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TUESDAY MORNING SESSION (CONTINUED)

April 4, 1944

THE ACTING CHAIRMAN: Next, I think we ought to take up the problem suggested by Hill v. Hawes, because that is important and we ought to consider it. I would add, too, that we have had distributed before you a proposal coming particularly from Judge Maris, as to transmission of original papers as the record. I would propose, of course subject to your approval, when we finish Hill v. Hawes to take that up as being rather interesting and important. Then, unless some member of the Committee wants to take something out of order, I think we might just as well then go back to the regular course. So, unless there is objection, unless some member of the Committee who won't be here tomorrow and wants to call up any particular rule, we shall proceed with that understanding.

JUDGE DOBIE: I think we will finish tomorrow. Don't you, Charlie?

THE ACTING CHAIRMAN: I should think so.

DEAN MORGAN: We ought to finish tomorrow easily.

THE ACTING CHAIRMAN: I should think so. We will probably be surer tonight as to the situation, but I should think we will.

Turning to the Hill v. Hawes problem, I think that the best thing to do is to take the suggestions that Mr. Mitchell gave. Mr. Lemann had to step out temporarily, and he will be

back after lunch.

PROFESSOR SUNDERLAND: What rule is this under.

THE ACTING CHAIRMAN: I will give them to you. I was going to say that Mr. Lemann favored Mr. Mitchell's first alternative or the substance of it, however it is worked out. I will give you Mr. Mitchell's suggestions.

The main one of his first alternative is in connection with Rule 77(d), which is the one as to notice by the clerk, which apparently seems to have been the thing which led Mr. Justice Roberts in particular and the Court to feel that further time should be given. Rule 77(d), you may remember, is Notice of Orders or Judgments.

"Immediately upon the entry of an order or judgment the clerk shall serve a notice of the entry by mail in the manner provided for in Rule 5 upon every party affected thereby who is not in default for failure to appear, and shall make a note in the docket of the mailing. Such mailing is sufficient notice for all purposes for which notice of the entry of an order is required by these rules; but any party may in addition serve a notice of such entry in the manner provided in Rule 5 for the service of papers."

It was our theory right along that that didn't affect the time of appeal. Didn't we say so in the notes? I have forgotten.

DEAN MORGAN: You said so in the notes, I believe.

I am not sure.

THE ACTING CHAIRMAN: Will you look at the notes? Apparently the Supreme Court didn't examine the notes.

PROFESSOR MOORE: As to 77?

THE ACTING CHAIRMAN: Rule 77(d).

PROFESSOR MOORE: No, we don't say.

DEAN MORGAN: Remember what I said about Justice Roberts saying that he thought we ought to put in that rule which provided for notice of the entry of judgment, a statement to the effect that that did not affect the time of appeal?

THE ACTING CHAIRMAN: Yes. That is really Mr. Mitchell's proposal. I am reading from page 3 of the original copy of Mr. Mitchell's proposal. I guess it is probably the same.

DEAN MORGAN: Yes.

THE ACTING CHAIRMAN: He says:

"The first proposal (to repeal Hill v. Hawes) can be effected by adding to Rule 77(d) the following:

"'As the time for appeal is fixed by law, runs from the date of entry of the judgment, and not from the date of notice of entry, the failure to give or to receive notice of entry does not in any way affect the time for appeal, or relieve, or authorize a court directly or indirectly to relieve, a party from failure to take an appeal within the time fixed by law.'"

Mr. Lemann has the same idea, but Mr. Lemann wants to know why something comparable to what we have in 73(b) as to the clerk isn't the idea. That is the notice of appeal. We have, "Notification of the filing of the notice of appeal shall be given by the clerk", and so on. Then at the top of the page, page 88 of the Rules, "but his failure so to do does not affect the validity of the appeal."

DEAN MORGAN: That is the place I think it ought to go.

THE ACTING CHAIRMAN: You think it should be back here?

DEAN MORGAN: Back in the judgment, yes.

THE ACTING CHAIRMAN: Wouldn't it go here in 77(d)?

DEAN MORGAN: It might go here.

PROFESSOR SUNDERLAND: The same language put in 77(d).

THE ACTING CHAIRMAN: Yes.

PROFESSOR SUNDERLAND: The same language you have in the other.

THE ACTING CHAIRMAN: I wonder if Mr. Mitchell's isn't a little too strong.

PROFESSOR SUNDERLAND: Like a sledge hammer.

MR. HAMMOND: He says he wants to knock it in the head.

THE ACTING CHAIRMAN: Well, this is not only knocking it in the head, but it is knocking it in other parts of its anatomy.

DEAN MORGAN: Where is the provision that the clerk

must send notice?

THE ACTING CHAIRMAN: That is 77(d). That is the one I was reading.

DEAN MORGAN: Of the judgement? Is that what it says?

MR. HAMMOND: Yes.

THE ACTING CHAIRMAN: Yes.

"The failure to serve notice of a judgment or order under this rule does not extend the time of appeal." Why isn't something like that the thing?

DEAN MORGAN: Yes.

JUDGE DOBIE: He wants to take a crack, I think, at that thing about vacating a judgment and entering another one, doesn't he? I think he wants to do that in terms. That is why he put in there "does not .... authorize a court directly or indirectly to relieve, a party from failure to take an appeal within the time fixed by law." In other words, he is repudiating Hill v. Hawes there by rule, and the Supreme Court, I think, said they thought it would be all right.

MR. DODGE: The Supreme Court conceded, didn't it, that the rules mean what they say and that the statute means what it says, and that there the notice was not effective.

DEAN MORGAN: No.

MR. DODGE: That was out of the case, but they held that the court might vacate the judgment and enter a new one. That is the whole point.

JUDGE DOBIE: That is a pretty silly procedure, it seems to me.

DEAN MORGAN: Yes. Did I tell you I had a conversation with Mr. Justice Roberts? He said that if we put in this requiring notice, we must have done it for some purpose, and that if we didn't intend it to have any effect on the judgment or the effectiveness of the judgment, we ought to have said so.

MR. DODGE: Did the Court decide, or did the Court have any question about that?

DEAN MORGAN: I am not sure. Certainly Mr. Justice Roberts had a question about it.

MR. HAMMOND: Yes. He stated that in so many words in his opinion.

MR. DODGE: In his opinion. I thought the Hawes case went on the effect of the vacating of the judgment and the entry of a new one.

THE ACTING CHAIRMAN: It seems to me the opinion rather built itself up on several things, including the term of Court. They just put themselves in a solvent position where they eventually had to say it must be that way.

PROFESSOR SUNDERLAND: It said that the notice or failure to give notice could be relied upon by the party, and if he could rely upon it, then it would be bound to have this effect.

MR. DODGE: But they didn't give it effect.

DEAN MORGAN: They gave it the effect of allowing the judge, at any rate, to set aside the judgment and enter a new one, you see, and he was very specific about that particular thing in his talk with me. I said to him, "We were informed that that was the custom, that the clerk of the court always did it." He said, "That is all the more reason why you should have left it out if you weren't going to give some added effect to it."

MR. DODGE: Do you think we are improving the situation enough by merely adding the words, "The failure to give notice does not affect the time of appeal"?

DEAN MORGAN: No.

THE ACTING CHAIRMAN: I think perhaps it might be a good idea to read just a little of the opinion. I suppose this is the important paragraph.

"It is true that Rule 77(d) does not purport to attach any consequence to the failure of the clerk to give the prescribed notice; but we can think of no reason for requiring the notice if counsel in the cause are not entitled to rely upon the requirement that it be given. It may well be that the effect to be given to the rule is that, although the judgment is final for other purposes, it does not become final for the purpose of starting the running of the period for appeal until notice is sent in accordance with the rule. The Federal Rules of Civil Procedure permit the amendment or vacation of a

judgment for clerical mistakes or errors arising from oversight or omission and authorize the court to relieve a party from a judgment or order taken against him through his mistake, inadvertence, surprise or excusable neglect. (See Rule 60(a), (b).) These rules do not in terms apply to the situation here present, as the court below held. But we think it was competent for the trial judge, in the view that the petitioner relied upon the provisions of Rule 77(d) with respect to notice, and in the exercise of sound discretion, to vacate the former judgment and to enter a new judgment of which notice was sent in compliance with the rules. The term had not expired and the judgment was still within control of the trial judge for such action as was in the interest of justice to a party to the cause.

"The judgment is reversed", and so on.

You see, he gets it all in. He gets three prongs to the result.

JUDGE DOBIE: I think it is silly to say that they can think of no reason for putting it in there unless it extended the time for appeal. That is just bunk, Charlie. You can see how they answered that, but they have a mighty poor imagination.

MR. DODGE: What is the suggestion for 77?

THE ACTING CHAIRMAN: Mr. Mitchell's proposal (I will read it again) is that:

"As the time for appeal is fixed by law, runs from the date of entry of the judgment, and not from the date of notice of entry, the failure to give or to receive notice of entry does not in any way affect the time for appeal, or relieve, or authorize a court directly or indirectly to relieve, a party from failure to take an appeal within the time fixed by law."

DEAN MORGAN: I don't think that hits it. I think Roberts could still say that the defendant might be misled and that there would be excusable neglect, even though it didn't in any way affect the time to appeal. I am going on the question of excusable neglect, not on the question of time of appeal at all, directly or indirectly or otherwise.

PROFESSOR SUNDERLAND: What does excusable neglect have to do with it? We have no rule on that, have we?

DEAN MORGAN: No. He said the court can relieve a person for excusable neglect of anything.

PROFESSOR SUNDERLAND: Anything at all?

DEAN MORGAN: Anything, certainly, in the interest of justice.

PROFESSOR MOORE: Especially when the term of court has not expired.

PROFESSOR SUNDERLAND: I don't see how they can extend the time for appeal just because there was excusable neglect in not taking it. They can't do that, can they?

MR. DODGE: They can relieve him from the judgment because of excusable neglect and then re-enter it, as they did here, and wouldn't this change prevent the district court from doing that?

JUDGE DOBIE: I should think it would.

DEAN MORGAN: It probably would, if the language is as strong as he has it, but I think you could hit it more directly.

THE ACTING CHAIRMAN: Of course, he wants to put something in 73(a). I had better give you that, too. This is to put at the end of 77(d).

DEAN MORGAN: Yes.

THE ACTING CHAIRMAN: Then, in 73(a) he would add after the word "prescribed" in the third line, the following in brackets:

"(which runs from the date of entry of the judgment, not from the date of notice of the entry)."

He says: "This seems a silly business, to recite in the rule what the statute says, but how else can we make it clearer than we already have, that the time for appeal is a statutory matter?"

PROFESSOR MOORE: Wouldn't that have to go in Rule 72 also?

THE ACTING CHAIRMAN: Are we to touch 72?

PROFESSOR MOORE: You would have the same problem

coming up.

THE ACTING CHAIRMAN: I don't know. I think there is something in what you say, but I don't think, if I were doing it, I would touch 72. Rule 72, you recall, is the appeal from a district court to the Supreme Court.

JUDGE DOBIE: They don't want us to mess with that. We made the suggestion to them once, you know, that they cut out citation and all, and they were as cold as a mother-in-law's kiss to that suggestion.

PROFESSOR MOORE: But, Judge Dobie, suppose you have a case where the clerk fails to give notice of an order that is appealable from a specially constituted district court direct to the Supreme Court, and the time for appeal goes by. Under the doctrine of Hill v. Hawes, the specially constituted district court would be entitled to vacate the order and set it aside so that the losing party could then appeal.

JUDGE DOBIE: I think that is pretty bad, but I understand that the Supreme Court didn't want us to mess with appeals from a district court to them, that they would take care of that. We wanted to do it, you know, and to make it as simple as the appeal to the circuit court of appeals. Isn't that correct, Charlie? They were very firm on that and said, "That is for us. Don't you mess with it."

THE ACTING CHAIRMAN: Yes, although I had always understood (I don't know whether directly or indirectly or by

implication) that it wasn't just that they were perverse about it, but that they were worried particularly about appeals from state courts, state judgments, and they didn't see easily how to work the two together. Whereas they might have asked our advice about it and we might have helped them out, they didn't. I think it was more that general problem. The result, of course, is just what you say. They didn't do anything about it.

MR. DODGE: If this rule of Mitchell's had been in effect, the decision of that case would have been the other way, wouldn't it, in Hill v. Hawes?

JUDGE DOBIE: Yes; not necessarily, but probably.

THE ACTING CHAIRMAN: From the language, you would think it would be. Of course, I have a little suspicion that, after all, they decided it before they looked at the language very much. They thought this was a harsh case. "We really ought to do something about it. Now let's see what we can do."

JUDGE DOBIE: Decided first and found the reasons afterwards.

DEAN MORGAN: Say something like this, Charlie: "All parties are charged with the notice of entry of the judgment, and the failure of the clerk to serve notice of the entry of the judgment shall not in any way affect", and so forth.

THE ACTING CHAIRMAN: I should think that that was a good idea.

MR. DODGE: "affect the time for appeal."

DEAN MORGAN: Yes.

THE ACTING CHAIRMAN: I don't know whether you want to decide which of the alternatives you want to follow. Perhaps I had better run over them again. The first alternative Mr. Mitchell puts up, of which Mr. Lemann expressed approval, is the repeal (I think that is a nice word) of Hill v. Hawes. Mr. Mitchell's other alternative was accepting Hill v. Hawes, making the time date from notice of entry of the judgment, and then reducing the time for appeal to thirty days. Mr. Lemann said he thought we had power to do that; he thought our power was pretty broad, but he thought it very doubtful as a policy that we should attempt to monkey with that. He thought that that was a pretty old and pretty standard thing, that if it ought to be changed, it should be by Act of Congress.

We (that is, Mr. Moore and I) recommended really an expansion of 60(b). I just mention that here, and if nobody is interested in that, we will just take the two here.

JUDGE DOBIE: I don't think it is a good thing to make it run from notice. I think that is bad. I think we had better do it either the Mitchell way or as Morgan suggests.

THE ACTING CHAIRMAN: I take it, then, the general sentiment is to do it by way of repeal; that of the possible courses that we might take, what we most want to do is to blot out Hill v. Hawes.

JUDGE DOBIE: Yes.

MR. HAMMOND: In connection with that, Mr. Mitchell suggested two ways and says that he favors the first alternative.

THE ACTING CHAIRMAN: Does he express a choice as between his alternatives?

MR. HAMMOND: Yes.

THE ACTING CHAIRMAN: Where is it? In the letter? I don't see it.

MR. HAMMOND: It is at the bottom of page 2.

DEAN MORGAN: Charles, the Supreme Court would have power under your previous memorandum to prescribe the time for appeal, wouldn't it?

THE ACTING CHAIRMAN: I should think so.

DEAN MORGAN: The circuit court of appeals, certainly.

THE ACTING CHAIRMAN: Yes, I should think so.

DEAN MORGAN: And that would be the only theory on which your alternative would be put up, wouldn't it?

THE ACTING CHAIRMAN: Yes, that there is power.

DEAN MORGAN: Yes, and we are not doing it for the district court; we are doing it for the court of appeals on the time you appeal, because that is statutory, clearly.

THE ACTING CHAIRMAN: I don't know. I am not so sure, in a sense.

DEAN MORGAN: It is the same old thing we had before.

THE ACTING CHAIRMAN: Yes. It is the thing that

takes it out of the district court into the court of appeals. So it is fully 50 per cent district court.

DEAN MORGAN: The District of Columbia Court was given power to prescribe its period of appeal by Congress, wasn't it?

MR. HAMMOND: That is what Mr. Mitchell says.

DEAN MORGAN: Yes.

THE ACTING CHAIRMAN: Mr. Mitchell, I take it, concludes a great deal from what the Chief Justice said, but I wonder, when you come to think about it, if Hill v. Hawes isn't directly a decision that we do have power over the time for appeal.

DEAN MORGAN: It may be.

THE ACTING CHAIRMAN: Just see what Roberts said.

DEAN MORGAN: Yes.

THE ACTING CHAIRMAN: That is a necessary result. He is just looking at the rule. "It may well be that the effect to be given to the rule is that, although the judgment is final for other purposes, it does not become final for the purpose of starting the running of the period for appeal", and so on. In other words, the rule now takes care of the appeals. They may not have thought of the question of power, but it certainly seems to be there.

MR. DODGE: We don't want to change that, anyway, do we?

THE ACTING CHAIRMAN: Frankly, I wish somebody would change it, but I am not really sure it is the wise thing for the Committee to tackle it.

MR. DODGE: Three months is too long.

THE ACTING CHAIRMAN: Yes, that is what I think ought to be changed, in my judgment, because you get three months to do the very simple thing of filing a notice of appeal, and then you get three months for making up the record before you go on to make it to the circuit court, where you get a lot more time, too. Therefore, you get almost six months as of right before you really take your appeal.

MR. DODGE: Altogether too long.

