better than "after". I don't know just why. "within a reasonable time, but in no case after one year".

THE CHAIRMAN: I should think you are right. I think it ought to be "after". Shouldn't it?

SENATOR PEPPER: You see, "exceeding" is a continuing period during all of which, but this is a single act to be taken at some time within six months or a year.

MR. DODGE: But you avoid the two successive after's if you say "more than one year after".

SENATOR PEPPER: Yes. "in no case more than one year after". That is better.

JUDGE DOBIE: Cut out "exceeding" and put "after".

JUDGE CLARK: "more than".

THE CHAIRMAN: "but in no case more than". Is that it?

JUDGE CLARK: Yes.

SENATOR PEPPER: Yes.

THE CHAIRMAN: "but in no case more than one year". I think we come, then, to agree with the Reporter as

to whether it is better to have the thing one year after the judgment or order was entered rather than one year after fraud was discovered, which leaves it wide open for twenty-five years or more. He has gone back to his more rigid limitation and left the other fraud cases that are discovered after that date to be resorted to by original action. You see, what we are doing here is to say what things can be done by motion and what can be done by original action, and the fact that we allow a motion to be made, an informal proceeding in the same court, summary in nature, within a certain length of time, doesn't mean that after that time has expired a man may not resort to a plenary suit with all the formalities and everything else that is required. So, we are not excluding resort to original action after this one-year limit has passed.

MR. DODGE: What does that mean? A bill to restrain the other party from enforcing the judgment?

THE CHAIRMAN: What?

MR. DODGE: I was wondering what kind of original actions to relieve a party that could be.

THE CHAIRMAN: Of course, it would be equity in nature. It would be an action to set aside and annul the judgment.

MR. DODGE: Is there any such form of action?

JUDGE CLARK: I really think that you could sue under a joint procedure under the united law and equity procedure. You could sue and ask eventually for damages. The theory upon

INTENTIONAL BLANK

which you are suing is that you are suing fraud in the judgment, and you sort of mentally set aside the judgment. Of course, actually, in order to get judgment, you don't need to go to the clerk's office. In fact, this type of action might be brought somewhere else, you know, not in the same jurisdiction. In our court we recently had somewhat this type of action dealing with a New York State judgment.

MR. DODGE: An action for fraud against the party?

JUDGE CLARK: Claims of fraud in the judgment.

MR. DODGE: What was it? An action for damages?

JUDGE CLARK: Actually, the case we had was an action where they claimed damages, but we said the basis of it--

THE CHAIRMAN [Interposing]: What was the original judgment for? Was it for money?

JUDGE CLARK: The original judgment was a judgment for accounting on a trust, the settlement of an estate. This was an action against the executor, claiming fraud and duress in getting the state court judgment accepting the accounting.

MR. DODGE: Had the judgment been paid?

JUDGE CLARK: Yes, the judgment had been paid, but the judgment was paid in part to the plaintiff. The plaintiff had received what she now claimed was only a partial payment of what she should have gotten. She had signed a stipulation for entry of judgment settling the accounts and took something under it. She took the amount under it, and now she sued,

claiming fraud and duress in the judgment and in being brought around to sign the stipulation for the judgment.

SENATOR PEPPER: Does this have to be a proceeding in the same court which rendered the judgment?

JUDGE CLARK: No.

THE CHAIRMAN: You can get jurisdiction anywhere.

MR. DODGE: That is an action in tort for fraud.

JUDGE CLARK: I don't know that you would consider it tort as such. I think it always had been considerably equitable in nature. We weren't worried about that, because the federal court has jurisdiction of law and equity. She made it as though it were a judgment in tort, but we held that the rationalization must be that to found an equitable proceeding to upset the judgment and then eventually gave the remedy in tort.

PROFESSOR SUNDERLAND: You couldn't have had a jury trial in that case, could you?

JUDGE CLARK: I don't think so.

THE CHAIRMAN: You see, Senator, if you are allowed to resort to a motion in the same court within a reasonable length of time, you don't have to hunt up your adversary and get service of process on him, because you are right back in the same lawsuit in which he has already appeared. If he has a lawyer left, you can serve the old lawyer; and, if he hasn't, you can serve him personally. Anyway, you are now allowed to

serve papers in any lawsuit, but when those time limits are gone on the motion system in the same court which rendered the judgment, then you have to go to a plenary suit, an original suit, and you are put to it to get jurisdiction and find the defendants within the jurisdiction of the court and to get service. That is a more difficult job.

SENATOR PEPPER: If this new proceeding is in the same court which rendered the judgment, it is really in the nature of a bill of review, isn't it?

THE CHAIRMAN: I suppose so, but it doesn't have to be It has to be served by original process, and a bill of review does not.

SENATOR PEPPER: Doesn't it? With us, our practice is that any time up to five years you may file a bill of review, but it is an independent proceeding, has a different term and number, and you have to serve and everything else.

THE CHAIRMAN: Do you have to serve as you serve a notice of motion or as you serve a summons in an original suit?

SENATOR PEPPER: The latter.

MR. DODGE: It is in the same court, isn't it?

SENATOR PEPPER: The same court.

MR. DODGE: It is the same way in Massachusetts exactly, an independent suit in the same court.

SENATOR PEPPER: I was wondering what would happen in such a suit if I brought it and somebody said, "This is a bill

of review, although not so called." Your rules say bills of review are abolished.

THE CHAIRMAN: That means we don't have a pleading called a bill of review. It is a suit with a complaint and answer. We abolished writs of mandamus. We don't abolish the right. We retain the action.