THE ACTING CHAIRMAN: I don't know whether we should do it. I should say that I think we have the power, and Mr. Lemann said he had no question but that we could properly construe that we have the power.

MR. HAMMOND: You mean under our enabling act?

MR. DODGE: We always fought shy of that. Didn't we discuss that away back and decide to leave the statute unaffected?

DEAN MORGAN: Yes.

THE ACTING CHAIRMAN: That is true, and Mr. Mitchell, of course, was all in favor of construing our power in a limited way.

DEAN MORGAN: That is right.

THE ACTING CHAIRMAN: But now he thinks that these events have shown that we have the power.

MR. DODGE: Which is the rule that he favors?

THE ACTING CHAIRMAN: I can't immediately find that he does. He does say that he puts them both up, and he says this: "I favor putting up alternative amendments, and let the bench and bar--and the Court--decide which to accept."

You thought that he expressed a preference.

MR. HAMMOND: I thought he did, but maybe not.

THE ACTING CHAIRMAN: I don't think it is there. It may be in his letter.

JUDGE DOBIE: I think it is in his letter somewhere; not this one, in the other one. It seems to me I found it.

MR. HAMMOND: I guess he said, "I favor putting up alternative amendments, and let the bench and bar--and the Court--decide which to accept."

PROFESSOR MOORE: He said, "My preference is for the latter," the latter being to assume that the Court has power to make rules affecting the time for appeal.

THE ACTING CHAIRMAN: What are you reading from there?

PROFESSOR MOORE: From page 2 of his letter.

JUDGE DOBIE: The letter to Stone?

PROFESSOR MOORE: No; his letter to the Committee under date of March 31.

THE ACTING CHAIRMAN: That is what we read the first day. I seem to have mislaid my copy of it.

JUDGE DOBIE: "My preference is for the latter" and "requiring a formally served notice to start the time for appeal." In other words, his preference seems to be to date it from the notice and then to make it thirty days.

THE ACTING CHAIRMAN: Yes, I see. That is what he said.

MR. DODGE: Where is that?

THE ACTING CHAIRMAN: That is in this letter dated March 31.

MR. DODGE: What page?

THE ACTING CHAIRMAN: Page 2.

MR. DODGE: Where?

THE ACTING CHAIRMAN: Just before the final paragraph, at the end of the full paragraph.

MR. DODGE: Oh, yes.

JUDGE DOBIE: "My preference is for the latter."

MR. HAMMOND: Yes, that is it.

JUDGE DOBIE: That is, to make it thirty days and to start it from the notice of appeal, and for us to take the power. Notice of judgment, I suppose, would be the time when it is received, wouldn't it? That, of course, would introduce the element that you would have to prove when the fellow got his notice.

PROFESSOR SUNDERLAND: That makes it an uncertain date.

JUDGE DOBIE: That is very bad, I think.

PROFESSOR SUNDERLAND: It is not a matter of record.

JUDGE DOBIE: No. I would rather have it sixty or forty-five days, or something like that, from the time of judgment.

MR. DODGE: Does he say here that his preference is for a rule shortening the time for appeal and making it run from notice?

JUDGE DOBIE: Yes.

THE ACTING CHAIRMAN: That is what he says in this.

MR. DODGE: Where?

THE ACTING CHAIRMAN: Going back a little on that same page, he says, "I have in my notes presented two alternatives. One is to make amendments reiterating more clearly our original intent and repealing, as far as express language can do so, the decision in Hill v. Hawes.

JUDGE DOBIE: That is the one we have talked about and the one we have read.

MR. DODGE: What page of the letter is that on?

JUDGE DOBIE: Page 2.

THE ACTING CHAIRMAN: What I am reading is from page 2, toward the end of that first full paragraph. Then he goes on: "The other alternative is to assume that the Court has

power to make rules affecting the time for appeal and fixing the time at thirty days from the date of notice of the judgment, instead of the date of entry, and requiring a formally served notice to start the time for appeal. My preference is for the latter. I think both should be incorporated in the draft to be printed and distributed, and let the courts and the bar comment on both."

It is practically time for adjournment.

DEAN MORGAN: Let's quit.

PROFESSOR CHERRY: Under the latter, he doesn't mean merely mailing by the clerk. He means a served notice.

DEAN MORGAN: That is right. That is what he means.

PROFESSOR CHERRY: Yes; which would be quite a change.

DEAN MORGAN: You are going to start the time for appeal by serving notice.

PROFESSOR CHERRY: That is right.

DEAN MORGAN: You have to do it within thirty days.

THE ACTING CHAIRMAN: I think we had better suspend now. You can think this over, and we will have it all ready by the time we get back.

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

TUESDAY AFTERNOON SESSION

April 4, 1944

The meeting reconvened at 1:50 p.m., Judge Charles E. Clark, Acting Chairman, presiding.

THE ACTING CHAIRMAN: I think we can come to order and start in on what I suppose should come to be known as the Hill v. Hawes situation.

If there is any desire to follow the second alternative (that is the alternative of shortening the time for appeal on given notice), I throw out the suggestion that the model of the Bankruptcy Act might well be followed. We could look that up, if you are interested to get the exact statement, but it is something like this. There is a shorter period if notice is given, but there is an over-all period if no notice is given. As I remember, if notice of a judgment is served, it is thirty days after the notice; and if no notice is served, it is in any event forty days.

That, I should say, would have two advantages here. First, it is a system that is in existence in the district courts and is applied by Congress. Second, it does have an end-all attached to it.

Did you hear, Edson?

PROFESSOR SUNDERLAND: I didn't hear what you said.

THE ACTING CHAIRMAN: I was saying, if we are following the alternative of shortening the period and having some

service of notice, might it not be a good thing to consider the provision of the Bankruptcy Act, which in effect is that if notice of the entry of the order is given, there is a thirty days' period; then, if no notice is given, there is a somewhat longer period but, nevertheless, a definite period, which I think is forty days. I suggested first that that would have the advantage of being a statutory scheme approved by Congress which is being applied in the district courts in that very large number of cases, and second that it didn't depend entirely on notice, that there was a statutory limitation, so to speak.

PROFESSOR SUNDERLAND: Thirty days, then, from the notice or forty days from the entry of the order?

THE ACTING CHAIRMAN: Yes.

JUDGE DOBIE: That complicates it.

PROFESSOR SUNDERLAND: I wonder what the experience in the states has been where the time runs from the giving of notice. I don't know.

DEAN MORGAN: The only thing I can say is that we did that in Minnesota with appealable orders, and it seemed to work all right there, because the person who wanted to appeal and wanted to have the order effective would immediately serve notice on him, and he knew he had to start the time for appeal running.

PROFESSOR CHERRY: That was not the clerk. That was

service by the party who wanted to start the time, and he proved that service just as he proved any other service, admission or affidavit.

I don't want to interrupt this discussion. You are talking now about the alternative, the second possibility. I have an idea on the other one when we come to it. I would rather defer it.

THE ACTING CHAIRMAN: We are discussing them both, and I think you had better give us your idea on the first one.

PROFESSOR CHERRY: I am wondering if we didn't partly get into trouble by the language we used in 77(d) as compared with the language we used in 73(b). In 73(b), on appeal, we called what the clerk does "Notification of the filing of the notice .... by mailing copies", and so on. Here our language is that "the clerk shall serve a notice of the entry by mail in the manner provided for in Rule 5 upon every party affected thereby". We talk about serving a notice.

One of the ways to clarify our situation, if we were not going to attempt to change the time, I think, would be to use that other language. The language is what we already have on pages 87 and 88 of the printed rules, in Rule 73(b) on Notice of Appeal, where we talk about the clerk giving notification.

PROFESSOR SUNDERLAND: "Notification" instead of "notice"?

PROFESSOR CHERRY: And not "serving notice", you see. "Notification of the filing of the notice of appeal shall be given by the clerk", and then we follow that up with: "but his failure so to do does not affect the validity of the appeal." We make that a very subordinate sort of thing. It is notification; it isn't notice; it isn't served.

Part of our difficulty or part of the thing that the Court could grab here, and probably did, was that judgment is entered, and then "the clerk shall serve the notice". That is a more formal sort of thing.

DEAN MORGAN: What do we mean, then, by the last sentence in 77(d)? "Such mailing is sufficient notice for all purposes for which notice of the entry of an order is required by these rules".

PROFESSOR CHERRY: There are some situations, evidently, where--

DEAN MORGAN (Interposing): Mr. Moore didn't think there were. I don't know.

PROFESSOR CHERRY: The only place you get it is in Rule 5, and that says where the order requires it. It isn't the rules on their own that do it, apparently, but the terms of the order. Is that right, Mr. Moore?

MR. DODGE: What is your suggestion? Amend 77 how?

PROFESSOR CHERRY: To say that "Notification of the entry of the judgment shall be given by the clerk by mailing

copies thereof to all the parties."

THE ACTING CHAIRMAN: You want to leave out the reference to Rule 5, don't you?

PROFESSOR CHERRY: Yes. Make it merely a notification.

THE ACTING CHAIRMAN: I should think that would be a good idea. Then put in also that failure to give it--

PROFESSOR CHERRY (Interposing): Yes. Then follow it up as the other rule does with the statement that if it isn't done, there are no consequences. I confess I was rather surprised on re-reading this to find that we called that service. I mean I didn't remember it. I remember the other language. I thought of this as the same.

PROFESSOR SUNDERLAND: It is a pretty mild way of doing it.

PROFESSOR CHERRY: I didn't mean that would be all. You would follow it up with a statement. Only I do think that that language calls for change. I don't think this should be called "serving a notice" on them.

PROFESSOR SUNDERLAND: Probably not.

PROFESSOR CHERRY: That really isn't what we meant, is it. Mail a notification. He ought to get a chance to learn about it, just as we have provided in the taking of the appeal.

PROFESSOR SUNDERLAND: That was just a gratuitous accommodation that we made.

PROFESSOR CHERRY: All right, but that isn't what you think about when you talk about serving a notice. That is a very formal sort of thing.

THE ACTING CHAIRMAN: Let's see if we can work it out something like this: "(d) Notification By Clerk of Orders or Judgments. Immediately upon the entry of an order or a judgment, the clerk--

PROFESSOR SUNDERLAND: "notification shall be given".

THE ACTING CHAIRMAN: "notification shall be given by the clerk of its entry by mail upon every party affected thereby who is not in default for failure to appear".

Do we need the note in the docket?

"and the clerk shall make a note in the docket of the mailing."

PROFESSOR CHERRY: That is right.

JUDGE DOBIE: That doesn't hurt. It is good practice.

PROFESSOR CHERRY: We have it in the other rule.

MR. HAMMOND: It was in the equity rule.

PROFESSOR CHERRY: Yes.

THE ACTING CHAIRMAN: What was the expression that you gave earlier, Eddie, about failure?

JUDGE DOBIE: To serve a notice is quite formal.

THE ACTING CHAIRMAN: "Failure to make such notification".

DEAN MORGAN: Yes.

THE ACTING CHAIRMAN: "shall not affect the validity of the order or judgment".

DEAN MORGAN: "or the time to appeal."

THE ACTING CHAIRMAN: "or the time to appeal." Anything else?

DEAN MORGAN: Or you could say, "or relieve or authorize the court to relieve a party for failure to have knowledge of the entry."

PROFESSOR SUNDERLAND: You had another statement there.

DEAN MORGAN: I suggested a different method of handling it, of course, which would leave this other sentence in, if it has effect, and that was to start out by saying, "All parties are charged with knowledge of the entry of the judgment." Then go on: "Immediately upon the entry of an order or judgment the clerk, for convenience of litigants, shall serve a notice of entry by mail in the manner provided", and so forth. Then follow it by saying, "But the failure of the clerk to serve the notice shall not affect the time for appeal."

Of course, it is very much larger than Cherry's.

PROFESSOR CHERRY: I like the language you have there, Eddie, but I would add to it changing to "notification" instead of "serving a notice" while I was doing it. That is what I had in mind.

THE ACTING CHAIRMAN: I am not clear as to what you want as the final clause of the last sentence.

DEAN MORGAN: "or relieve or authorize the court to relieve a party for failure to have knowledge of the entry."

THE ACTING CHAIRMAN: That is all right, but then don't you want to say, "Any party may in addition serve a notice of such entry in the manner provided in Rule 5"?

DEAN MORGAN: That is right, surely, "and such mailing is sufficient for all purposes for which notice is required." I assume that we had some reason for putting in that last sentence, Charlie. I don't know.

THE ACTING CHAIRMAN: I was wondering if that first part of the last sentence had much reason for being. Does that refer to injunctions, by any chance?

DEAN MORGAN: It may be. It couldn't be, though, because we didn't provide for--

PROFESSOR MOORE (Interposing): I suppose that means that in order to hold a man in contempt, the injunctive order would have to be served not by just the clerk sending a notice, but by one party having the injunctive order served on the other.

MR. HAMMOND: That comes from the equity rule. It isn't the exact wording. It seems to be a change of the wording of the equity rule.

THE ACTING CHAIRMAN: How does the equity rule read?

MR. HAMMOND: Do you want me to read the whole equity rule?

THE ACTING CHAIRMAN: Is it long?

MR. HAMMOND: No, it isn't so long. It is rather interesting.

"Neither the noting of an order in the equity docket nor its entry in the order book shall of itself be deemed notice to the parties or their solicitors, and when an order is made without prior notice to or in the absence of a party, the clerk, unless otherwise directed by the court or judge, shall forthwith send a copy thereof by mail to such party or his solicitor, and a note of such mailing shall be made in the equity docket, which shall be taken as sufficient proof of due notice of the order."

We have apparently rephrased that last clause. We are afraid to do away with the equity rule.

MR. DODGE: I don't like those words, "for convenience of litigants", which we haven't put in anywhere else and which might lead the clerk to think, "This isn't very important, so I guess I won't send it. It is only for convenience and is not really required." Why should you put that in?

DEAN MORGAN: Merely to emphasize the fact that it wasn't, but I think that this might be left out if you put the other in about "failure of the clerk to serve".

MR. DODGE: You have adopted in substance the last

part of Mitchell's suggestion on page 3 of his memorandum, haven't you?

DEAN MORGAN: That is right.

MR. DODGE: "the failure to give or to receive notice of entry does not in any way affect the time for appeal, or relieve, or authorize a court directly or indirectly to relieve," and so forth.

DEAN MORGAN: "for failure to have knowledge of the entry". I put it that way, instead of all that.

MR. DODGE: Why isn't that the best way to deal with it, rather than try to doctor with the time of appeal? To bring the question up, I make a motion to that effect.

THE ACTING CHAIRMAN: You make a motion that the sentence suggested by Mr. Mitchell be added to 77(d), and that doesn't mean that no other changes are to be made to 77(d); is that it?

DEAN MORGAN: That isn't what he moved. He moved my substitute.

MR. DODGE: Yes.

THE ACTING CHAIRMAN: All right. You had better state it again, then.

DEAN MORGAN: Insert before the first sentence in paragraph (d), "All parties are chaged with knowledge of the entry of an order or judgment." Then at the end of the first sentence as printed in paragraph (d) insert: "but the failure

of the clerk to serve the notice of the entry shall not affect the time to appeal, or relieve or authorize the court to relieve a party for his failure to have knowledge of the entry."

PROFESSOR SUNDERLAND: You should say "actual", because you already have him constructively notified.

DEAN MORGAN: That is right. Mr. Mitchell just wanted to guard against the court's saying, "Well, he was constructively notified; he wasn't actually notified. Consequently, it is excusable neglect," you see.

MR. DODGE: "And I will indirectly relieve him from it." You have left out "directly or indirectly".

JUDGE DOBIE: Would you put in that addition to 73(a) as he suggests?

MR. DODGE: No.

DEAN MORGAN: No.

JUDGE DOBIE: You don't think that is necessary.

DEAN MORGAN: I don't think that is necessary.

MR. DODGE: How about Mr. Cherry's suggested modification of the language of the first sentence? "Immediately upon the entry of such order or judgment notification shall be given".

DEAN MORGAN: That with O.K. with me. Instead of "the clerk shallnotify", say "notification shall be given".

MR. DODGE: I embody that in my motion, too.

THE ACTING CHAIRMAN: What Mr. Cherry made?

DEAN MORGAN: Yes. Instead of "the clerk shall serve a notice", say "notification shall be given".

MR. DODGE: My motion is that the Cherry-Morgan proposal be adopted.

JUDGE DOBIE: I second the motion.

THE ACTING CHAIRMAN: Is everybody clear what that is? Have you got that down well enough, Moore?

PROFESSOR MOORE: I think so.

THE ACTING CHAIRMAN: You will have to insert "he" so that it will be "and he shall make a note in the docket", I guess.

Are you ready for the question?

DEAN MORGAN: Question.

THE ACTING CHAIRMAN: All those in favor will say "aye"; those opposed, "no." The "ayes" have it, and it is so voted.

JUDGE DOBIE: Is Lemann coming back?

THE ACTING CHAIRMAN: Yes, he is coming back. He was in favor of this general approach.

I want to ask, do you want to consider this as finally disposing of Hill v. Hawes? I think you ought to do something about Mr. Mitchell's second alternative, either say you don't approve it or put it up as an alternative.

JUDGE DOBIE: I don't object to putting it out, but I think the Committee ought to go on record as approving what

we have done.

PROFESSOR CHERRY: Suppose it were sent back to Mr. Mitchell with the statement that we have agreed to now, and ask him if he still felt that that other ought to be put up to the bench and bar. If he does, I think it ought to be, but it may be that when he sees that wording of it, he will withdraw the other. We can't consult with him about it now. If he feels strongly enough about it and wants it to go to the bench and bar, all right.

THE ACTING CHAIRMAN: Would you rather not, then, take any action on the second alternative?

JUDGE DOBIE: We have approved this one. I wouldn't object to doing what Cherry suggests: Write Mitchell and tell him that if he wants the other, it would go out, but I think it ought to go out that we approve this one rather than the other one, that that is the Committee's view. I think the bench and bar are entitled to know that.

SENATOR LOFTIN: I haven't heard any of the discussion, but doesn't what you have approved cover the situation?

JUDGE DOBIE: If he wants the other to go out, I haven't any objection to it.

THE ACTING CHAIRMAN: There are quite different ideas that we have in mind. This directly repeals, as he puts it, Hill v. Hawes.

SENATOR LOFTIN: That is the view that you have just

approved.

THE ACTING CHAIRMAN: That is right. The other alternative which we find in the correspondence Mr. Mitchell said he preferred has quite a different approach. That was to shorten the time for appeal to thirty days but to make it date from the date of the actual notice.

DEAN MORGAN: He wanted the alternatives put up, I think.

THE ACTING CHAIRMAN: He said first that he wanted both alternatives put out, and let the Court and bar decide. Then in his latest letter he said that he himself favored the second alternative.

MR. HAMMOND: Which is the one we haven't approved.

MR. DODGE: That was primarily because he wanted the time of appeal shortened.

DEAN MORGAN: That is right.

MR. DODGE: I don't know that he was making a choice in favor of that approach.

SENATOR LOFTIN: Put it up to him and see if he still feels that it ought to be submitted to the bar.

MR. DODGE: Yes.

PROFESSOR CHERRY: If he does, we will go along with him.

DEAN MORGAN: Let me make a motion. I move that the Reporter be requested to draft an alternative following the

language of the bankruptcy provision. That, Scott, if you remember, is a shorter period with notice and a longer period without notice.

SENATOR LOFTIN: And submit that to Mr. Mitchell.

DEAN MORGAN: Yes.

SENATOR LOFTIN: To see if he still feels that it ought to go out.

DEAN MORGAN: Yes.

SENATOR LOFTIN: I second that motion.

THE ACTING CHAIRMAN: All in favor say "aye"; those opposed, "no." (Carried)

I take it the general sense is that, unless Mr. Mitchell turns out to care very much either way, you would prefer to send out just the one form.

DEAN MORGAN: Yes.

THE ACTING CHAIRMAN: All right.

SENATOR LOFTIN: I hate to see the Committee sending so much out to the bar in the form of alternatives.

DEAN MORGAN: So do I.

SENATOR LOFTIN: They get the idea that we don't know our own minds up here.

DEAN MORGAN: You don't want the truth revealed, Scott.

SENATOR LOFTIN: That is right. I think we ought to conceal it.

THE ACTING CHAIRMAN: Of course, I don't feel that way when I am in the minority.

I thought that next, as being perhaps fully as important as anything, and certainly being new, we ought while everyone is here to consider the proposal by Judge Maris for Third Circuit. If you can find among the papers laid before you one under the heading of Rule 75, Preliminary Draft III, 4/4/44, Reporter's Comment, Transmission of Original Papers as Record, we have said:

"In forceful letters of February 7 and 17, 1944, to Chairman Mitchell, Judge Maris has transmitted the strong request of all members of his court for authority to substitute the original district court papers in place of extensive copies now required. He points out that in courts having the non-printing of the record rule, there is now required much copying which serves no useful end, and argues that transmission of the original papers by the district court clerk would (1) save all this waste of time and expense (2) tremendously simplify and expedite appeals by doing away with all matters of designation and the like and (3) provide a better record by giving the appellate court the opportunity to examine the original documents."

Then we express the opinion that the arguments are irresistible.

I might say that this is a very short résumé, but

I think it is a fair résumé. There were two different letters, and they were each many pages long. Apparently the whole court has talked it over, and they are quite strenuous about it. He stated it as the view of the entire court.

They consider that under our existing rule, which you know has many references to copies, and so on, they have not the power and that the existing rule requires copies. I think that is true, although of course at that time we weren't thinking of this issue, the non-printing rule, which has developed since then, but we did speak of copies.

JUDGE DOBIE: All this rule does is to permit the circuit courts of appeals, each one, to do it by rule, doesn't it?

THE ACTING CHAIRMAN: That is it, yes. That is all Judge Maris suggested. We go on here and say:

"Nevertheless, as he points out, not all courts have come even to the non-printing rule. (Thus Judge Sibley has requested that his objections to Rule 75 be reconsidered.)"

Parenthetically, I might say that Mr. Chandler, of the Administrative Office, wrote me last week that Judge Sibley has sent him that long correspondence he had with Mr. Lemann back in 1940, in which he objected to Rule 75, wanted the district judge to make up the record, and all that, that he wanted it to be considered by the Committee. I guess he felt that he hadn't succeeded in getting the consideration he wanted

through Mr. Lemann. At any rate, he asked Mr. Chandler to see that it was submitted to the Committee again. I am now taking this occasion to bring it up incidentally. I don't know that there is any more we can say about it, but at any rate he wants it before you.

Now to go back to Judge Maris: "Hence it is presumably unwise to require this from all appellate courts. We think, however, that this simple course should be made available where desired, and that certainly it should be presented in all its beauty and simplicity for consideration of the bench and bar."

Then we suggest a rule on the next page. This is just an additional section to Rule 75, a new section. Do you want me to read it?

MR. DODGE: In that first sentence, what business have we to authorize the circuit court of appeals to make rules?

THE ACTING CHAIRMAN: Doesn't that go back to this: that if we can require them to do certain things, may we not exempt them from our rule? As the Third Circuit now construes, we have required them to do certain things as to copies, and now this is to say that alternatively under certain conditions (to wit: that they wish to) they can do something else.

PROFESSOR CHERRY: Would your idea be satisfied if it said something to this effect? "Whenever a circuit court of

appeals has provided by rule ...."

DEAN MORGAN: That is right.

PROFESSOR CHERRY: Rather than our seeming to be authorizing them to make rules. I think that is a distinction which is tactful.

THE ACTING CHAIRMAN: That will be noted.

PROFESSOR CHERRY: I think there is a point there.

MR. DODGE: Certainly. In (1) of that section we have referred to "as prescribed in the rules of the court to which the appeal is taken".

PROFESSOR CHERRY: Yes.

MR. DODGE: May prescribe what part of the record shall be put in, and so forth.

PROFESSOR CHERRY: We are just taking cognizance of the fact.

MR. DODGE: "If it provides that it be not printed, the clerk of the court shall ...."

JUDGE DOBIE: I don't think the circuit court of appeals will be offended by this suggestion, do you, Charlie?

PROFESSOR CHERRY: How about Judge Sibley?

THE ACTING CHAIRMAN: I think Judge Sibley is going to hold the whole thing unconstitutional, but he hasn't done it yet, at any rate.

MR. DODGE: This is the only time we have undertaken, under the guise of prescribing rules for the district courts, to

empower the circuit court of appeals to make certain rules.

THE ACTING CHAIRMAN: It still seems to me a matter of wording.

DEAN MORGAN: You don't care anything about that, do you?

THE ACTING CHAIRMAN: No, I don't, but if we have restricted them in our existing rules, we can certainly take it away.

MR. DODGE: We haven't assumed that. In paragraph (1), just preceding the new one, "What part of the record on appeal .... shall be printed", and so forth, "shall be as prescribed in the rules of the court to which the appeal is taken".

THE ACTING CHAIRMAN: That is a different thing.

MR. DODGE: Here we go on to say if their rules do not require printing--

THE ACTING CHAIRMAN (Interposing): No. That is a different thing. That is the matter of printing. Of course we are not going to change that now. That is a different thing, and you get it several different places in the rules. But look, for example, at (g). "The clerk of the district court .... shall transmit .... a true copy", and so forth, "but shall always include, whether or not designated, copies of the following:"

DEAN MORGAN: You say the clerk has to do it, that is

all. Now you say when the rule of the circuit court of appeals so provides or provides for the hearing of appeals on original papers, then the clerk shall do such-and-such a thing. I think it would be a good idea if you could put it right after that.

THE ACTING CHAIRMAN: That is all right.

DEAN MORGAN: Don't you think, instead of (n), it ought to come in right after (g), another paragraph under (g)?

THE ACTING CHAIRMAN: That is possible, but there is a question how the whole rule will fit in.

DEAN MORGAN: Yes, that is right.

THE ACTING CHAIRMAN: What we considered was that this would be practically a substitute for everything up to (h).

DEAN MORGAN: Oh, I see, up to (h).

THE ACTING CHAIRMAN: And then that (h), and so on, would be a little different. Notice in our suggested form the last sentence, 92 to 94.

DEAN MORGAN: Oh, yes.

THE ACTING CHAIRMAN: That is, it seemed to us that the provisions (a) to (g) inclusive would be now superseded, and that (h), (j), (k), and (l) would apply, but would apply to the originals and not to the copies. That is why we put it at the very end.

DEAN MORGAN: I see. That is all right.

THE ACTING CHAIRMAN: I don't see why we can't follow

the form that you have suggested, that "Whenever the rules of the circuit court of appeals so provide, the clerk shall ...."

DEAN MORGAN: "provide for the hearing on original papers." Is that right?

PROFESSOR CHERRY: The language that you have here, just cutting out that they may provide. Whenever they do provide, and then go on as you have it.

THE ACTING CHAIRMAN: Then I suppose it would start like this: "Whenever a circuit court of appeals has provided by rule for the hearing of appeals has provided by rule for the hearing of appeals on original papers".

DEAN MORGAN: "in lieu of the procedure above provided".

THE ACTING CHAIRMAN: Yes, "then the clerk of the district court".

DEAN MORGAN: Yes, that is right.

THE ACTING CHAIRMAN: Did you get that?

PROFESSOR MOORE: Not all. What about the designation, the statement of points, and so on?

THE ACTING CHAIRMAN: Those are all out.

PROFESSOR MOORE: They should be, but if you incorporate this in (g)--

DEAN MORGAN (Interposing): No, no. We are going right down to (n). I withdrew that, Bill.

THE ACTING CHAIRMAN: The idea is that we shall not

try to empower the circuit court of appeals, but shall simply say what happens when they have acted.

DEAN MORGAN: We don't say we can't do it; we say we don't want to.

THE ACTING CHAIRMAN: All right. Did you get that now?

"Whenever a circuit court of appeals has provided by rule for the hearing of appeals on the original papers in lieu of the procedure above provided, then the clerk of the district court, within a reasonable time not to exceed 30 days after notice of appeal has been filed, shall transmit all the original papers in his file dealing with the action or the proceeding in which the appeal is taken, with the exception of those whose omission is agreed upon by written stipulation of the parties on file, and shall append his certificate reasonably identifying the papers transmitted. If a transcript of the testimony is on file the clerk shall transmit that also; otherwise the appellant shall file with the clerk for transmission such transcript of the testimony as he deems necessary for his appeal subject to the right of an appellee either to file additional portions or to procure an order from the district court requiring the appellant to do so. After the appeal has been disposed of, the papers shall be returned to the custody of the district court.

"The provisions of subdivisions h, j, k, l and m"

(m is the suggested new one that we have to consider separately) "shall be applicable but with reference to the original papers as herein provided rather than to a copy or copies."

Let me add one or two things. First, this is drawn in the light of the Court Reporter Bill, which in substance provides this: The reporter does not transcribe his notes until he is asked, but whenever he is asked by any party, he then automatically is to make an additional copy which is filed with the clerk. Hence, there is likely in a great number of the cases to be either all or almost all of the transcript, anyhow. Then we say the clerk just sends that on. If it hasn't been done, we wanted some machinery without too much trouble to get it all up.

We provide in the first place that the appellant puts in the transcript. If he doesn't, the appellee can force him to do it, but then we put in that the appellee could put in his own copy if he wished. One might say that the appellee never will do it. As a matter of fact, I think he probably would a good deal, because in the big cases usually both sides are getting the transcript, and it is probably a simpler thing many times, where the appellee doesn't care, for him to add what he wants. At any rate, this gives the machinery for getting it all up.

It all goes up to the appellate court, and then pre-

sumably the appellate court will require a certain amount of it to be printed in their brief. That is the rather outstanding feature of the so-called Judge Parker rule. That is the general plan.

One other thing. This correspondence came to Mr. Mitchell. He acknowledged it to Judge Maris and sent it on to me. Now Mr. Mitchell puts this in his suggestions to us. This is on page 7 of the original draft. I don't know that that is the same in the mimeographed copies or not. On Rule 75 he says this:

"Why not add a provision that the original record may be certified up to the Circuit Court of Appeals, if the rules of the Circuit Court of Appeals require it, as some of the Circuit Judges have suggested? Such a record should be returned to the District Court after the appeal has been finally disposed of."

Then the rest of his suggestion deals with some other matter.

By the way, Monte, I don't know whether you got the background. I was just saying in connection with this that this came from Judge Maris for the whole Third Circuit and fits in with the non-printing rule. It probably isn't applicable to other circuits. But in that connection Judge Sibley has sent on to Mr. Chandler his correspondence of 1940 with you and asked that it be presented to the Committee.

MR. LEMANN: That is in connection with the record on appeal.

MR. DODGE: What does Judge Sibley want?

THE ACTING CHAIRMAN: In the first place, the judge supervises the making up of the record and tells what goes in and what goes out, and finally signs it. The judge is responsible for the making up of the record. Then, I am not sure, but I think he is against non-printing, isn't he, Mr. Lemann?

MR. LEMANN: I didn't think printing had anything to do with it. It has been some time since I read the correspondence, but printing is required by our rules in the Fifth Circuit, and I don't think it has ever been suggested that we shouldn't have it. My recollection is that he said that records came up to them that were very messed up and that it was wrong not to require the approval of the district judge of the preparation of the transcript. Vaguely, as I recall it, I think that is the nub of his criticism. He said that now the district judge had no control over it and that you just left it to the lawyers. He said that the lawyers from the large metropolitan districts get the records in pretty good shape, but that they deal with a lot of records that come from country lawyers who are careless in the way they are made up, and that they have a terrible time going through the transcripts to straighten them out.

JUDGE DOBIE: I don't think we have had any trouble. I think that is very largely due to the clerks.

MR. LEMANN: His idea seemd to be that if the district court had to do something about it, you would avoid that difficulty. Is that about right, Charlie? Have you got it there?

THE ACTING CHAIRMAN: Yes, I think that is correct.

JUDGE DOBIE: I don't think the district judges would welcome that at all.

MR. LEMANN: I pointed out to him that whenever the parties couldn't agree on whether the record was properly made up, the district judge had to pass on it, as provided here.

JUDGE DOBIE: That is right.

MR. LEMANN: But that didn't satisfy him. Then he made some criticism, as I recall it, of what certain words meant. I think perhaps it was "pleadings" or some other word. He said that the way we used the word, according to his understanding of the definition of the term, our language wasn't artistic.

THE ACTING CHAIRMAN: If you really want that, Mr. Chandler has it. I mentioned it, but I thought we had considered it about all we could.

DEAN MORGAN: We considered that very thoroughly before, and I think we decided that if the parties agreed, the judge in practically every case would just sign the transcript.

MR. LEMANN: I didn't know he had revived it. I sent it to you at the time.

THE ACTING CHAIRMAN: You did, yes, and we had long correspondence about it, but I got this just the end of last week. Mr. Chandler said that Judge Sibley had sent on the correspondence again, and Mr. Chandler wanted to know if I wanted it. I replied that I would mention it again but that I thought we had considered it probably as much as it was worth while.

MR. LEMANN: I know I asked him, "Judge, what would you suggest that we do?" I have great respect for Judge Sibley. I think he has made a first-rate judge. In this correspondence two years ago, I asked him, "What do you recommend, Judge? What would be your solution?" His answer was that he hadn't any recommendation to make, that this was something for the Committee to decide. Is that in accord with your recollection at all?

THE ACTING CHAIRMAN: Yes. As a matter of fact, we considered this at the May meeting, and I gave you extracts of his letters in advance. If you wish, we can send to Mr. Chandler's office, but I think, for my part, we have done all we can by it. We just disagreed, really.