MR. DODGE: I think that phrase, "original action to relieve a party from a judgment, order, or proceeding", coupled with the abolition of bills of review, is quite difficult of comprehension by the ordinary lawyer. I don't know, in the first place, what an "original action to relieve a party from a judgment, order, or proceeding" is, unless he had paid a judgment obtained by fraud and sued to recover the amount in an action of tort or something like that.

THE CHAIRMAN: Suppose the judgment has been obtained under the old rule by extrinsic fraud. You are not bothered with the difficulty about intrinsic fraud. It is plain extrinsic fraud. Two or three years after that, if you discover it, you bring an action. If the judgment has been executed and the vacation of it won't help you any, then maybe all the remedy you can get is to get damages for your loss. But suppose the judgment determines your right to a piece of real estate. There is no reason that you can't ask for leave to vacate and annul the judgment and have it declared that you are still the owner of this property, although the judgment

purported to vest title in your adversary. I can imagine a number of cases where that sort of situation may arise.

MR. DODGE: Some kind of what would have been a bill in equity to relieve the party, the plaintiff, from the judgment.

JUDGE DOBIE: There are a number of cases in which the federal courts have enjoined the plaintiff from enforcing the judgment obtained in a state court.

THE CHAIRMAN: Yes.

JUDGE DOBIE: The leading case is Wells Fargo & Co. v. Taylor, where the Wells Fargo people had a good defense, but the state court entered judgment without giving them an opportunity to set it up. So, they then brought an independent suit in the federal court to enjoin the plaintiff from enforcing that judgment. They granted that injunction.

MR. DODGE: Was there any time limit on it?

JUDGE DOBIE: No.

THE CHAIRMAN: It would be laches, and there may be a statute of limitations.

JUDGE DOBIE: They might set up laches, but they proceeded pretty promptly.

THE CHAIRMAN: The general statute of limitations would apply.

JUDGE DOBIE: Yes.

SENATOR PEPPER: Is it well settled that that sort of

proceeding should be called an original action? I noticed Judge Dobie said they entertained an independent action.

JUDGE DOBIE: That was independent because this was a state judgment, and that was the first time it had ever been in the federal court.

SENATOR PEPPER: "Original" is mixed up in your mind with original jurisdiction and things like that. I was just wondering whether that was the apt word.

THE CHAIRMAN: Where did we get the word "original"?

JUDGE CLARK: The word "ancillary" has been used a good deal, and the opposite of ancillary is original.

THE CHAIRMAN: I see.

JUDGE CLARK: That is how we came to use it. I don't know that there is any objection to using "independent", if that is clearer. What do you say?

SENATOR PEPPER: I merely raise the question. I don't know.

JUDGE CLARK: This motion is really an ancillary thing in general, you know. You don't need new grounds of jurisdiction, and so forth.

SENATOR PEPPER: I see. That is all right.

PROFESSOR CHERRY: In the draft on page 50, lines 22 and 23, you have both "original action" and "not limited to relief of an ancillary nature".

SENATOR PEPPER: That shows what it means.

PROFESSOR CHERRY: Yes. In the redraft you have simply "original action". Perhaps Senator Pepper's difficulty would be cleared up--

MR. DODGE [Interposing]: I was glad to see those words struck out, because I didn't know what they meant. "not limited to relief of an ancillary nature".

JUDGE CLARK: We struck it out because we thought it might create more confusion.

MR. DODGE: Can an original action be maintained on the three recognized grounds for bills of review? First, we dealt with one of them, newly discovered evidence. The other two, as I understand it, are error of law apparent on the record and new occurrences since the filing of the bill. Aren't those the three grounds, Mr. Moore?

PROFESSOR MOORE: Fraud was a ground.

MR. DODGE: I think error of law apparent on the record was where a case hadn't been to the court above and just after the time for appeal expired, the appellate court of that jurisdiction handed down a decision establishing the law contrary to what had been ruled in the trial court.

THE CHAIRMAN: I started this ruction about 60(b) because I found out a couple of years ago that the federal courts were using certain proceedings or bills of review or writs of coram nobis or whatnot to grant relief from judgments, and our rules were silent and didn't prescribe any practice or

forms or anything. I thought that every legitimate and well-known method of attacking and vacating and setting aside judgments ought to be tied down to our rules. If that right exists, we ought to specify the practice, the form of pleading, by motion, or whatnot. So, one of our objectives has been to draw 60(b) so that it prescribes the practice for every kind of relief that the court now grants.

Along that line, there were two grounds for relief that we realize are not specified as such in the new draft of 60(b). One is fraud upon the court. One of the circuit courts set aside one of its own judgments nine years after it was rendered because fraud was perpetrated on it. A fake article on some patent matter was written by somebody who was hired to do it and, on the pretense that it was an independent article, unbiased, and by a scientist, it was read to the court and brought into the case and had quite an effect, evidently, on the sustaining of the facts. Some nine years after that, the court found that one of the parties had gone and hired this fellow to write that article and had fixed it up to be presented to the court as an impartial, scientific publication. Years later, the court on its own motion, when it found that out, knocked the judgment out.

I had a clause in the draft I had that this rule does not limit the power of the court to entertain an original action to relieve a party from a judgment, order, or proceeding,

or to set aside within one year, under Section so-and-so, a judgment against a defendant not actually personally notified. Then I added, "nor bar a court from setting aside its judgment for fraud upon the court."