MR. LEMANN: Nobody else has found any trouble have they? You haven't any complaint from anyone else?

JUDGE DOBIE: We haven't had any difficulty at all.

Under our rule they don't have to print the whole thing, and we are very stern with lawyers who do print the whole thing. We had a case the other day in which we told a man it was absolutely useless, and we made him pay for it, and perhaps we would tax the cost of appeals.

MR. LEMANN: You have a rule that would always permit that to be done. Tell me, are you discussing now the suggestion of sending up the record in the original?

THE ACTING CHAIRMAN: Yes, in the original form. Before us is the suggestion on Rule 75 in the new comment.

MR. HAMMOND: Before you take that up, I have some recollection about the Judge Sibley matter. It seems to me that Mr. Mitchell said, after we had considered it at the May meeting, that somebody was to write Judge Sibley a letter and say that we had thoroughly considered it. He has apparently never heard anything, and he was a little in doubt as to whether we had considered it.

THE ACTING CHAIRMAN: I rather think that is so. He apparently thinks that his views haven't been considered.

MR. LEMANN: He didn't write us in May, did he?

THE ACTING CHAIRMAN: No. The correspondence which he now identifies in the letter to Mr. Chandler is of May and June 1940 and is with you.

MR. LEMANN: He thinks the Committee hasn't ever had it before.

THE ACTING CHAIRMAN: Apparently, yes.

MR. HAMMOND: He has apparently never heard anything from the Committee.

MR. LEMANN: Did Chandler ask him for suggestions?

THE ACTING CHAIRMAN: No, no.

MR. LEMANN: He did this of his own motion.

MR. HAMMOND: I think I know something about that, too. Mr. Chandler wrote him, as the senior circuit judge, in regard to certain amendments of Rule 79, and he also put in this other matter about the history.

MR. LEMANN: I know I sent that correspondence not only to the Reporter but to the Chairman. The Chairman wrote me some rather caustic comments and said, "Don't repeat this part of it to Judge Sibley." I think he said Judge Sibley, he thought, was unduly critical.

JUDGE DOBIE: I am in sympathy with Judge Sibley's letter and, if you all think so, a courteous letter would be fine.

MR. LEMANN: I think we ought to ask the Reporter to write him and tell him.

THE ACTING CHAIRMAN: Do you think I should do it?

MR. LEMANN: Either you or Mr. Mitchell should.

THE ACTING CHAIRMAN: I think somebody ought to write him.

MR. LEMANN: I think it is due him. He took the

trouble to write fairly extensive letters, and I think the answers were pretty well outlined by what Mr. Mitchell and I wrote him at the time (Mitchell through me). It could be put in other words.

THE ACTING CHAIRMAN: Let me just call your attention to what Mr. Chandler said, without going into too much detail. This is Mr. Chandler's letter to me of March 30, last week.

"Dear Judge Clark:

"I have received within the last day a letter from Judge Sibley, enclosing copies of rather extended correspondence with Mr. Lemann concerning changes desired by Judge Sibley in Civil Rule 75. Specifically, the Judge has sent me copies of letters which he wrote to Mr. Lemann on May 14 and June 15, 1940.

"I presume these have been brought to your attention and the desires of Judge Sibley have been considered. I promised him, however, that I would bring his views to the attention of the Advisory Committee. I shall appreciate it if you would be good enough to inform me whether you are familiar with it," and so on.

He goes on: "I will be glad to give you copies of the correspondence, if you wish."

I wrote back to Mr. Chandler that we had considered it quite at length and that I didn't think he need bother with

copies, but that I would again mention it at the Committee meeting.

I certainly think that some notice should be taken of Judge Sibley. The question is who is the proper person to tell him that we think his idea is all wet.

MR. LEMANN: I think either you or the Chairman. I would be glad to write him myself, and would, perhaps, but he evidently wasn't satisfied with the replies I gave him and thought that I had just pigeonholed them or that Mitchell had, and that if he got by to the Committee as a whole--I think I brought it before the Committee at the time.

DEAN MORGAN: Surely, you did.

SENATOR LOFTIN: You did.

PROFESSOR CHERRY: Yes.

JUDGE DOBIE: I think it would probably be better for the Chairman to do it. I think the courteous way to handle it is to have Mr. Mitchell write Judge Sibley a nice letter and tell him it has been considered.

THE ACTING CHAIRMAN: I will ask the Chairman. I will suggest to him that he write.

MR. LEMANN: Either you or he. If he prefers that you do it, you don't mind, do you?

DEAN MORGAN: It doesn't seem to me that in a case of this kind you should try to convince Sibley. It seems to me all you should say is that his proposal has been considered on

at least two occasions by the Committee, and you regret to inform him that the Committee couldn't see its way to adopt them, and just quit. I wouldn't argue with him.

MR. LEMANN: I would state the reasons why.

DEAN MORGAN: Oh, hell!

MR. LEMANN: Tell him we don't think so, and then say, "Judge, we realize these are matters on which opinions may differ, but the Committee's conclusion was that the rule was working all right, and nobody else has kicked about it." I think we ought to tell him that.

DEAN MORGAN: I think you would only invite some more correspondence if you did that.

MR. LEMANN: Let's leave it to the Chairman and the Reporter to handle it.

THE ACTING CHAIRMAN: All right, I will try to get the Chairman to do it.

JUDGE DOBIE: If he insists that you do it, then I think you ought to do it, Charlie.

THE ACTING CHAIRMAN: Monte, you don't want to be commissioned to do it?

MR. LEMANN: I think, in view of the fact that he has written to Mr. Chandler, that perhaps he would appreciate a more official reply than I, just a member of the Committee, could give him. Don't you think so?

THE ACTING CHAIRMAN: If you would like to write the

letter, I will sign it.

MR. LEMANN: I will try it. I am perfectly willing to frame a letter, if you will sign it. I think I have the material in my files. I haven't looked at it now for four years. We can handle that, Charlie.

THE ACTING CHAIRMAN: Just as you say. If Mr. Mitchell would send one of his fine letters, I think that would be the best way.

MR. LEMANN: I think Mr. Mitchell regards all of this with special interest. Many of them were his own brain children, and I think he wouldn't mind writing. He has done it only through me. I know he asked me to omit some of his rather pungent comments, and I did.

THE ACTING CHAIRMAN: I will take it up with Mr. Mitchell. Of course, this may be just a part of his convalescence, you know. All right, I think that will take care of it.

DEAN MORGAN: Don't say, "I regret to inform you." Say, "I regret to have to inform you."

THE ACTING CHAIRMAN: Coming back to this proposal, what is your pleasure?

MR. LEMANN: What is the proposal? This rule (n) here?

THE ACTING CHAIRMAN: It is rule (n), only we have changed the beginning of it now. It was thought that we

shouldn't put it in the form of granting power to the circuit court, and now it is to read--have you copied it?

PROFESSOR MOORE: "Whenever a circuit court of appeals provides by rule for the hearing of appeals on the original papers in lieu of the procedure above provided in this rule, the clerk of the district court, within a reasonable time", and so on.

MR. LEMANN: All the rest of it?

DEAN MORGAN: Yes.

JUDGE DOBIE: Have we a motion before us?

MR. LEMANN: This will go in what rule? Seventy?

DEAN MORGAN: Rule 75.

PROFESSOR MOORE: At the very end.

MR. LEMANN: This wouldn't contemplate printing at all.

THE ACTING CHAIRMAN: No, this doesn't affect that. In fact, we still continue (1), you see, in line 92, which is the present provision authorizing the circuit court to take care of that. I shouldn't say "authorizing"; recognizing that the circuit court may take care of it.

MR. LEMANN: As a matter of interest, how many circuits would use this, do you suppose?

THE ACTING CHAIRMAN: There are several now. You can't tell. Not necessarily would every non-printing circuit do it.

MR. LEMANN: How many are there?

THE ACTING CHAIRMAN: The non-printing circuits now include the Second (we have come to do it this winter), the Third, the Fourth, the United States Court of Appeals for the District of Columbia; and in the First Circuit there is a provision, only I think there in the First Circuit it is a sort of second alternative, not the original. Isn't that correct, Armistead?

JUDGE DOBIE: I think so.

MR. HAMMOND: In the First you have to do it by order of the court.

THE ACTING CHAIRMAN: In the First it isn't an automatic system. In the First you do it by order of the court.

MR. LEMANN: In your Circuit, how? Automatically?

THE ACTING CHAIRMAN: Yes.

MR. LEMANN: What do you do? Do you have several copies of the transcript, or just one?

THE ACTING CHAIRMAN: Just one.

MR. LEMANN: You pass it around?

THE ACTING CHAIRMAN: Yes; except that we have the usual provisions of this rule which requires the parties to print as an appendix to their respective briefs the matter they rely on.

JUDGE DOBIE: Anything in particular that they want to bring to the attention of the court. Then you always have

the transcript before you on the bench, haven't you, when the appeal is heard? We do.

THE ACTING CHAIRMAN: It is a curious thing that, although our rule was adopted November 22, I haven't yet seen an appeal that way.

JUDGE DOBIE: We always have the transcript on the desk when the case is argued.

THE ACTING CHAIRMAN: Have you had any trouble with the admiralty bar?

JUDGE DOBIE: Not the slightest, except their making some very bum contentions before us, particularly New York lawyers.

THE ACTING CHAIRMAN: The admiralty bar demanded an audience with Learned Hand. They said we were violating the statutes of the United States in that case which provided for admiralty rules. Learned Hand finally put them off by saying they could still print if they wanted to. So the admiralty appeals are still printed in the old style.

JUDGE DOBIE: We have never had any of that.

MR. LEMANN: Can you tax the other fellow with costs if you don't have an agreement with him and you print?

THE ACTING CHAIRMAN: As yet, we haven't put real teeth in the rule. We have just stated the rule. Learned Hand refused the admiralty bar because they ought to realize that it was optional, anyway. I think the admiralty bar is a

little on the pompous side, but this time I thought it was correct. Our new rule says, "In lieu of the former rule, you should do thus." There is no penalty attached.

MR. LEMANN: I should think if a fellow printed and won the case, that the other fellow might say to him, "I won't pay the cost of printing because you had no business printing." It wouldn't be optional in that sense.

JUDGE DOBIE: We do that if he prints too much. We did it the other day.

THE ACTING CHAIRMAN: It has been our idea to work into it gradually, to put on the penalties a little later, but for the time being indicate a preference for this and not to force them to do it yet.

MR. LEMANN: I had a case recently with a voluminous transcript, in which there was no question about printing, but the question was about making up copy to go to the appellate court. The case was tried out in Texas, and there were a great many letters and original reports introduced in evidence. Some of these things were minute books that obviously had to go up in the original, but a great many of them were letters and reports that could be copied. After a good deal of struggling, my correspondent in Houston went to the district judge. If it had been in my own office, I would have assumed that I had to have copies and have them certified and sent up to the appellate court. He went to the district judge and got the district

Judge to sign an order to send everything up in the original, all the correspondence, everything.

It worked all right. It saved a lot of trouble in locating copies and the expense of having copies made. When it got to the court of appeals, they simply took that original record and sent it to the printer. They had to print. There was no argument about the printing end. That is the rule. But it did obviate the necessity of making copies of a lot of letters, and I wonder if the rule shouldn't permit that always to be done.

MR. DODGE: Haven't we got that in here somewhere?

MR. LEMANN: I thought it was rather a stretching of the rule about original papers and exhibits in paragraph (i):

"Whenever the district court is of the opinion that original papers or exhibits should be inspected by the appellate court or sent to the appellate court in lieu of copies, it may make such order therefor".

We proceeded under that rule. No objection was made. The district judge signed an order.

I think it does cover it, but it isn't the normal procedure. I thought it was a pretty sensible one, though. I think some district judges might not have signed the order, Scott, to let it be done.

SENATOR LOFTIN: He might have thought there was some special reason that those particular exhibits should have been

seen by the appellate court.

MR. LEMANN: There wasn't any reason that they should see the originals. They could see copies. Some of them were themselves copies.

SENATOR LOFTIN: That rule seems to contemplate that there is something about the exhibit itself that the appelate court should see.

MR. LEMANN: That is what I thought. That is why I thought we were stretching the rule. When you read the rule over again, Scott, I think you would say that the words "should be inspected by the appellate court" are not essential to the application, because it goes on to say, "or should be sent to the appellate court in lieu of copies". The language, when you look at it, is broad enough to authorize that to be done.

SENATOR LOFTIN: You get in under the wire on the second alternative.

MR. LEMANN: I think there are a good many district judges who would not have permitted it to be done, as this district judge did, and I wondered, "Well, is it perfectly plain that it ought to be done?" I think it is the sensible thing to permit it to be done. Why should the record stay in the district court at all? Why shouldn't it all go up to the appellate court, and all come back? which is what you have here.

THE ACTING CHAIRMAN: Yes.

MR. LEMANN: You have provided for that in this rule,

but this would fit in only where there is not to be any printing.

JUDGE DOBIE: Under the English system, if you take an appeal from King's Bench to the Court of Appeals, I think it goes right on up. Of course, that is a department of the same court.

MR. DODGE: I don't think they have any printed records at all.

PROFESSOR SUNDERLAND: Except in the House of Lords.

MR. DODGE: I meant in the Court of Appeals.

PROFESSOR SUNDERLAND: No, they don't have any printed records.

MR. LEMANN: I think this new amendment may cover what I was talking about, even though the court of appeals said it had to be printed after it got up.

DEAN MORGAN: Oh, yes; quite so. I move the adoption of rule (n).

... The motion was regularly seconded ...

THE ACTING CHAIRMAN: Any further discussion? If not, all those in favor will say "aye"; those opposed, "no." The "ayes" have it, and it is so voted.

Armistead, I would like to ask you, what do you say to the admiralty bar claims to us that we had no power to do this to them. You see, their theory is that the statute requires printing, and that admiralty rules are made only by

virtue of the special admiralty rule statute, which doesn't authorize superseding statutes.

JUDGE DOBIE: We never had the question up. I have never thought about it at all. I strongly doubt, though, the validity of the contention.

THE ACTING CHAIRMAN: They have been pretty strenuous about that. Of course, the Maritime Bar Association of America voted almost unanimously not to adopt the Federal Rules. They did because they hoped to get a trial de novo. As a matter of fact, in our circuit we say that the findings of fact should stand unless clearly erroneous in admiralty cases as well as any other. So I think the result of it is that they don't get the very thing they wanted out of not taking the Federal Rules. Nevertheless, they voted against it.

That is one reason that the Supreme Court didn't go farther. The Supreme Court, Justice Stone, talked to Walter Armstrong and me and was quite interested in adopting the Federal Rules generally for admiralty, and the Maritime Section of the American Bar Association approved this. The Maritime Bar Association, however, opposed it, and therefore the Supreme Court adopted only certain provisions, such as the discovery of material, and so on. This winter, Judge Magruder has written me asking for some help, because the First Circuit has a rule substituting notice of appeal in admiralty cases for the decision of any allowance of an appeal. He said that while

they have had the rule for two or three years there, an admiralty lawyer, or lawyers, has now objected that it is illegal, and he asked me for help. I wrote back and said in effect that I thought it was a fine thing, but I was afraid of the Alaska Pillsbury case which had held otherwise out in the Ninth Circuit. I didn't quite know whether he could sustain it or not. He wrote back very mournfully that he appreciated my interest, but he thought I hadn't given him much help.

JUDGE DOBIE: We have never had the question up that I remember. I don't think we have.

THE ACTING CHAIRMAN: Do you require an allowance of appeal in the admiralty cases, too?

JUDGE DOBIE: I don't think so.

THE ACTING CHAIRMAN: What do you think about it? Do you think that is legal? It ought to be, of course, but I mean under this lay-out. As a matter of fact, we have been worried about it, and we now pretty much require an endorsement of the district judge.

JUDGE DOBIE: I don't remember the question's ever having arisen.

THE ACTING CHAIRMAN: Maybe I have suggested something to you that you had better not know about.

JUDGE DOBIE: We don't have an enormous amount of admiralty down there. About three-fourths of it comes from Baltimore, and one-forth of it comes from Norfolk. We have never

had a South Carolina case in five years, and we have had one from North Carolina.

THE ACTING CHAIRMAN: I think with us that the admiralty bar is the most individualistic of any.

JUDGE DOBIE: I think they are, too.

THE ACTING CHAIRMAN: There are other suggestions as to 75, but I think there is no reason for taking those up out of order. I suggest now that we go back to Rule 27, unless some member of the Committee wants something special taken up. If not, let's go back to Rule 27. That is the point to which we had arrived.

MR. HAMMOND: I think you had a suggestion, didn't you, Mr. Morgan, on 27?

THE ACTING CHAIRMAN: Yes. In line 7 is the underlined new material, and Mr. Morgan had suggested this in place of the new material: "and the court may order the provisions of Rules 34, 35, and 37 applied". You had an alternative: "the court may by order make the provisions of Rules 34, 35, and 37 applicable to any proceeding hereunder".