Charlie says that that is already covered in his draft by subdivision (2) in line 4, which says, "or (2) through the fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party." I think he is right, but the court that I speak about did it nine years afterwards, and we are placing a one-year limitation on it, aren't we? So, it is not quite the same thing that I had. I had a clause at the bottom saving the power of the court to set aside its own judgments for fraud upon the court, in those words, whatever power the courts had.

Then, the only remaining relief that the court grants against the judgment and which isn't mentioned here is where one of the judges of the court has been corrupt, and of course that is a pretty bad thing to stick in a rule, but I stuck it in just to bring it up, that is all. I had, "for fraud upon the court or corruption of the court." Those are two grounds for setting aside judgments, which are not mentioned in this thing, except that fraud upon the court may be taken care of by the fraud clause in line 4 with a one-year limit on it, but a circuit court will set aside a judgment on its own motion, as I understand it, at any time, without regard

to limit, if it discovers there has been fraud imposed upon it.

MR. DODGE: I would like to ask one question. Is it intended by eliminating those various forms of proceeding at the end to deprive the party of rights for the kinds of relief which it formerly could get? Can those all now be obtained by the original action?

THE CHAIRMAN: I had a clause in my draft which said, "The writs of so-and-so are hereby abolished, and the relief heretofore available on those writs may now be obtained by a motion or action under this rule," just the way we did on mandamus.

MR. DODGE: Why is it important to put that in?

THE CHAIRMAN: Because nobody knows just what kind of relief these old writs did grant.

MR. DODGE: There is a great body of law as to the bill of review.

JUDGE DOBIE: The audita querela and coram nobis and vobis, as we know, go back to history and to the types of courts they had over there, and we thought it would be pretty bad to incorporate all that archaic asininity into these rules.

THE CHAIRMAN: We didn't want to keep the writs, but his point is that the kind of relief you used to get by these writs and bills ought to be still available.

JUDGE DOBIE: We had a man come before us and say, "I want the court to grant a writ of audita querela," and the

other fellow, a North Carolina country lawyer, said, "What's that thing? I never heard of it." He didn't want to encrust all of that on it.

MR. DODGE: The recognized rights of parties under those writs are to be preserved by an independent action, as I now understand it.

THE CHAIRMAN: Except in so far as they may be already taken care of by this motion business.

JUDGE CLARK: That is what I was going to ask. It was ruled in the Second Circuit in Judge Frank's decision in the Wallace case that the rule as to newly discovered evidence had been limited by what we had done. Do we want now, so to speak, to restore it to the old law, or is what we have now by this other provision, giving them a year, to cover it?

MR. DODGE: You have taken care of that and limited it to one year. Are we leaving the other rights of the parties to be affected?

JUDGE CLARK: I should think we had made some limitations on the rights. Whereas before you could bring a bill for newly discovered evidence, now you can only move within one year.

THE CHAIRMAN: That isn't his point. He wants to know whether the kinds of relief he used to get under these writs can now be had. The time limit is a secondary proposition. It is whether the right to get a certain kind of relief

that you used to get by these things is still existing.

JUDGE CLARK: That is true, isn't it?

PROFESSOR SUNDERLAND: You can't get anything more than is outlined in the first part of that paragraph, can you?

THE CHAIRMAN: I wanted a clause in that the relief heretofore available through these writs can now be obtained by a motion or a plenary action under these rules. They took that out and said it was too dangerous. Everybody howled about it and didn't know what the relief was. It would take a lawyer six months to find out what his writs were.

In the mandamus rule, you know, it was said, "Writs of scire facias and mandamus are abolished. The relief heretofore available by mandamus or scire facias may be obtained by appropriate action or by appropriate motion under the practice prescribed in these rules."

SENATOR PEPPER: I think that is all right.

THE CHAIRMAN: That is what I had in, but they scared me off. Have you seen this memorandum that has been drawn by Mr. Moore's staff? It is about that thick. It tells you all the things that these writs used to do.

MR. DODGE: The things you can be relieved from under bills of review are perfectly well defined in the cases. There are a great many of them. I am simply wondering whether they are abolished or are still left to be obtainable in an independent action.

JUDGE CLARK: I think the answer would be substantially this: that at least almost everything is covered. I don't know that you could say absolutely everything is. Mr. Moore raises a question, for example, whether error apparent on the record didn't come within something of this kind, but I would say that practically all of the things that you normally would want to do are covered by this, with perhaps a shorter time limit.

MR. DODGE: Except as otherwise provided in these rules with respect to particular matters, the kinds of relief obtainable under these are now obtainable in an independent action.

SENATOR PEPPER: Or are subject to limitations of time.

THE CHAIRMAN: Here is the way I put it. Under the rules, either by motion or independent action, you can get relief from judgments on a variety of grounds that we have specified. Now the writs are abolished. If the kinds of relief we prescribe in the rules cover the whole field that these writs and bills used to cover, then we have preserved every right they had under these old proceedings; but if we have not prescribed either by motion or independent action that a certain kind of relief can be granted that used to be granted by any of these old procedures, it doesn't follow that we have lost that.

But I was convinced myself that if we prescribed the remedies heretofore granted by writs of coram nobis, audita querela, and everything else, it would throw the bar up in the air. They never heard of those things. Mandamus and scire facias are present in modern stuff, and you can get that out of the books very quickly. Really, as far as I read that memorandum and studied all the grounds under which these old procedures could be used to grant relief, I think the Reporter did a pretty good job of preserving everything that is worth while. It is better to leave the lawyers with a definite statement in our rules than to have them hunting through the books to find out what a writ of audita querela is.