In other words, Mr. Morgan is adopting the Reporter's suggestion at the foot there, of including these other rules, and has changed the form of statement somewhat.

Monte, we just turned to Rule 27. That is the point which we had reached. I should like to find out, have you been able to check up on what we did with the Hill v. Hawes

situation?

MR. LEMANN: Mr. Dodge just told me.

THE ACTING CHAIRMAN: I take it that is along the line you had in mind.

MR. LEMANN: That is my own idea.

THE ACTING CHAIRMAN: I want to report to Mr. Mitchell. The Committee view was that, unless he wanted to put up the alternative about the time, we wouldn't take action on it, if that is all right.

MR. LEMANN: That would be my idea, yes. I think we would meet a great resistance in the bar to cutting down the time. We have ten days' limit now on supersedeas. Ninety days otherwise ought to be retained, I think.

THE ACTING CHAIRMAN: All right. Now coming back to Rule 27, Mr. Morgan's language is quite acceptable, although he has two alternatives. I think perhaps you had better make some motion, Eddie.

DEAN MORGAN: I move the adoption of the second alternative. He might make a general order, you see.

THE ACTING CHAIRMAN: Yes. Mr. Morgan moves that for the underlined material in lines 7 and 8 of Rule 27 there be subetituted the following: "and the court may by order make the provisions of Rules 34, 35, and 37 applicable to any proceeding hereunder".

MR. HAMMOND: Before the vote is taken on that, I

Just want to call your attention to this: You, Mr. Reporter, had suggested, also, Rules 33 and 36. I was wondering what Mr. Morgan's reason was for omitting those.

DEAN MORGAN: Did I omit them?

MR. HAMMOND: Rule 33 is Interrogatories to Parties.

DEAN MORGAN: Yes. You have a separate way of meeting 33, objections to interrogatories, haven't you?

PROFESSOR SUNDERLAND: You can do everything by these other rules that you can do with 33 and 36. They really aren't very essential.

DEAN MORGAN: Can you?

PROFESSOR SUNDERLAND: They result in nothing but ex parte affidavits, anyway.

MR. HAMMOND: I knew you had some good reason.

DEAN MORGAN: I don't know whether I did or not. I thought I did at the time. I have forgotten.

THE ACTING CHAIRMAN: When you said 37, you meant 36, didn't you?

DEAN MORGAN: Probably. Let me see.

THE ACTING CHAIRMAN: It should be 36, and not 37, if it goes in at all, shouldn't it?

MR. DODGE: What has 36 got to do with this?

DEAN MORGAN: Admissions of fact.

MR. DODGE: In connection with depositions to perpetuate testimony, admissions of fact from an adverse party--

DEAN MORGAN (Interposing): From a party that is expected to be adverse, yes.

MR. DODGE: I don't see why we have to drag that in here.

PROFESSOR SUNDERLAND: It seems to me that unnecessarily complicates it. We don't need to resort to that at all. We don't need to resort to interrogatories of parties.

THE ACTING CHAIRMAN: Of course, Rule 34, the original one, may not be very directly applicable.

DEAN MORGAN: No.

PROFESSOR SUNDERLAND: That is different. You have to get hold of documents. There is no other recourse to get the documents.

DEAN MORGAN: You might have to have a physical or mental examination, too.

PROFESSOR SUNDERLAND: You might. Put in 34 and 35 along with the deposition provision, and you have everything you need and it keeps the procedure a little simpler.

DEAN MORGAN: You don't think you need 36?

PROFESSOR SUNDERLAND: I don't think you need it.

DEAN MORGAN: Rule 36 rather than 37, clearly. That was a mistake.

THE ACTING CHAIRMAN: Yes.

PROFESSOR SUNDERLAND: I don't think you need either 33 or 36.

DEAN MORGAN: Why not the admission of the genuineness of a document?

MR. DODGE: If you are going to examine him, why do you want that? You mean to file notice to admit before there is any suit pending?

PROFESSOR SUNDERLAND: You can do that through your deposition.

MR. DODGE: You can accomplish the result by this deposition.

MR. LEMANN: Of course, you could say just 36 generally, couldn't you? You could always accomplish 36 by a deposition.

PROFESSOR SUNDERLAND: Yes, you can, but of course here we are dealing with procedure before a suit has been instituted, and I don't think we ought to make it too complex.

MR. LEMANN: It isn't often resorted to.

PROFESSOR SUNDERLAND: No.

THE ACTING CHAIRMAN: How do we stand, then?

PROFESSOR SUNDERLAND: I move that we add to that underlined portion in lines 7 and 8, 35 only, so that it reads: "compliance with Rules 34 and 35."

MR. DODGE: Second the motion.

THE ACTING CHAIRMAN: And follow Mr. Morgan's language. He wants to make it: "and the court may by order make the provisions of Rules 34 and 35 applicable to any

proceeding hereunder".

PROFESSOR SUNDERLAND: Yes, that will be all right.

THE ACTING CHAIRMAN: Any further discussion?

DEAN MORGAN: I don't care to make any point on 36. I think you can accomplish it under 34 and 35.

THE ACTING CHAIRMAN: All right, those in favor of the motion say "aye"; opposed. (Carried)

MR. HAMMOND: There was one question I had noted here, whether there ought not to be the same provision in subdivision (b) of Rule 27, page 37.

THE ACTING CHAIRMAN: Any suggestion about that? What do you say, Edson?

PROFESSOR SUNDERLAND: I suppose theoretically it ought to follow the same way.

JUDGE DOBIE: In other words, the same consideration before appeal; is that the idea?

THE ACTING CHAIRMAN: Does anybody wish to make a motion?

MR. LEMANN: I think it ought to go in there logically. It doesn't often happen, but I think a corresponding change should be made in paragraph (b), and I so move.

DEAN MORGAN: I second the motion.

JUDGE DOBIE: Leave the wording to the Reporter.

THE ACTING CHAIRMAN: Mr. Moore is working on the suggestion that it can be stated more shortly. Would you read

what you have just been whispering in my ear?

PROFESSOR MOORE: The idea is to adopt essentially the provisions back in (a)(3), isn't it?

THE ACTING CHAIRMAN: Yes.

PROFESSOR MOORE: "may make an order under the same conditions as prescribed in subdivision (a)".

MR. LEMANN: Put that on page 37, the last paragraph of (b)?

DEAN MORGAN: Yes.

THE ACTING CHAIRMAN: What do you think of that?

MR. LEMANN: I think that is all right.

PROFESSOR SUNDERLAND: I think that will cover it.

THE ACTING CHAIRMAN: All right, all those who approve say "aye"; those opposed. So voted. (Carried)

Rule 28. Mr. Morgan, who came from the district court, I believe, thought that up in Massachusetts there might not be enough notaries around, and this was voted before. Mr. Oglebay has been reading the Holmes-Pollock Letters, and you will find this in the list of new cases. See the dictum of Holmes, J., in a letter to Pollock, page 267: "The Notary Public, like the domestic dog, is found everywhere."

JUDGE DOBIE: There is no objection to that. It just broadens the power. Down in our part of the world, notaries are as common as dogs.

MR. HAMMOND: The question is on the use of the word

"master." That is the only thing.

DEAN MORGAN: You put "master" here because the definition includes referee, auditor, or examiner, under 53(a).

THE ACTING CHAIRMAN: Yes. You will notice the Reporter's note at the foot of the page that covers that. It seemed to us the master was quite the simple way of doing it, but that was the longer form that was preferred.

PROFESSOR SUNDERLAND: I think the shorter form is much better.

JUDGE DOBIE: I think so. I think "master" is much better.

PROFESSOR SUNDERLAND: When we have gone to the trouble of defining a word, it seems to me we might as well use the definition.

MR. HAMMOND: That wouldn't be construed as giving any power to the master, I don't think.

DEAN MORGAN: Why not?

MR. HAMMOND: The ordinary power of excluding testimony and all that sort of business.

DEAN MORGAN: Oh, no. There are only certain masters that have that power under the rules.

THE ACTING CHAIRMAN: Under 53(c), the order of reference may limit his power and direct him.

JUDGE DOBIE: I move its adoption.

THE ACTING CHAIRMAN: It is moved that the amendment

as submitted here be adopted. All those in favor will say "aye"; those opposed. It is so ordered. (Carried)

Rule 30. Rule 30(a) was a suggestion which was made because of a case where it seemed somewhat harsh to require a managing agent to appear without fees, and this was inserted. I frankly don't like it and objected somewhat at the time, but nevertheless the Committee voted it, and that is that.

MR. LEMANN: In the note on page 33, you have: "where the party involved resides in one district and the action is pending in another district far removed." You mean you make a witness go?

DEAN MORGAN: Make a party. That was the case. They made a Wisconsin party come to New York to give a deposition in New York.

MR. LEMANN: Where is our rule on where you can make a fellow go? Which rule is that?

DEAN MORGAN: That is a witness, not a party.

MR. LEMANN: But where is the rule that applies to where you make a party go?

DEAN MORGAN: A party or a witness?

MR. LEMANN: We have a rule for each. Give me both, please.

DEAN MORGAN: Depositions.

MR. LEMANN: That is what I have been looking at. In 45 I think perhaps you have it. That is a witness.

DEAN MORGAN: If he was just a witness, and not a party, you would have to take it in his county, or something of that sort.

MR. LEMANN: The bottom of 59 would be the ordinary witness, wouldn't it?

DEAN MORGAN: That is right.

MR. LEMANN: Where do we get where you make the party go?

DEAN MORGAN: You don't get any, do you?

MR. LEMANN: If you are going to make him go, there must be something here to make him go, if you summon him as a witness. In my one case that I keep talking about when they made me a witness, I was attorney for a party, and instead of my going to Texas, they came over to New Orleans and took my deposition. They had lots of agents of my corporate client who were in a sense parties, and they never suggested that they could make them go over to Texas. Maybe they could have and just didn't know it.

THE ACTING CHAIRMAN: I think this comes really, as one might say, almost back-handed. If you look at Rule 37(d), there is a penalty for failure to attend.

MR. LEMANN: I shouldn't think that enlarged the right to make a party testify. Suppose a party didn't want to testify. You don't have to testify just because you are a party, do you? Don't you have to be summoned as a witness? If you want to

examine the other fellow, don't you have to subpoena him as a witness?

SENATOR LOFTIN: I think there is some provision about giving him a notice.

PROFESSOR MOORE: When you are going to take the deposition of B, the adverse party--

MR. LEMANN (Interposing): When you do, he is the witness. You examine him as a witness.

PROFESSOR MOORE: But you don't have to subpoena him.

DEAN MORGAN: No.

MR. LEMANN: Where is that?

PROFESSOR MOORE: Rule 37(d).

MR. LEMANN: I wouldn't have thought it was so plain as that. Is that what the court relied on in that case? Could I look at that case?

THE ACTING CHAIRMAN: There appear to have been cases that so held. In that last list of cases that we sent out is Collins v. Wayland, Ninth Circuit, 139 F. (2d) 677, where a proper notice--

MR. LEMANN (Interposing): Is that the list that you handed us this morning?

THE ACTING CHAIRMAN: I don't think it is limited to this. I understand there are several more cases than this, but this happens to be a recent one.

MR. LEMANN: Under what rule?

THE ACTING CHAIRMAN: It says: "Where a proper notice to take plaintiff's deposition in the district of suit was served on the plaintiff, who was a resident of another district, and the plaintiff failed to appear, the court did not err in dismissing the plaintiff's complaint upon notice; if plaintiff desired relief he could have obtained it by motion under Rule 30(b)."

That is, it puts it up to the plaintiff to ask for relief.

MR. DODGE: There is no specific limitation here on the place where you can take the deposition of a party, although there is of a witness.

THE ACTING CHAIRMAN: That is it.

DEAN MORGAN: That is right.

MR. DODGE: He has to go to the court for relief, and here you are helping him a bit by providing for the payment of travel.

DEAN MORGAN: You may make him come to the district where the court is held, you see.

MR. DODGE: If you want to do that, you have to pay him.

THE ACTING CHAIRMAN: It seems to me that the difficulty was that that is a case where the district court has been on the whole perhaps a little arbitrary, and we change our whole rules in the ordinary case where the district court is

not arbitrary to cover that case. We require a tender in the very ordinary case to a party, and that, I should think, in all except these exceptional cases is just a nuisance; the idea of taking the deposition of a party in New York City and giving him sixty cents, and all that sort of thing. That is why I am sorry to see the provision go in.

DEAN MORGAN: That is trivial, of course. Ordinarily, if you are going to subpoena a party as a witness, you have to make your tender, don't you?

MR. LEMANN: Why does this belong in 30(a) rather than in 45(e)? Rule 30 certainly applies to witnesses other than parties, and you don't put the witness fees in 30(a) for ordinary witnesses; you just put witness fees for parties. The lawyer will ordinarily say, upon reading that, "Where is the provision for ordinary witnesses? Here I am, looking at a rule on depositions which deals with all witnesses, and I see something in here about fees for parties made witnesses." He says, "Well, go over and look at 45. That is where I will find the other people."

I don't see much logic in that. If you are going to put it anywhere, I should think it should be in 45.

Suppose, instead of the plaintiff, it is the defendant. You sue him. I don't suppose the question would be so likely to arise. Suppose I sue a Massachusetts corporation doing business in Louisiana. I sue him in the only place I can get

venue, and so on. I could make him come down there from Massachusetts to take depositions. I never thought I could.

MR. DODGE: You mean an officer of the corporation, as if he were a party.

MR. LEMANN: Yes.

THE ACTING CHAIRMAN: Of course, the court can take care of this. In the list of cases we have just given you, if you will look at the case just before, you will see that is a case where the court took care of it.

MR. DODGE: Is an officer of a corporation a party within the deposition rule?

THE ACTING CHAIRMAN: There is a provision about managing agents.

PROFESSOR MOORE: That is over in 26(d)(2), and it makes an officer, director, or managing agent essentially a party when he goes to use his deposition.

MR. DODGE: That is only when you use it.

PROFESSOR MOORE: Yes.

MR. LEMANN: Where is the rule we have been discussing which entitles you to force a party to come anywhere, to make the managing agent of a corporation come anywhere, or the president of a corporation? If I sue the United Fruit Company in California, can I make the president go out there from Boston?

PROFESSOR MOORE: I suppose 37(d) does.

MR. LEMANN: Suppose he says, "I don't want to go"?

PROFESSOR MOORE: Rule 37(d). The officer himself, I suppose, is not subject to contempt, but the corporation is subject to the penalties provided in 37(d).

THE ACTING CHAIRMAN: The case that brought this up originally was the Fruit Growers Cooperative case, Fruit Growers Cooperative v. California Pia and Baking Co., Inc., and that was a case before Judge Campbell in the Eastern District. He held that the third-party defendant should be permitted to take the depositions of plaintiff's employees even though plaintiff asserted no claim against the third party if the third party's defense is negligence of the plaintiff.

"The plaintiff is a Wisconsin corporation, with its only office and place of business at Sturgeon Bay, Wisconsin.

"The defendant and third-party plaintiff is a domestic corporation, with its principal place of business in Brooklyn, New York.

"The third-party defendants are railroad corporations organized and existing under the laws of the State of New York.

"The plaintiff sold 175,000 pounds of cherries to the defendant and third-party plaintiff by written agreement .... and delivered said cherries .... in three carloads to the Ahnapee and Western Railroad Company" for so-and-so, for which the plaintiff sues.

"The answer of the defendant .... denied due per-

formance of the sales contract by the plaintiff, and, as an affirmative defense and counter-claim, alleged negligence of the plaintiff in packing and stowing the said cherries for shipment", and then brought in the railroad companies.

"The third-party complaint alleges, in effect, that the said shipment of cherries was damaged while in the care and custody of the railroad carriers en route", and so on.

"The answer of the third-party defendants is in substance a general denial with affirmative defenses that the said third-party defendants and other carriers were not negligent in transporting the shipment". ....

"The third-party defendants have served notices of the taking of the depositions on the plaintiff's attorneys, by oral examination in a law office in New York City of the plaintiff and the employees of the plaintiff having knowledge of said sale, condition, packing, preparation for shipment, and shipment of the cherries on the following points." ....

It was held that plaintiff should produce its employees having knowledge. Then he goes on:

"With reference to the question of expenses, it does not seem to me that plaintiff, who sought relief in this forum, should have the right to require the payment of the expenses of the taking of the depositions in the forum of its choice of its officers or managing agents.

"If the plaintiff objects to the depositions being

taken in the Southern District of New York," orders may be entered providing for the taking of the depositions in this district; that is, the Eastern District.

MR. LEHMANN: That wouldn't help them much. It never had occurred to me. It just slipped my mind. It is perfectly obvious to the rest of you gentlemen, but it never had occurred to me that if I brought a suit for a client in Boston, I would have to send all my people up there to testify if I couldn't take their depositions in New Orleans.

PROFESSOR SUNDERLAND: Couldn't that matter be taken care of by a protective order?

MR. LEHMANN: Not this kind of judge.

THE ACTING CHAIRMAN: Judge Campbell didn't want to do it, but what could he do?

PROFESSOR SUNDERLAND: It is just the case we contemplate for a protective order.

THE ACTING CHAIRMAN: There is another case we cite here, Stevens v. Minder Construction Co., in the Southern District. That is what the Judge did. "Where notice to take deposition in the district in which suit has been brought is served on plaintiff residing in another district far removed," (that was in Virginia; that is far removed from New York) "the court may under Rule 30(b) alter the place of taking, prescribe the form of the questions (whether oral or written), or direct prepayment of expenses for attending at the taking."

MR. LEMANN: I didn't realize that when a party was testifying he became subject to a different rule than that applying to ordinary witnesses, but apparently that is true.

MR. DODGE: He has the right of application to the court.

DEAN MORGAN: I didn't suppose that, either, Monte, until this case came up. I hadn't supposed that he had two characters.

MR. LEMANN: It never occurred to me that I could make that guy come all the way from Boston.

PROFESSOR SUNDERLAND: Why do we have to have this provision in here about tender when it is taken care of by a protective order?

THE ACTING CHAIRMAN: That is my view entirely.

MR. LEMANN: In your view, this interpolated language shouldn't go in at all, but you have to rely on the protective order. Is this mandatory? Yes, this is mandatory.

MR. DODGE: I question that this happens enough to make it necessary to amend this rule.

DEAN MORGAN: So do I.

MR. LEMANN: You have a backdoor out of this, anyhow. It is mandatory, "shall", but you can get relief from the application of the provision by an order of court, which brings you back to the court backhandedly.

MR. DODGE: You have to rely on the power of the

district judge to protect you.

MR. LEMANN: You have two or three cases saying he would protect you.

MR. DODGE: Yes, and one case where he didn't protect him.

MR. LEMANN: I think the payment of the expenses is probably only a part of the hardship.

JUDGE DOBIE: One day's attendance isn't very vital, is it? Of course, the mileage may amount to something.

MR. LEMANN: Suppose you are going to keep him for a week.

MR. DODGE: Leave the rule as it stands, except for that change in (b), the words "time or".

THE ACTING CHAIRMAN: This is one place where I believe in the Lemann principle of constitutional law.

MR. LEMANN: The only one? Isn't that sad?

THE ACTING CHAIRMAN: I could add one or two others, but this is one. Of course, another place was the extension of time of answer by stipulation. There I believe in the Lemann principle thoroughly.

MR. LEMANN: Well, you believe in constitutional law when it suits you.

PROFESSOR SUNDERLAND: Why not include the word "expense" on the next page, if you are making this motion inclusive?

THE ACTING CHAIRMAN: If you do get down to (b), I call your attention to the fact that you put in a considerable insertion at the end of line 19. You took over the provision from Rule 26(b).

PROFESSOR SUNDERLAND: That has been disposed of.

THE ACTING CHAIRMAN: Yes, that has already been voted. I think we probably had better have some motions on this. I shall have to say that Mr. Mitchell was distressed by this Fruit Growers case, and I think he brought it up originally. While I have disagreed with him, I think at least we ought to have the courtesy of a motion.

DEAN MORGAN: We didn't discuss the protection, did we?

PROFESSOR SUNDERLAND: I don't think we did.

DEAN MORGAN: About going to the court and getting an order. That is really all it puts on him.

MR. LEMANN: You tell him my heart bleeds with him, but I think the provision of one day's expense wouldn't stop the bleeding much if you have to go to the judge anyhow.

DEAN MORGAN: The mileage is what he is talking about.

MR. DODGE: To bring the matter to a focus, I move that Rule 30 stand as it is now, except for the insertion of the words "time or" in line 17 and the word "expense" in line 27.

JUDGE DOBIE: I second the motion.

THE ACTING CHAIRMAN: Subject, of course, to what we

have already voted in line 19. All those in favor will say "aye"; those opposed, "no." The "ayes" have it, and it is so voted.

THE ACTING CHAIRMAN: We turn to Rule 33, which is the next one. Is there any wish for discussion? My recollection is that we went into this pretty thoroughly.

PROFESSOR SUNDERLAND: I should like to make one suggestion, the recasting of a sentence. I think the wording of the sentence beginning on line 18, page 34, suggests that the practice is improper.

"If interrogatories are served after a deposition has been taken, or if a deposition is sought after interrogatories have been answered, the court, on motion of the deponent or the party interrogated, may make such protective order as justice may require."

That assumes that that isn't a proper practice. It seems to me it would be better to word it this way:

"Interrogatories may be served after a deposition has been taken, and a deposition may be sought after interrogatories have been answered, subject to such protective orders, on motion of the deponent or the party interrogated, as justice may require."

THE ACTING CHAIRMAN: Mr. Oglebay mentioned a bit of post mortem. He says we suggested that and that you and Senator Pepper didn't like it. But I suppose that is an

inadmissible suggestion.

PROFESSOR SUNDERLAND: Entirely inadmissible.

THE ACTING CHAIRMAN: It doesn't make any difference now. Of course, if more light comes to us later, and we realize how good the Reporter's draft was originally, so much the better.

PROFESSOR SUNDERLAND: I don't like the implication there that that isn't good practice. It ought to be considered proper practice unless there is a reason against it.

DEAN MORGAN: You don't think it is good practice, though, do you?

PROFESSOR SUNDERLAND: I don't know why not.

DEAN MORGAN: I should suppose you ought to make up your mind.

PROFESSOR SUNDERLAND: If you don't get all you want with the deposition.

DEAN MORGAN: If you take your deposition first and don't get all you want, you are pretty dumb at that time.

PROFESSOR SUNDERLAND: If later you want something more, it seems to me you ought to take a cheap way of getting it.

DEAN MORGAN: I should say it is a practice you ought not to encourage.

PROFESSOR CHERRY: I should think these words are rather neutral, but I should also think the words you are

suggesting would encourage the practice.

DEAN MORGAN: Yes.

PROFESSOR CHERRY: It would be an implication I don't think these words have.

PROFESSOR SUNDERLAND: I don't see why it shouldn't be encouraged.

DEAN MORGAN: I should think it ought to be discouraged. You don't want to be pestered with two or three proceedings before the trial.

PROFESSOR SUNDERLAND: You take a deposition, and you want something more. Why should you have to take another deposition instead of taking so many interrogatories?

DEAN MORGAN: If you have made a mistake, of course it gives you a chance to rectify, but you don't want to encourage people to make mistakes or to do sloppy work.

MR. DODGE: The implication is rather farfetched.

DEAN MORGAN: I don't think there is very much implication.

MR. DODGE: I move that Rule 33 stand as it now is.

JUDGE DOBIE: How about "service" instead of "delivery"?

MR. DODGE: That is to harmonize with the other rule.

JUDGE DOBIE: I say, you agree to that.

MR. DODGE: As written, with the underlined words inserted.

THE ACTING CHAIRMAN: All right, are you ready for the question?

MR. LEMANN: I was just wondering. I guess it is all right, but lines 18 to 21 don't seem very artistic in view of lines 24 and 25. Lines 24 and 25 seem to be rather all-inclusive. It is a matter of emphasis, perhaps, to put in that special case. You have a special case, haven't you, in 18 to 21?

MR. DODGE: That is a different thing.

DEAN MORGAN: That is altogether different.

JUDGE DOBIE: I second that motion.

THE ACTING CHAIRMAN: That is the motion to adopt the provision as amended?

JUDGE DOBIE: Yes.

THE ACTING CHAIRMAN: Are you ready for the question? All those in favor say "aye"; those opposed. It is so voted. (Carried)

Rule 34 now. Here, too, we added something, didn't we, from 26?

PROFESSOR SUNDERLAND: Yes.

DEAN MORGAN: "subject to such protective order as the court may make under 30(b)", or something of that sort, wasn't it?

PROFESSOR SUNDERLAND: Yes.

THE ACTING CHAIRMAN: That has already been voted, in line 8.

DEAN MORGAN: That is right.

THE ACTING CHAIRMAN: Was there any other suggestion about the rule?

DEAN MORGAN: This is just what we voted last time.

THE ACTING CHAIRMAN: Yes. If there is no objection--

DEAN MORGAN (Interposing): We don't have to change everything we did last time.

THE ACTING CHAIRMAN: Not the second day. The first day we do. That will be considered approved.

Rule 36. Any question?

MR. LEMANN: Rule 36 would permit you to cut down the time for answer to ten days from twenty, wouldn't it? The only comment that occurred to me as I read it is that a fellow ordinarily gets twenty days, but here any time after commencement of the action, before answer, that you serve a demand on a fellow to admit facts, he has to do it in ten days. It is quite something to notice that you ordinarily give twenty days, but here you get only ten.

MR. DODGE: Twenty to file an answer to a pleading.

DEAN MORGAN: This isn't an answer to pleadings.

MR. LEMANN: No, but it causes you to go forward. I have no objection, but it is a considerable advance over the original provision, where you couldn't serve a notice like this until the fellow had had his time to answer.

DEAN MORGAN: Rule 36 had ten days to begin with.

MR. LEMANN: Yes, but you couldn't do it before pleadings were closed, Eddie. You couldn't serve.

DEAN MORGAN: I get your point now.

MR. LEMANN: I am just calling attention to a rather radical change. Personally, I don't object to it, but it is a radical change. We ought to do it with our eyes open. You see, you can do this the minute you file suit, and you can call upon him to admit the truth of any relative matters of fact set forth in the request. All I have to do if I want to cut your time of answering down to ten days is just to take certain allegations in my petition and serve you with a separate notice and ask you to admit their truth. You have to do it in ten days instead of twenty. I think that amounts to cutting down the time to answer to ten days.

DEAN MORGAN: If that is all you are going to get, if your interrogatories are drawn that way, you haven't asked for much information.

THE ACTING CHAIRMAN: Let me point out this: If you look at the note, you will see that we made changes all along the line here. This is all subject to the protective orders of the court. That is one main reason for making the change in 26, and of course if you make it in 26, why not in 33, and why not in 36. But if we don't make it in 26, which is the ordinary deposition one, parties and very often plaintiffs felt that they were tied up, and we had various cases brought

to our attention. There was the original requirement in 26 that you had to get an order from the court at an early time, and in one case a lawyer in Connecticut was trying to take the deposition of a fellow leaving on a boat from Seattle for Australia. By the time that he got orders taken and his lawyers out to Seattle to raise the question of whether it was an order from Connecticut or an order from Seattle, and by the time he got the order, the fellow had gone. He never did get the witness. It is that kind of little machinery that seems to be not worth while, and the better way to do it seems to be to allow it to be done at once and then go to the court for protection if you need it.

MR. LEMANN: In other words, you have fifteen days; is that right?

THE ACTING CHAIRMAN: What?

MR. LEMANN: On interrogatories you have fifteen days. Am I right about that? You have three time elements, as I see it. Am I right? For depositions, only reasonable notice. You could do it immediately, as soon as you draw your petition.

THE ACTING CHAIRMAN: I don't quite see where you get fifteen days.

MR. LEMANN: Rule 33.

THE ACTING CHAIRMAN: That is ten.

MR. HAMMOND: Line 8.

MR. LEMANN: Line 8 of your redraft. the third

sentence.

THE ACTING CHAIRMAN: I see.

MR. LEMANN: You have left it fifteen days. I just took another look at it. Am I wrong? Look at line 8 of page 34 of this material. Fifteen days.

DEAN MORGAN: This is deposition.

MR. LEMANN: These are interrogatories.

DEAN MORGAN: Deposition by interrogatories, is it?

MR. LEMANN: Yes, Interrogatories to Parties, page 34 of our material, line 8, fifteen days.

DEAN MORGAN: That is right.

MR. LEMANN: If I were in an institute, I would say, "Gentlemen of the Bar: You have four ways to proceed. No. 1, if you are not alert, you will just file an ordinary petition and wait for an answer in twenty days. No. 2, if you want to be really streamlined, you should immediately serve a notice to take the deposition of the adversary and give him reasonable notice, which I think would be forty-eight hours, unless you get a protective order and take his deposition to ask him about things. No. 3, you can initiate interrogatories to him, in which case, however, you have to give him fifteen days. No. 4, you can call on him to admit certain facts, in which case you can give him ten days. You have four methods open to you."

THE ACTING CHAIRMAN: That shows how flexible the

sentence.

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THE ACTING CHAIRMAN: That shows how flexible the

rules are:

MR. LEMANN: Of course, it is confusing, and if they should ask me, "Mr. Lemann, why did the Committee make these different time elements?" I should have to say, "Gentlemen, it is due to the desire of the Court for greater flexibility."

JUDGE DOBIE: Admissions are very much simpler. He doesn't have to answer the questions.

THE ACTING CHAIRMAN: The rules originally had these comfortable variations. You started your accounting at a different time, but you did have this flexibility in the original rules. That is, Rule 33 was always fifteen, Rule 36 was ten, and so on.

MR. LEMANN: Flexibility is a frill.

PROFESSOR MOORE: You might add a fifth, Mr. Lemann. Plaintiff can move for summary judgment the minute he starts his action. That forces the defendant to do something within ten days.

THE ACTING CHAIRMAN: Can't you do some of it pre-trial?

MR. LEMANN: That would take only the same time limit, though, ten days, as one of the others. That wouldn't give you another time.

PROFESSOR MOORE: That is right.

MR. LEMANN: Maybe we ought to change that:

SENATOR LOFTIN: Do you think they all ought to be

uniform?

MR. LEMANN: I don't know. I was just thinking aloud. I should think the fifteen days ought to be ten, probably. I can't see much reason for fifteen in 33, but there I go against my constitutional principle of no change where none is demanded.

JUDGE DOBIE: I think, unless there is some quite obvious reason for that, we had better leave it alone. It would be confusing. I don't think any of this is very vital.

THE ACTING CHAIRMAN: We are at 36 at the moment. Shall we go on to 41? Does somebody want to do something definitely about 36?

DEAN MORGAN: I can't quite see why we give them less time here than in the other. Do you know why, Charlie?

THE ACTING CHAIRMAN: Ask Edson. Edson did this originally.

JUDGE DOBIE: If you have interrogatories, you may have to give a long, involved answer, but here you just admit this or don't admit it.

THE ACTING CHAIRMAN: You say "Yes" or "No."

JUDGE DOBIE: Yes. You probably should be able to make up your mind about that pretty quickly.

PROFESSOR SUNDERLAND: Judge Chesnut made the point in dealing with interrogatories that the time was so short that you couldn't expect parties to do very much work in hunting information. But I don't know whether there was any real reason

for having a fifteen-day limit in one case and a ten-day limit in another.

DEAN MORGAN: You did it to begin with, Edson. You must have had some reason.

MR. LEMANN: What an assumption!

DEAN MORGAN: Did you see that show a long time ago, "I'd Rather Be Right," where a Cabinet member was explaining how they had put gold in a hole in the ground, and Roosevelt asked, "Did we do that?" The Cabinet member said, "Yes," and Roosevelt said, "Well, we must have had some reason for it."

PROFESSOR SUNDERLAND: I can't recall at the moment just what my reasons were, if any.

THE ACTING CHAIRMAN: I hear no motion.

DEAN MORGAN: The changes are exactly what was voted, as I recall it.

THE ACTING CHAIRMAN: Yes.

MR. LEMANN: The only open question, I suppose, is whether you want to have intervals of ten in one place.

JUDGE DOBIE: I move we leave it as it is here.

THE ACTING CHAIRMAN: It is moved that we leave Rule 36--

MR. HAMMOND (Interposing): I think Mr. Lemann had some suggestion.

MR. LEMANN: No, I was just calling attention to the fact, Mr. Hammond, that it gives a little variety in the rules,

and something else for you to make one reason stand out in contrast with the other. You can say, "Gentlemen, you contrast that with this. This is ten and that is fifteen." If they ask me why, I will quote Mr. Roosevelt: "There must have been some reason." You might say, as you suggest, that on admissions you don't need more than ten days, and on answers to interrogatories you need a longer time.

DEAN MORGAN: Where you have to investigate, and so forth.

MR. HAMMOND: I was just wondering, if you permitted the request at as early a time as commencement of the action, what a court would do under (2) at the end, because some or all of the requests for privileges are irrelevant. How would he determine whether they were irrelevant if no answer had been filed?

THE ACTING CHAIRMAN: By affidavits. That is actually the case. I mean we always get this sort of thing by affidavit.

MR. LEMANN: An affidavit that it is relevant.

DEAN MORGAN: An affidavit to show why it is irrelevant, usually.