SENATOR PEPPER: The difference is something like this: There is a great body of decided cases with which I used to be familiar (I am no longer) on the subject of bills of review. There is a body of jurisprudence there. If I were assured that this original or independent action was coextensive with the remedy by bill of review, I would agree that this abolition of the bill of review was a mere scrapping of an obsolete term and conforming the practice to our new theories; but if there is no definition of what you can get by original action, and right alongside of it is the statement that the bill of review is abolished, if I filed a complaint in an original action asking for something which under a decision of Lord Elton I found, for instance, was obtainable by

a bill of review, I would be told that that case was inapplicable, that that was a bill of review, and that they have been abolished. There is no authority applicable to an original action, and there isn't any because this is a new thing. There is no body of law that I can go to to find out what I can do by original action, but there is a great body of law which will inform me what I can get by bill of review. I am not much interested in coram nobis and audita querela, and so on, but the bill of review, at least in my own experience, has been a very important department of procedure.

THE CHAIRMAN: Of course, on the motion for new trial on the ground of newly discovered evidence, the bill of review was the way in an equity case of getting that relief.

SENATOR PEPPER: That is true, if it comes up within the time in which you can move for a new trial, but with us the statute of limitations on bills of review is five years, and it often happens that a very material matter comes up after two or three years, such a matter, for instance, as was referred to by you, sir, in connection with this fraud perpetrated on the court. I think it is a pity if we are going to sacrifice the relevancy of the body of case law applicable to bills of review by seeming to make it irrelevant by abolishing the bill, if our intention is to make it available as a reservoir of knowledge on which you can draw for the purpose of the original action.

MR. DODGE: I agree with that entirely, and it isn't necessary to go back to Lord Elton to find out about a bill of review. They are constantly being discussed in the opinions of the Supreme Court of Massachusetts. If we are abolishing all the legal rights that are consequent upon the right to file such a bill, I would like to know it; and if we are not, I would like to know it.

THE CHAIRMAN: For instance, the bill of review was the basic method in equity for getting a new trial on the ground of newly discovered evidence. Now we have provided in two different places, 59 and 60, for motions for new trial on the ground of newly discovered evidence, one within 10 days as a matter of right, and the other within one year by leave of the court. There is no doubt at all in my mind that those two provisions about new trial on the ground of newly discovered evidence under these rules are substitutes for the old bill of review rights, with any time limit the court might apply, to get a new trial. I think Judge Frank held that very thing. He said it isn't reasonable to suppose that these rules prescribe all the procedures for motion for new trial or for getting a new trial on newly discovered evidence, and then that you have another one that is never mentioned in the rules to do the same thing by the old equitable bills.

So, I think that one answer to your question is that where we have specifically provided that there are certain

kinds of remedies of the nature that one of these old procedures granted, our rules are substitutes for the old procedure, whether the time limit is the same or shorter.

MR. DODGE: I assumed that.

THE CHAIRMAN: Whether there are some kinds of relief that used to be granted by these old procedures that we have not provided for in the rules and which ought to be preserved, I was talked out of the idea that that ought to be done by a sentence on the abolition that the rights heretofore granted by these bills and writs could be obtained either by motion under these rules or by independent action. That would hook it up and make the independent action just as effective as the bill of review.

JUDGE DONWORTH: I have a suggestion along that line which I should like to read at the proper time.

THE CHAIRMAN: Let's have it.

JUDGE DONWORTH: First, I want to call attention to the fact that in lines 10 to 30 we have no time limit, and I favor the omission of a time limit. I favor it as it reads. "This rules does not limit the power of the court [no time limit whatever] to entertain an original action to relieve a party from a judgment, order, or proceeding". There is a limit in the next clause, which relates to a particular statutory relief. We are not bothered about that, but on the entertainment of an action there is no time limit involved.

THE CHAIRMAN: There is none imposed by the rules, you mean. You don't mean to say that there is no time limit on an original action on the general equitable principles of laches or the statute of limitations.

JUDGE DONWORTH: The statute of limitations, fraud, and so forth. I am not sure that Senator Pepper meant to say what I thought he did say, that if we abolish these writs and bills of review, there is no body of law that we can go to to see what kind of relief we can get against a judgment. I think there are numerous cases of actions to set aside judgments for fraud. As has been stated here, you can bring a suit in the federal court to set aside for fraud a judgment rendered in a state court, and so on. It would be largely fraud; possibly other things, but in the main amounting to fraud.

I think this thing is about right as it is, but I would add at the end this. I will read beginning at the middle of line 15. "Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, but this abolition shall not limit the power of the court to grant relief in any original action for relief or to entertain and take appropriate action on any motion herein provided for."

I mean by that that if the particular thing that we are now talking about was formerly granted by these special writs, we don't intend by their abolition to abolish any right

of relief that exists under any system. The original action, which we don't define, would become an original action on some recognized ground of equity or, in an appropriate case, of law. I do think that the suggestions that have been made here lead to the wisdom of putting a clause in at the end substantially along the lines that I have read.

MR. DODGE: With an exception, "except as otherwise provided in these rules", to cover that matter of motion for new trial or something like that.

JUDGE DONWORTH: That might be.

MR. DODGE: I think that is exactly what the Senator had in mind.

SENATOR PEPPER: Yes. Judge Donworth, you misunderstood me, I think. I believe that there is a great body of law that you can draw upon and inform yourself as to what relief you can get by an original action. What I was afraid of was that we might be cut off from access to that body of law by a flat abolition of the bill of review and the bill in the nature of a bill of review, if there was no saving clause of the sort that you have suggested.

JUDGE DONWORTH: I think your fear is well grounded.

THE CHAIRMAN: Why don't we cover the whole thing this way? Instead of abolishing the bills of review and the writs of coram nobis and vobis, say, "The procedure heretofore used in the case of coram nobis, bills of review," and so on,

"is abolished." I haven't done that, but I mean what we are doing is to abolish the procedure and form---

SENATOR PEPPER: That is all right.

THE CHAIRMAN: ---not rights and remedies. Couldn't we do that?

JUDGE CLARK: Could I go back a little in the history of our approach to this? I am not opposed to this. It is just that the Committee quite properly wanted to head one way in one meeting, and at the last meeting you were quite aiming at finality of judgments. A little history on that: Mr. Moore brought in his long memorandum, and of course in one sense it does point to a considerable body of law. There is no question that it is there. The only difficulty is that the outer fringes get very indefinite as to what you do on coram nobis, and so on. That is, you have a lot of definite law and then a lot of indefinite law on the outer fringes. In his memorandum he suggested a very wide provision for relief. He made somewhat an analogy of what could be done by the old term of court, and so on. At that time there was a good deal of feeling that we ought to strive somewhat more for finality of judgments, and therefore we ought to make the rule definite and limited. That is why the rule is drawn this way. I don't care which you do, but I think it must be recognized that you can't have your cake and eat it, too. If you are going to have a definite rule supporting finality of judgments, you can't

then at the same time provide that there shall be re-enacted or kept alive all the body of both definite and indefinite law. It is a difficult question, and I am not taking either side of the question as such, but I think you should bear in mind that now what you are doing is making the thing pretty wide open. Maybe that is the best thing to do, but please have it in mind that your question of finality of judgments is down pretty small.

JUDGE DONWORTH: We are not creating any new right except by the first part, giving the right to make a motion within one year. That, possibly, is a new kind of procedure, but so far as the general action is concerned, which we say doesn't limit the power of the court to entertain the original action, we are not laying down the law in that provision but we are leaving it to the body of law to which you refer.

JUDGE CLARK: There is no question about that. That is, we are adding a few new rights. That is, 60(b) is in one sense an additional right. We are taking none away. In the past, the control over judgments, as Mr. Moore's memorandum shows, was pretty extensive. That was the real gist of his memorandum. So, we are accepting all that and adding just a little to it. In other words, we are not regularizing the law, and perhaps we shouldn't.

JUDGE DOBIE: May I say just one word there? I think I probably was the most vociferous when this thing came up

before. Judge Donworth wasn't here. The big idea that I had in my mind was to get rid, as I said, of all these hideous technicalities. I referred to that great book, Dobie on Federal Procedure, in which there are nine pages on bills of review. You have the pure bill of review for error apparent on the record. That had to be filed within the time limited to appeal. You have the impure bill of review for after discovered evidence, on which there was absolutely no time limit whatever, subject of course to the general equitable doctrine of laches. There was the simple petition for rehearing, which you had to file before the term was over. You couldn't file the bill of review until the term had ended. My idea was just to get rid of all that infernal technical nonsense which I gave nine pages to in a book written long ago, when I was even more ignorant than I am now.

It is one of those strange things, Senator, that nobody can quite explain. I don't care how you phrase it, but we don't want anything like that which came up in that case I mentioned where the fellow wanted to argue the audita querela and go into the bills of review and bills in the nature of a bill of review. I think that old equity pleading was perfectly hideous.

MR. DODGE: You want to go beyond forms of procedure and cut down the rights of the parties. If that is the intention, let's say so, and if it isn't, let's say that. Otherwise,

not only the bar but also the courts are going to be troubled with this as it stands now. What is the effect of this language upon the rights formerly enforceable under a bill of review? We have dealt with the motion for new trial on the ground of newly discovered evidence, and that should be taken care of, but we haven't dealt with the other matters.

JUDGE CLARK: I don't like the term "you", unless it is generic. Let me put it this way, that I certainly understood the Committee wanted to do what you are saying. That is, the Committee wanted to make a rule that the lawyers could read and understand what they could do and what they couldn't do. Maybe that is impossible and maybe, even if possible, it should not be done; but I think that was the way you were heading before.

Take for example the suggestion that was made here that we provide that the remedies accorded by these old writs should still exist, although the proceedings would be different. I should think, then, that your provisions as to newly discovered evidence would not be restrictive. I mean the new provisions that we are going to add.

MR. DODGE: You can make an exception as to that. If we mean cut down the rights of the parties, let's say so, and if we don't mean to but mean to leave them enforceable by an independent action, let's say that.

JUDGE CLARK: Of course, I don't object. I am not

saying what you should do, but I do suggest that you can't have it both ways. It is either one or the other, and at different times we have headed in different directions.

PROFESSOR SUNDERLAND: I would like to see the rule made clear that all of the rights you have to relief are those given by this motion or by an original action for relief from a judgment, order, or proceeding.

THE CHAIRMAN: That is the way the rule is intended to be now, not this particular motion, but all the rights that they are entitled to attack judgments for are prescribed in these rules. There is a number of them.

PROFESSOR SUNDERLAND: You might have it read this way: "Motions under this rule supplant writs of coram nobis, vobis," and so on, "which are hereby abolished."