MR. LEMANN: You have the petition. That would give you at least some indication. I suppose if you sued me for breach of promise, you couldn't go in and ask whether I ran over somebody with an automobile.

DEAN MORGAN: Except in New Hampshire. In New

Hampshire, you know, they amended an action in assumpsit on the common counter to an action for wrongful death before the statute had expired.

MR. LEMANN: You voted last time, I understand, to make all the things permissible as soon as the suit is filed. If Mr. Wickersham had been here, you wouldn't have done it. He fought and bled with that. But the argument was that you can get an order to do it now, that most judges will give you the order, and why not make it automatic? It is a considerable increase, I think, in the right to use this power to make it immediately available. I think it is certainly something that should be permitted.

THE ACTING CHAIRMAN: There was considerable demand for it and also some statement on the part of various district judges that they didn't see from their end that it was anything more than a nuisance. It is interesting, too, if you make these after answer now, to note how long the answer actually is. As I called to your attention, Mr. Hammond has some figures on tax suits, and the period of answer seems to be growing longer and longer, notwithstanding the rule.

MR. LEMANN: This rule will stop that, Charlie. I have had one case at the bar since these rules came up in which they took my deposition, and they extended the time to answer for about a year while they were examining me. They would examine me for a week or two and come back and examine me again

after several months, because I had to go away or they had to go away, and they didn't file the answer until they finished the deposition because they told the district judge they didn't know how to answer until they got all the information.

THE ACTING CHAIRMAN: Of course, that is true, and we are inviting them to extend the time still more. That is the general trend of our changes. But if that is the case, I should say that is all the more reason that you don't want to put obstacles in the way of parties who need to move promptly before they lose the testimony. Where a man is going to Australia or to the South Pacific or whatnot, you don't want more obstacles. The longer the issue is delayed, the more reason for making it freer.

I guess we still have no motion on Rule 36, and we will pass on, shall we? We will take 36 as approved in the form here.

Rule 41.

DEAN MORGAN: You have to insert Rule 70 here.

THE ACTING CHAIRMAN: Yes, the condemnation rule should be included here.

JUDGE DOBIE: Reference to it, not incorporation.

DEAN MORGAN: Rule 71, isn't it?

MR. HAMMOND: Rule 71-A.

THE ACTING CHAIRMAN: It would be the insertion in line 3 of Rule 71-A. All right, shall we consider that

approved?

On Rule 43 and Rule 44 you will see here again an informative note.

MR. LEMANN: If we are not going to have them one place, we should not have them in another. I move the note be deleted in the print.

THE ACTING CHAIRMAN: Before I put the motion, I would like still to make a little speech about it. I still think that is a little unfortunate. This happens to be one of the matters that has been discussed a great deal, one of the great academic criticisms of the rules. I think the criticisms have been greater than the practical results justified, but be that as it may, it has been criticized, and criticized rather strongly.

I should think that if we sit for two years, and it takes two years then for the amendments to go through, and we don't show any knowledge of any objections of any kind, I should think it was a showing that we hadn't fully done our job. I think really that there is an obligation on the Committee to consider matters of this kind, and one way of considering them, of course, is to decide that at the moment we don't think anything should be done, but it seems to me we should say this. This is one way of saying so. Of course, there are other ways. We could make a formal report and say we have done so-and-so. But this does it succinctly.

MR. LEMANN: How many such notes have we? We had one yesterday on class suits.

THE ACTING CHAIRMAN: There is at least one more. I don't know whether there are more than that or not.

MR. LEMANN: I was just wondering. If we have one, why not have them all?

DEAN MORGAN: The other one was on account of the Supreme Court proposition. It was the question of the Erie v. Tompkins case, which was a rather different kind of question.

MR. LEMANN: It may be that this stands on a special footing.

DEAN MORGAN: Charlie, you can just recite: "We have left undone the things we ought to have done," and there is no helping it.

THE ACTING CHAIRMAN: Yes, and one of the things that we have left undone is consideration of the American Law Institute's proposed law of evidence.

DEAN MORGAN: That is what I say.

THE ACTING CHAIRMAN: Don't you want any boost for that?

MR. LEMANN: I would like to boost it, but I don't know whether this is a boost or a knock.

THE ACTING CHAIRMAN: There are also four or five notes which contain references to the Soldiers' and Sailors' Civil Relief Act.

DEAN MORGAN: Those have got to go in, I think.

THE ACTING CHAIRMAN: Why? Doesn't Monte's principle apply somewhat to them? An example of that is Rule 55; another, Rule 62. There are several cases of that.

DEAN MORGAN: I noticed those when we went through.

THE ACTING CHAIRMAN: Rule 64.

MR. LEMANN: As to those, of course they are very valuable for the guidance of the bar, but I guess there are a good many things we could put in for their guidance.

THE ACTING CHAIRMAN: In our suggestions for the Committee we raised the question, "What is to be done in the light of the Soldiers' and Sailors' Civil Relief Act?" and didn't we suggest the possibility of putting it in one rule, the default rule? Then when it came up, I know the Chairman, among others, was quite insistent that we should call attention to this, on the ground that our rules might be misleading to a lawyer.

DEAN MORGAN: That is right.

THE ACTING CHAIRMAN: You see, the Soldiers' and Sailors' Civil Relief Act actually modifies Rule 55.

MR. LEMANN: Of course, we might deal with that particular thing by repetition, by saying at some appropriate point, "Attention of the bar is directed to the fact that Rules Blank, Blank, Blank, and Blank are affected by the Soldiers' and Sailors' Civil Relief Act." Are there any other

statutes that may affect some of these rules, which have been passed since the adoption of the rules?

MR. OGLEBAY: I may say there has been no effect except actively to modify the effect of Rule 55, and that is the only one we called attention to originally. Then Mr. Mitchell and some others thought that we should call attention, since it was a very important Act, to other places where it might be important, although it didn't actually affect the rule itself. So we drew those up, too, although we didn't originally make any suggestion.

MR. LEMANN: I don't think it is very important. It can't do any harm to put it in. Maybe it is a good idea to put them all in. I don't think it is worth hesitating much about it.

JUDGE DOBIE: I should think those on the Soldiers' and Sailors' Civil Relief Act ought to be put in as a caveat or warning. I don't think it would do any harm.

MR. LEMANN: I should think that anyone dealing with a soldier or sailor would know that he has certain provisions that he has to look after. However, the question now, of course, is what to do with this note on the Code of Evidence. I made a motion to omit it, but I will withdraw the motion if everybody thinks we should say something about it. It is just a matter of taste.

JUDGE DOBIE: What is the status of the whole situation

about the Code of Evidence? Do we intend to take it up sometime and go into it?

DEAN MORGAN: That is what you said we were going to do.

THE ACTING CHAIRMAN: Yes, we did say we were going to do that.

DEAN MORGAN: I drew an amendment for 43 and 44 at the request of the Reporter at one time.

THE ACTING CHAIRMAN: That is correct, and the Reporter supported the amendment.

MR. LEMANN: My recollection is that a year ago, you yourself, Eddie, said that you thought we ought not to undertake it.

DEAN MORGAN: I thought we didn't have time for it, that is quite true. I said that at that session we couldn't possibly do it.

MR. LEMANN: I thought you wanted to wait until the bar was more familiar with it, or something of the sort.

DEAN MORGAN: Oh, no. I would be perfectly willing to go after it right away, as a matter of fact.

MR. LEMANN: After the war is over.

THE ACTING CHAIRMAN: This came as a direct outgrowth of the discussion that took place when Mr. Morgan's amendment came in, and then it was decided we didn't have time to consider it. I have forgotten, but I think it was the suggestion that

we make a note.

MR. OGLEBAY: Yes; Senator Pepper.

MR. LEMANN: I withdraw the motion. Let it stand.

THE ACTING CHAIRMAN: All right. Rule 45.

MR. LEMANN: That is the representation we are going to do something about.

THE ACTING CHAIRMAN: I think we should.

MR. LEMANN: Do we have a mandate to continue now as long as we want to?

THE ACTING CHAIRMAN: At the pleasure of the Court, but I take it, under the mandate we could continue indefinitely at the pleasure of the Court. I don't understand that there is anything in the order now that says that once we have presented amendments, we are through.

MR. LEMANN: I wonder in this sort of thing whether we ought not to get a specific direction from the Court.

MR. HAMMOND: I think that was Mr. Mitchell's idea, before we actually went into it.

MR. LEMANN: Before we do a lot of work on it, for example. It seems to me you had something like that in your own mind, Eddie, a year ago.

DEAN MORGAN: Yes.

THE ACTING CHAIRMAN: What were the terms of the order? Wasn't it that the Court asked the surviving members to constitute a standing committee? Have you the terms of the

order?

DEAN MORGAN: I think Mr. Mitchell thought we ought to have a special authorization, that there was no use of our working on it unless we did have.

MR. LEMANN: It seems to me that we had some notion of taking the general temper of the bar about it, too, perhaps, but at least the Court.

DEAN MORGAN: We had to check with the Court first to see whether they wanted or were willing to have us go into that.

THE ACTING CHAIRMAN: That is an obvious thing. We are not going to meet down here unless our expenses are paid, and our expenses have to be authorized by the Court. Of course it is almost automatic. We can't expect them finally to commit themselves and say, "Now, do thus and so," but we certainly are not going ahead and do any particular work unless they authorize the expenditures and do know about it.

MR. LEMANN: On something as extensive and far-reaching as that would be. I am not thinking merely of the expense, but of the time to be put on it, and then have them say, "Well, we think it is too much of an undertaking." I think we ought to fight it out with them in advance.

DEAN MORGAN: Oh, I think you have to do that.

THE ACTING CHAIRMAN: Here is the order continuing this Committee. Justice Stone, on January 5, 1942, announced the designation of "a continuing Advisory Committee to advise

the Court with respect to proposed amendments or additions to the Rules of Civil Procedure for the District Courts. Personnel shall consist of the surviving members, or as many of them as are willing to serve, of the Advisory Committee appointed by the orders of the Court dated June 3, 1935, and February 17, 1936."

It is a continuing Committee.

MR. LEMANN: Are you going to entertain on the tenth anniversary of the Committee next year for the survivors?

THE ACTING CHAIRMAN: Maybe we should take steps for some celebration each anniversary date, but what is the date that we take? Is it the date of the passage of the enabling act? Goodness knows, it was one of the worst enabling acts that ever could be devised. It ought to be the appointment of our Committee.

SENATOR LOFTIN: I would say the appointment of the Committee.

THE ACTING CHAIRMAN: That is something. We might appoint a subcommittee to arrange the annual dinner.

DEAN MORGAN: I think we had better get on with these rules.

JUDGE DOBIE: I think so, too.

THE ACTING CHAIRMAN: Is 45, therefore, unquestioned?

PROFESSOR SUNDERLAND: I would like just to introduce the word "designated" in line 6. It says, "directed to produce

documents". It would read: "directed to produce designated documents", to emphasize the fact that you have to identify your document before you can tell anybody to bring it in. We use that same language in our Rule 34 regarding discovery and production of documents.

DEAN MORGAN: You don't want a blanket order.

PROFESSOR SUNDERLAND: No blanket order.

DEAN MORGAN: I feel that is true, too.

JUDGE DOBIE: In other words, just put "designated" between "produce" and "documents". Do you want to repeat it?

PROFESSOR SUNDERLAND: There is no need to repeat it. It is in 34. That reads: "any designated documents, papers, books, ... or tangible things".

SENATOR LOFTIN: "any designated"?

PROFESSOR SUNDERLAND: Just the word "designated".

JUDGE DOBIE: I make that motion, Mr. Chairman.

THE ACTING CHAIRMAN: In 45(b) there is a little different wording. That is the subpoena for trial. "directed to produce the books, papers, or documents designated therein".

PROFESSOR SUNDERLAND: That is the same thing.

THE ACTING CHAIRMAN: Yes, I should think so. All those in favor will say "aye"; those opposed. So voted. (Carried)

Any further question about that? If not, we will pass on to Rule 50. This, I take it, we discussed at very

considerable length last time. We had two suggestions. One was in a form which was supposed to be straightforward, and the other was one that followed the old course of avoiding the decision in the Slocum v. New York Life Insurance case. I think we pretty well settled this, didn't we, Bill, at the last meeting?

PROFESSOR MOORE: I believe so.

THE ACTING CHAIRMAN: We talked it over. This is in line with what we worked on. Has anyone any question about it?

PROFESSOR SUNDERLAND: I wonder whether we are using "new trial" here in the correct sense. It provides in lines 15 to 17: "If no verdict was returned, the court on motion may direct the entry of judgment as if the requested verdict had been directed or may order a new trial." According to the definition, "new trial" means examination after verdict of jury or decision of court. If there hasn't been any decision or any verdict, you don't get a new trial.

DEAN MORGAN: You mean there was a mistrial in the first place.

PROFESSOR SUNDERLAND: There would be a mistrial, but not a new trial.

PROFESSOR CHERRY: He doesn't have to order a new trial, then.

PROFESSOR SUNDERLAND: It is automatic that you try it again, but it is not a new trial.

THE ACTING CHAIRMAN: Isn't that what we had in before?

JUDGE DOBIE: Do we make any direct provision as to whether the appellate court can enter judgment?

THE ACTING CHAIRMAN: Whether the appellate court can enter judgment?

JUDGE DOBIE: Yes, where there is no motion for judgment.

THE ACTING CHAIRMAN: We practically cover it. Look at lines 17 to 19. It says the district court's failure to order judgment is the equivalent of a denial.

DEAN MORGAN: That is right.

THE ACTING CHAIRMAN: So we get at it by not saying what the appellate court may do, but we say what the district court has done.

JUDGE DOBIE: You think that under this the appellate court can direct a verdict, with no motion for judgment non obstante veredicto, final judgment, without sending it back?

THE ACTING CHAIRMAN: That is the intent of this. If it doesn't do it, we haven't done what we thought we were doing.

JUDGE DOBIE: We have had it to occur and occur, and the Supreme Court has dodged it every time, you remember.

THE ACTING CHAIRMAN: That is true.

PROFESSOR SUNDERLAND: I suggest that, instead of "new trial", we substitute "another trial".

THE ACTING CHAIRMAN: I don't object, of course. This, according to Mr. Lemann's view, is something that has given no trouble for five or six years, isn't it? You see, the language of the original rule, the original rule as printed on page 64, says: "If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial."

PROFESSOR SUNDERLAND: I just took occasion to check up that thing, and I found that nowhere could you find a definition of "new trial" that included another trial after there had been a failure to render a verdict.

DEAN MORGAN: You can say it is another trial.

PROFESSOR SUNDERLAND: It is another trial. It is not technically a new trial at all.

THE ACTING CHAIRMAN: Shall we change that, then?

DEAN MORGAN: All right.

THE ACTING CHAIRMAN: Does the Lemann principle apply?

MR. LEMANN: I should think so. I would rule it would apply.

THE ACTING CHAIRMAN: Mr. Sunderland moves that for the words "a new" in line 17, the word "another" be substituted. All those in favor say "aye"; those opposed, "no."

I think we will suspend and have some--

DEAN MORGAN (Interposing): Let's finish this rule.

MR. LEMANN: I have just a foolish question which you

can answer right away on the last sentence, that "If the motion for judgment is sustained, the contemporaneous ruling"--

DEAN MORGAN (Interposing): That is right.

THE ACTING CHAIRMAN: If we are going to finish this, I shall have to call for a show of hands. All those in favor of Mr. Sunderland's motion raise their right hands. Two. All those opposed. Three. It is lost.

SENATOR LOFTIN: Not on the merits, just on principle.

MR. LEMANN: --"contemporaneous ruling on the motion for new trial is effective only in the event that the judgment is reversed." I wonder if a judgment could be reversed in such a way that the upper court might dispose of the case so that your motion for new trial wouldn't be effective.

DEAN MORGAN: Yes, the court could. It could say that and order a new trial, if it were based on alleged erroneous instructions, and so on, rather than on sufficiency of evidence.

MR. LEMANN: The upper court could dispose of the case? That is what I meant.

DEAN MORGAN: It might.

MR. LEMANN: Finally, by direction, so as to shut off the motion for new trial.

DEAN MORGAN: Not unless the order on the new trial was assigned as cross error, or something of that sort.

THE ACTING CHAIRMAN: I am not sure that I got the

question. I thought that was just what the appellate court could do. Look at page 44, the final paragraph of the note.

MR. LEMANN: Yes.

THE ACTING CHAIRMAN: Is it intended that the appellate court shall take any of these various courses that would be appropriate?

MR. LEMANN: I thought so, but then I wondered how you would have a motion for a new trial effective in the event that it was reversed, if the judgment disposed of the case. That was my only question.

PROFESSOR CHERRY: If the reversal disposed of the case?

MR. LEMANN: I am talking about the top two lines on page 44 of this print. Have you got that?

PROFESSOR CHERRY: What you want is that it not be effective unless the judgment is reversed?