THE CHAIRMAN: That isn't enough, because we have other rules that grant certain methods of relief that might have been obtained by some of these procedures. We have a great group of rules that allow you--

PROFESSOR SUNDERLAND [Interposing]: That is true.

THE CHAIRMAN: That is just another way of repeating my clause that the writs of coram nobis, and so on, are hereby abolished.

PROFESSOR SUNDERLAND: There is a question there whether it abolishes the form only, the procedure, or whether it carries with it the abolition of the relief which might have

been obtained under those forms. I think it ought to be made clear that it abolishes any relief that could be obtained under those forms, unless that relief is authorized by these rules. That is what I would like to see done. Cut that stuff all out so we never have to go back to it again.

JUDGE DOBIE: That is my idea.

THE CHAIRMAN: I didn't finish my sentence. I stated only half of it. I said these writs are hereby abolished, and then I was going to add that these rules now prescribe the procedure for such rights as are preserved or still exist, that formerly were granted by these various writs and bills. I haven't worded that right.

PROFESSOR SUNDERLAND: I say, these forms are abolished, and the rights to relief are only those authorized by these rules.

MR. DODGE: That is the same idea.

THE CHAIRMAN: That is a better statement, as I understand it, and that narrows you down to the one question. You know what the motions all are. The question is whether the original action not being defined here--

JUDGE DONWORTH [Interposing]: Professor Sunderland's suggestion goes too far, I think. You say that we are abolishing these special proceedings, and nothing is to be permitted except what is specified in these rules. I don't think that is correct. I like the clause that I first read here. "This rule

does not limit the power of the court to entertain an original action to relieve a party from a judgment, order, or proceeding".

PROFESSOR SUNDERLAND: That stays. That is all right.

JUDGE DONWORTH: That is in the broadest possible terms. We don't specify any ground. Your language would imply that we are limiting the grounds on which the court may take that action. I favor no limit except the body of law that already exists.

PROFESSOR SUNDERLAND: No. I would simply say that no relief could be had from a judgment or proceeding except relief authorized by these rules, that we abolish these old forms, and no relief can be had except relief authorized by these rules. One of the things authorized by the rules is whatever you can get from an original proceeding.

MR. DODGE: You are opening up the same old difficulty.

PROFESSOR SUNDERLAND: That is true, but I don't see how you can get away from an original proceeding. There is no definition you can give to that. If we get away from all this ancillary stuff, kick that into the waste basket, and have nothing but our own affirmative rules plus this one thing--the original proceeding--I think that is the best that can be done, and that is pretty good, too.

MR. DODGE: Can you bring an original proceeding for

relief from a judgment where you ought to have relief from it on account of changed circumstances, some new event that has happened that makes the judgment really unenforceable or should make it unenforceable?

PROFESSOR SUNDERLAND: I think that under our rules any way we can draw them, we probably will have to retain a background of legal literature in regard to what can be done by an original proceeding. We probably can't get away from that.

THE CHAIRMAN: Under the existing law, I think you can go into the court that rendered the judgment and ask for relief on the ground that the circumstances have changed and the judgment ought to be abolished. Can we do that under these rules? Is there any procedure by motion prescribed by our rules that allows you to go into a court and say, "Here, this judgment was all right when it was rendered, but the circumstances have changed now and it is inequitable to have the injunction retained," and so on, and get relief from the court which rendered it?

JUDGE CLARK: I didn't suppose that ever came under this. I must say that Mr. Moore and I have debated that somewhat. It seems to me, as the Supreme Court has said only recently (the majority said it, and the minority agreed) in connection with United States v. Hartford Empire (not Hazel Atlas), that control over an injunction is always in the hand of an equity court, and I didn't suppose that was ever a

question really of relief against the judgment as such. That is a new step in the proceeding in a continued remedy. It is like alimony. The court changes it because the situation of the parties has changed. This may be a question of name, but it didn't seem to me it was. New events have developed in the case of a continuing remedy where the court always has control. I should think you would have it, no matter what we did to this.

PROFESSOR SUNDERLAND: There is continuing jurisdiction over those proceedings.

JUDGE CLARK: Yes. It doesn't seem to me that this rule has anything to do one way or another with that.

PROFESSOR SUNDERLAND: It doesn't seem to me that it has.

JUDGE CLARK: That is the general ground of equity jurisdiction, just as in the case of divorce you have jurisdiction over alimony. That is what they said in United States v. Hartford Empire, and they have said it elsewhere, too. They said it there because of a little dispute between the majority and the minority. The minority said that the relief granted in that case was not right, and all that. The majority said that you could always adjust it, that the district court could always adjust it.

MR. DODGE: Do you think we are sufficiently advised as to the rights of the parties under those old proceedings to abolish them or cut them down to a great extent?

PROFESSOR SUNDERLAND: We have taken Mr. Moore's tremendous memorandum, which I have gone through again, and there is practically nothing in there of any value that isn't based on these rules.

MR. DODGE: I think we ought to say something in the rule about it one way or the other.

SENATOR PEPPER: Isn't Judge Donworth's suggestion a wise one, if at the end of our abolition clause we were to insert such words as "as forms of procedure"? It would read:

"Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished as forms of procedure".

Then, Judge Donworth, would you read what you have to follow that?

JUDGE DONWORTH: "but this abolition shall not limit the power of the court to grant relief in any original action or to entertain and take appropriate action on any motion provided for in any of these rules."

PROFESSOR SUNDERLAND: That wouldn't go far enough to suit me. I would go further than to abolish the procedure. His suggestion abolishes the procedure. I would abolish the procedure and the remedies which were obtained by that procedure---

MR. DODGE: The substantial rights.

PROFESSOR SUNDERLAND: ---and substitute our rules

for the remedies that were provided by those old writs.

MR. DODGE: Substantial rights of the parties as heretofore recognized.

PROFESSOR SUNDERLAND: If our rules aren't as broad as those rights, then we cut down the remedial rights to the extent of the difference between them.

MR. DODGE: That is dangerous.

JUDGE DONWORTH: The trouble with your suggestion--

SENATOR PEPPER [Interposing]: Mr. Sunderland, may I inquire how you would determine whether those rights are or are not cut down by our rules? We have a flat declaration here that a court may entertain an original action to relieve a party from a judgment. Either that means that we are going to wipe the slate clear of all precedents and start afresh to build up a huge body of jurisprudence as to what relief can be given in that action, or it means that in that form of action the court may draw on the experience of the past to the extent that it thinks appropriate, notwithstanding the abolition of these writs as forms of procedure. It seems to me that the latter is the intelligent way to proceed.

PROFESSOR SUNDERLAND: That just keeps all this body of literature which Mr. Moore has collected in that terrible memorandum of his as live stuff. I think that ought to be dead stuff.

MR. DODGE: You are extinguishing rights as well as

INTENTIONAL BLANK

changing procedure.

PROFESSOR SUNDERLAND: Slightly, I think that would be true.

MR. DODGE: I don't think we should do that, as presently advised.

PROFESSOR SUNDERLAND: Probably it isn't nearly as serious a cut-down of right as for us to cut 10 days off a period, for example.

THE CHAIRMAN: I asked the staff to make that memorandum. I thought the way to handle this thing was to find out precisely what kinds of relief should be granted by all these old procedures and then to make provision in our rules, either by motion or independent suit, for the same sort of relief, and then say that the writs, and so on, are all abolished as forms of procedure and that the relief heretofore granted, or such of it as we want to preserve, is to be had under a motion or an independent suit under these rules. They got out the memorandum, and it is supposed to list all the different things you can do under these old procedures. While it is a little vague, as they say, around the edges, that isn't the fault of the Reporter. It is just the law that is vague.

I think, as Sunderland says, the truth is, if you read through that memorandum as I have done two or three times, you have great difficulty in finding any kinds of relief that you could get under any one of these old procedures that we

haven't in one form or another prescribed in these rules. We have placed some time limits that may not fit. For instance, the bill of review for newly discovered evidence, as I understand it from your statement, might be brought five or ten years after.

JUDGE DOBIE: No limit whatever.

THE CHAIRMAN: And we have placed a limit of one year on it. So, we have made that difference. We have affected the right not by abolishing it, but by placing a time limit on it. We have done that all through these rules. Time limits are procedure.

SENATOR PEPPER: Mr. Chairman, when this jurisdiction to entertain bills of review grew up, it was part of the system by which on the equity side of the court relief was given against the rigors of the common law side. The motion for a new trial, which has to be made within a limited time, very short, was found in experience not to be adequate to deal with the cases that justice required the court to deal with. The bill of review was an equitable device to get away from the rigors and the limitations on the motion for a new trial. We don't deal with that situation adequately merely by repeating provisions for a new trial, no matter how liberal our limitations of time are, because whatever they are, they stop far short of the cases which are bound to occur where justice requires something to be done after the new trial motion has

ceased to be available. That is the original action, I assume, and all I am pleading for is that when we provide for the original action, which is clearly the thing that we ought to do and it is finally stated in this draft, we should not superadd language which excludes from consideration in the original action the very class of things which make the original action desirable. That is all I am contending for.

THE CHAIRMAN: Let me ask this.On a bill of review, when your request was to get a new hearing for newly discovered evidence, when there was no time limit on the application and you went into court on a bill of review and showed that you had this evidence and that justice required that you have a new trial, did the court simply, in the same case in which the bill of review was a sort of ancillary proceeding, make an order setting aside the judgment and granting new trial? Is that what they did?

SENATOR PEPPER: It depended on what the nature of the case was. If the judgment in the former proceeding had been a judgment impending a lien upon land or freeing land of a lien or entering a judgment in ejectment, and subsequently, long after you could move for a new trial, it developed that there had been fraud or that a legal doctrine that was current when the case was decided had subsequently been declared to be otherwise by the court of last resort, or if fraud had been discovered, you could file a bill, and the relief would be

according to the circumstances. It might be a money judgment; it might be restitution; it might be the striking off of the lien which the former judgment had imposed; or it might be decreeing a molding of the judgment under which a new person would be put in possession of the land. All those things were possible, and they happened again and again and again. I have known of a great many bills of review in my own experience, and I have read a great many of the decisions in Pennsylvania, where the practice is common.

As I say, I entirely agree that the ancient procedure of learning incident to these things should be abolished. I believe the original action is the sensible way to grant the relief. All I want to be sure of is that the rights that Judge Donworth is preserving are preserved in order that we may have recourse to that wealth of experience of the past.

JUDGE DONWORTH: I should like to supplement that by this brief remark. One of the remedies that can be obtained in an original action is an injunction, a declaration that the judgment attacked is fraudulent and void as to the plaintiff and enjoining the other party from resorting to that judgment. We have nothing at all in these rules about an injunction against a fraudulent judgment, and the only allusion to it is that we provide for an original action. We give the court the right to grant any relief that the circumstances of the case require.

JUDGE CLARK: Certainly the gentlemen who have spoken don't want to limit this too much, and I should think that maybe all we could do is what we suggested here originally, that only ancillary proceedings by coram nobis and coram vobis are to be abolished, and allow the general actions as the general scope.

SENATOR PEPPER: That isn't what I meant. I would be totally in favor of abolishing all these coram nobis's and audita querela's and bills of review and everything, and of substituting the original action just as provided for here, provided that the abolition is of those methods of procedure, leaving the power of the court to give such relief as it may deem appropriate under the procedural methods laid down by these rules. That is all.

THE CHAIRMAN: Of course, I can see one situation that you haven't done that in. One of the important purposes of the bill of review is to get relief on the ground of newly discovered evidence. I asked you whether under a bill of review the court granted a new trial on that ground.

SENATOR PEPPER: It might.

THE CHAIRMAN: Is it to be allowed to do that without time limit, depending upon the circumstances?

SENATOR PEPPER: We happen to have a five-year limit in Pennsylvania, but in some jurisdictions--I think Judge Dobie referred to Virginia, where it was subject only to the equitable

rule of laches.

JUDGE DOBIE: That is the only limitation. It started with Lord Bacon's ordinance, and it has come down to us. Of course, you can have a state statute, but the old equitable bill of review had nothing except laches.

THE CHAIRMAN: We have one year. Of course, that is a one-year limitation on a motion, and not a one-year limitation on an independent suit where you have to get new service and start over again. So, I have assumed that our motions were limits not on the right or the ultimate remedy, but limits on getting it by a certain kind of procedure, a motion instead of an independent lawsuit. I had the vague idea in my head that when we left the independent action, the original action, or whatever you call it, all the grounds for relief that could heretofore be availed of in an independent action were preserved as heretofore.

SENATOR PEPPER: How would it do to test the sense of the Committee, if Judge Donworth would move what seemed to me to be a very clear statement of what I myself ineffectively attempted to formulate? Would you be willing to do that, Judge Donworth?

JUDGE DONWORTH: Yes, at your suggestion. Following the suggestion you made in the course of the argument, I put in "as methods of procedure".

SENATOR PEPPER: Yes.

JUDGE DONWORTH: So, the final sentence, as I propose it with the amendment suggested by Senator Pepper, is this:

"Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished as methods of procedure, but this abolition shall not limit the power of the court to grant relief in any original action or to entertain and take appropriate action on any motion provided for in any of these rules."

SENATOR PEPPER: He offers that motion, and I second it, to test the sense of the Committee. I think we could talk about it almost indefinitely, because evidently it is a question of original apprehension.

JUDGE DOBIE: I don't like the phrase, "as methods of procedure", because I think that still keeps up a lot of that antique learning, but I make no point of it.

JUDGE DONWORTH: That was Senator Pepper's suggestion, and I adopted it.

SENATOR PEPPER: I wanted to bring out in strong relief the issue between the view expressed by Professor Sunderland and the view that I have been favoring, namely, that this abolition was the kind of abolition which was appropriately in rules of procedure and that it wouldn't be appropriate to make the abolition extend beyond the limits of procedure. I don't think we have any right here to adopt rules which will make unavailable substantive rights which heretofore have been

supposed to exist.

THE CHAIRMAN: That interests me, because I wrote a letter to the Reporter after our last meeting and protested against the form of Rule 60(b) on the ground that it purported on its face to define the rights, and I said that the method of approach ought to be that if you are applying for certain relief on certain grounds, your procedure shall be by motion. That is a very different thing from saying that you may set it aside on the ground of fraud. I asked him to recast the whole rule and approach it from the other point of view, as a procedural matter.

SENATOR PEPPER: He has done that.

JUDGE CLARK: No, I didn't do that. I didn't do that because, again I think I am entitled to say, the view of the Committee was the other way then. You are perfectly entitled to change your view.

PROFESSOR CHERRY: It is within the term!

JUDGE CLARK: I get strange children wished upon me.

THE CHAIRMAN: I didn't ask him to change it in the face of the action of this Committee. I asked him that he be kind enough to draw a supplemental draft of 60(b) that approached the thing from my point of view, to let you look at it as compared to the one that we have here.

SENATOR PEPPER: I would be in favor of what the Reporter has brought in if the amendment of Judge Donworth

could be accepted in lieu of lines 15, 16, and 17.

THE CHAIRMAN: Would you be willing, before we make a final decision on that amendment, to have it copied overnight and to take it up the first thing in the morning. Let's look at the exact wording of it.

SENATOR PEPPER: Surely.

THE CHAIRMAN: We are down to the last gasp here, and there won't be any changes now.

SENATOR PEPPER: I don't mean to be exigent or insistent. All I want to do is to get the issue clear and then have the Committee vote on it. That is all. I think that Judge Donworth's statement does clarify the issue.

MR. DODGE: I object to cutting down the substantial rights of the parties, at least without a detailed knowledge of what those rights are that we are losing.

SENATOR PEPPER: Anyway, I don't think that we have the power to cut down the rights.

THE CHAIRMAN: We tried by this memorandum to get a list of all the rights.

MR. DODGE: I know it.

THE CHAIRMAN: We have enough paper there to cover it. If there is no objection, we will adjourn until nine-thirty.

[The meeting adjourned at 6:00 p.m.]