MR. LEMANN: I don't know that that would help. I don't know that it is important enough to bother about. I think the language isn't very precise.

... Brief recess ...

THE ACTING CHAIRMAN: I think we might proceed now. Referring particularly to the question Mr. Lemann raised at the end of Rule 50, lines 22 to 26 are explained in the footnote at the top of page 45. "The first sentence of the new paragraph of subdivision (b) incorporates the proper district

court practice established by the Supreme Court in Montgomery Ward & Co. v. Duncan. The second sentence avoids the situation illustrated by County of Allegheny v. Maryland Casualty Co. in the Third Circuit (contemporaneous unconditional order for a new trial cancels out a judgment notwithstanding the verdict and there is no appealable order)."

There is a still more recent case from the Seventh Circuit, McIlvaine Patent Corporation v. Walgreen Co., 138 F.(2d) 177, and it holds that where the trial court granted a motion for a new trial and also granted a motion for judgment notwithstanding the verdict, the appellate court assumed that the order granting the new trial was subject to the implied condition that it was not to be effective unless the judgment notwithstanding the verdict was reversed, rather than treat the order for new trial as cancelling out the order for judgment even though the order for new trial did not so provide on the face. They say that they assume from that and from the memorandum of the district judge that it was conditional. Then they quote Moore's Federal Practice. Then they say:

"Otherwise, the order for a new trial might well cancel the judgment n.o.v. and result in no appealable order cited in this case. Rather than treat the order granting the new trial as having this effect, we prefer to hold that the judgment stands subject to appeal and subject to the condition that, if reversed, the order granting the new trial will become

effective."

In other words, this incorporates that result in this case, or is intended to.

MR. LEMANN: I will admit the reason was that I was addressing myself to the felicity of the language in 26 on page 44. That was my only point. It isn't very serious.

THE ACTING CHAIRMAN: I suppose, from the way the court talks of it here, we may assume that the order granting the new trial was subject to the implied condition that it was not to be effective.

DEAN MORGAN: That is all right, but Monte says, suppose that the appellate court should order judgment unconditionally for the plaintiff.

MR. LEMANN: Or the defendant, or whatever it was.

DEAN MORGAN: If it isn't for the defendant, the moving party, if it is for other than the moving party--

MR. LEMANN (Interposing): There wouldn't be any occasion for a new trial. It would dispose of that. This seems to be a little inartistic for that situation. If the appellate judgment disposed of the case finally, of course the new trial would be out, too. Your language would imply that it would still be open. I suppose anybody could construe that.

THE ACTING CHAIRMAN: I suppose so.

MR. LEMANN: Have I made the point, Mr. Moore?

THE ACTING CHAIRMAN: If the motion for judgment is

sustained, I suppose that then the motion for new trial does go out the window.

PROFESSOR MOORE: I think the motion for judgment is sustained in the district court.

DEAN MORGAN: Sustained and granted. Sustained, I see.

THE ACTING CHAIRMAN: No, this is an attempt to make a suggestion to the circuit court of appeals without saying to them in so many words. This, I take it, is the meaning: If a motion for a judgment is sustained by the district court, then the C.C.A. deals with the motion for new trial only in the event that it reverses that judgment of the district court.

DEAN MORGAN: I don't think you will ever get that out of the language.

MR. LEMANN: They wouldn't deal with the motion for new trial necessarily, then, because they might dispose of the case finally. I don't know whether they may deal incidentally or inferentially with the motion for new trial.

PROFESSOR CHERRY: If they agree with the action of the trial judge, they say, "Action sustained."

DEAN MORGAN: We say "granted".

PROFESSOR CHERRY: Have we said that elsewhere?

DEAN MORGAN: Yes.

PROFESSOR CHERRY: That would make it quite clear that you are referring to the action in the trial court.

MR. LEMANN: "effective only in the event that the cause is remanded by the appellate court", instead of "the judgment being reversed." It is effective only in the event the cause is remanded.

DEAN MORGAN: "that the judgment is set aside and the cause is remanded."

MR. LEMANN: That would cover it.

PROFESSOR SUNDERLAND: I should think that would make it clear.

MR. LEMANN: "the judgment is set aside and the cause is remanded by the appellate court."

DEAN MORGAN: I should think that would be a much better way to put it.

MR. LEMANN: That would cover my point. Do you see any objection to that, Mr. Moore?

PROFESSOR MOORE: I think that is all right.

THE ACTING CHAIRMAN: What is it? "If the motion for judgment is granted".

MR. LEMANN: "by the district court contemporaneously with a motion for new trial, it is effective only in the event that the judgment is set aside and the cause remanded by the appellate court."

PROFESSOR MOORE: You want to say, "after it is granted by the district court, its contemporaneous ruling".

PROFESSOR CHERRY: If you say "its", you don't need

"by the district court".

THE ACTING CHAIRMAN: "only in the event the judgment is reversed and the action", I guess. I don't think we say "cause". "and the action remanded."

MR. LEMANN: All right.

PROFESSOR SUNDERLAND: Would you say "cause"?

JUDGE DOBIE: "case".

PROFESSOR SUNDERLAND: "case" or "cause". You don't say "action".

MR. LEMANN: I don't think you would use "action" ordinarily.

THE ACTING CHAIRMAN: I think I am right that nowhere in the rules does the word "cause" appear.

MR. LEMANN: "case remanded".

THE ACTING CHAIRMAN: That is all right.

PROFESSOR MOORE: Or "further proceedings."

MR. LEMANN: "by the appellate court." That is all right. I think that is what the man needs ordinarily, probably.

THE ACTING CHAIRMAN: I take it this is the way it will read: "If a motion for judgment is granted by the district court, its contemporaneous ruling on a motion for new trial will be effective only in the event the judgment is reversed and the case is remanded by the appellate court for further proceedings."

MR. LEMANN: That is right.

THE ACTING CHAIRMAN: All those in favor of this wording say "aye"; opposed. It is so voted. (Carried)

Is there any other matter in this rule? If not, we will pass on to Rule 52. Any suggestion about Rule 52? This is a rule we have discussed a good deal.

DEAN MORGAN: No.

THE ACTING CHAIRMAN: I should like to say, as to the addition at the end in lines 11 to 15, that of course there is nothing in any rule that can be final and automatic, but it does seem to me that our statement in our opinions in the Second Circuit of this principle, the principle particularly in lines 11 to 15, has been very helpful. The district judges have been trying to carry it out, and it seems to me that it has had two effects. One of them is that it disposes of the case much more promptly. That may or may not be important, but I think that is the case. The other is that it seems to me the findings have been better. They really have followed it out.

DEAN MORGAN: Yes.

JUDGE DOBIE: Have you ever had cases in which they asked you to remand the case for specific findings, where they weren't separately included? We had that case.

THE ACTING CHAIRMAN: We have done it, yes. We started this out in a case that we remanded.

JUDGE DOBIE: We refused to do it in this particular case because Judge Paul wrote a very elaborate opinion, and they

were all in the opinion.

THE ACTING CHAIRMAN: We wouldn't do it there. We will get the findings from almost anything.

JUDGE DOBIE: Yes.

THE ACTING CHAIRMAN: The only case I think of immediately where we remanded is where there were no findings anywhere.

JUDGE DOBIE: I think it is an excellent thing, though, to make that express provision. Judge Caffey, I know, is one who was very bitter against it because he said a lot of times it was silly.

THE ACTING CHAIRMAN: I think it has been quite helpful.

JUDGE DOBIE: In many cases, particularly patent cases, they are extremely helpful.

THE ACTING CHAIRMAN: Rule 52 is passed.

MR. HAMMOND: Just a minute. I have a few suggestions here from Mr. Tolman that I guess I had better call your attention to.

THE ACTING CHAIRMAN: All right.

MR. HAMMOND: In line 12 he says change "of" at the end of the line to "thereof".

DEAN MORGAN: No.

THE ACTING CHAIRMAN: No. It is "a part of .... the opinion". I don't see what the "thereof" is going to be.

MR. HAMMOND: Here is the rest of it: Strike the "or" that follows and insert a period.

THE ACTING CHAIRMAN: I am sorry, I think that would be too bad. Of course, if this were a new matter, and we didn't have the worries of the district judges and the circuit case in the Supreme Court that raises the question, it would have been very simple, but now it does seem to me that the rule should make it abundantly clear, even if it is stating the obvious. Don't you think so, Armistead?

JUDGE DOBIE: Yes. I move its adoption as changed here.

THE ACTING CHAIRMAN: Is there anything more?

MR. HAMMOND: I didn't quite state it, but I guess you have it enough. Part of the same thing is to begin a new sentence where "or" was: "If filed separately ...."

THE ACTING CHAIRMAN: I am afraid that now I don't know what he did want.

DEAN MORGAN: What is the rest of it now?

MR. HAMMOND: The first is to change "of" to "thereof" and strike the "or" and then begin a new sentence with the word "If". Strike the word "but" and substitute "they must be filed", "If filed separately, they must be filed contemporaneously with the opinion or memorandum."

JUDGE DOBIE: I don't think that is helpful, frankly.

THE ACTING CHAIRMAN: I am a little in doubt just what

to say in answer to that. In the first place, that is really what I have in mind. It says it a little more drastically. I think, on the whole, I don't want to wave too much of a club at the district judges. Of course, Major Tolman might well reply, "If you are going to do it, you had better do it as directly as you can," but, on the other hand, I am not sure but that I would rather put it in backward. I don't see why this doesn't state the hope, if you will, that we have. It doesn't use the word "must". Whereas I would like the district judge to think it was "must", I don't know whether I want to put it in plain language.

MR. HAMMOND: He has a personal remark here, too. He says, "Personally, I think the new matter in lines 11-15 will not accomplish the result hoped for."

THE ACTING CHAIRMAN: All I can say is that I think it has done a great deal. I don't think any mechanical rule will accomplish everything, but I certainly will testify that I think it has been very helpful.

SENATOR LOFTIN: As a matter of practice, won't a great many of the judges simply file a memorandum and ask the lawyers to prepare the findings of law and fact?

THE ACTING CHAIRMAN: Yes, and those findings aren't worth a damn. They are simply useless.

SENATOR LOFTIN: Your idea is to try to avoid that and to have the judge prepare the findings of law and fact.

THE ACTING CHAIRMAN: Of course, you can't avoid it particularly. The judge can ask for suggestions of findings in advance of announcing his decision, but the judges who are interested in carrying out what the appellate court wants will try to make their own statements, and those will be both directer and shorter than what the counsel prepare.

DEAN MORGAN: We always used to do it in Minnesota. The court would tell us to give him a short memorandum of findings or, if he was in doubt, he would ask each side to submit findings. In my district, at any rate, we always used to be careful to separate facts from law and to be sure that we had the facts within the pleadings, and so forth, so that when we had the facts, the conclusions of law necessarily followed.

PROFESSOR CHERRY: Considering that we started with a situation where a good many of the district judges resented the idea of making any findings at all and said that there shouldn't be any until after you found out what was revealed, I should say that the rules in five years have accomplished wonders. If this additional language will carry it still further forward, I think that is fine. I mean, we have to look back and remember the opposition we had to that by the district judges.

THE ACTING CHAIRMAN: I know a great deal of the opposition has been in the Southern District. They thought they were put upon, and the retaliation of getting long findings

from lawyers didn't bother the Supreme Court, because they didn't have anything to do with them. It was just useless as far as we were concerned.

DEAN MORGAN: The lawyers hadn't been used to drawing them, so they just cut up the opinions.

THE ACTING CHAIRMAN: That is what they did right along when that was the case, and it was a kind of silly performance all around, really. The judge wasn't putting any mental effort in it. He would put some mental effort in his own original opinion, and this helps out there. Frankly, I don't know that I care much either way. It is much the same idea.

MR. HAMMOND: It seems to be. It is just a change in language, more or less, and it does make it a little stronger that they must be filed.

THE ACTING CHAIRMAN: I am inclined to think I would leave it as it is, as being less ferocious. I am not sure. I don't think that we would reverse if a judge had not followed this procedure, if we could see what the real case was. I suggest we leave it as it is.

DEAN MORGAN: I so move.

JUDGE DOBIE: I second the motion.

THE ACTING CHAIRMAN: Unless there is objection, we will leave it as it is.

Rule 54. You have here the suggestion we worked on

for change, and Mr. Hammond has worked out another which is before you. Mr. Morgan went over Mr. Hammond's draft and has made a few suggestions. I am perfectly ready to accept that. Let me say two or three things, first.

I have no illusions that any rule can settle the very difficult question of final judgment, final judgment as distinguished from an unfinal judgment. That is a difficult question. I think there will always be some borderline decisions on it, and I don't want to claim more for a change in the rule than there is. I say that because I think that sometimes there has been the thought that by making these changes we were going to close the matter.

All I can say is that the former rule we had did develop certain doubts in the minds of the judges. It didn't say all we had in mind. In the first place, it stated only half the rule. It stated when the judgment could be entered and not when it couldn't, and I think there was a real ambiguity about it. I have no doubt that we can help out the situation very materially by getting a clearer statement. We are not going to do away with all cases, and I certainly don't claim that we can, but I think that we are going to make it helpful to district judges who want to pass on the subject, and not make the matter difficult. I think they will have a somewhat clearer idea.

So I think that the attempt that we are making here

is quite worth while, and I think the suggestions we have are quite helpful.

If you will follow Mr. Hammond's before you, you can see that what he has done is to change the order and to state first that when the matter is finally adjudicated, judgment can be entered. Then he states at the end when the entry of orders is only provisional. He has spelled out quite a little more than in the original form the idea we are after. As I said, I am quite ready to accept his suggestion.

I call attention to the changes suggested by Mr. Morgan in Mr. Hammond's draft. If you will look down to the fifth line of the Hammond draft, where it says "and such entry shall terminate the action as to them", change "such entry" to the words "when entered"; "and when entered shall terminate the action as to them."

Now going down to the next sentence: "The judgment or judgments may be entered even though claims, counterclaims, cross-claims or third-party claims, arising out of other transactions or occurrences, are then undetermined, but, in that event, the court may stay enforcement of the judgment or judgments until the entry of a subsequent judgment or judgments and may prescribe". In other words, Mr. Morgan suggests taking out the words "the court" right there. "and may prescribe such conditions as are necessary", and so forth.

The second paragraph states in effect that the entry

of a judgment which does not settle all the claims out of a single occurrence shall not terminate the action, and so forth, "and the judgment," (Now I am reading from the end of the fourth line from the foot of the page) "order or other form of decision". Now, in place of the words "may be vacated or modified", take the words "is subject to revision". Then go on: "at any time prior to". Change "such" to "the" and make it "prior to the entry of a judgment or judgments adjudicating all such claims or demands for relief."

DEAN MORGAN: Page Mr. Velde;

MR. HAMMOND: By the way, Mr. Velde went over the Criminal Rules.

DEAN MORGAN: Did he de-such them?

MR. HAMMOND: He de-sucked them.

DEAN MORGAN: I move the adoption of Mr. Hammond's draft.

THE ACTING CHAIRMAN: With the changes?

DEAN MORGAN: With the changes, yes.

THE ACTING CHAIRMAN: Before we go further, Mr. Moore is making some suggestions. Have you got it before you now?

DEAN MORGAN: Yes.

THE ACTING CHAIRMAN: He suggests, in the line which would be 14, which is the first line of the second paragraph, that you ought to take out the word "judgment" there and insert it in other places later on that I shall refer to.

MR. HAMMOND: What line is this?

THE ACTING CHAIRMAN: The second paragraph. There will be certain other cases below that I shall speak of. The reason, he says, is that we define "judgment" in 54(a) as any official decree or order from which an appeal lies. Therefore, he suggests that that second paragraph would read like this:

"The entry of any order or other form of decision as to one or more, but not all, claims for relief, including counterclaims, cross-claims and third-party claims, arising out of a single transaction or occurrence, before the entry of a judgment or judgments adjudicating all such claims or demands for relief, as provided in the first sentence of the preceding paragraph, shall not terminate the action as to the claims or demands for relief adjudicated by the order or other form of decision, and the" (again strike it out) "order or other form of decision is subject to revision at any time prior to the entry of a judgment or judgments adjudicating all such claims or demands for relief."

DEAN MORGAN: I think that is much better.

JUDGE DOBIE: Delete it in the text, but leave it in the next to the last line.

MR. LEMANN: "in the preceding paragraph". Don't you want to say "in this rule"?

THE ACTING CHAIRMAN: Yes; that is all right. It is the preceding paragraph, anyhow, but I guess maybe it would

be surer to put it in. "the preceding paragraph of this rule".

MR. HAMMOND: "this subdivision of this rule", if you are going to put it in.

MR. LEMANN: It is still of this rule.

MR. HAMMOND: Yes.

THE ACTING CHAIRMAN: I don't know. Do you think that is really very necessary?

MR. LEMANN: In the drafting of contracts, and so on, we usually say "as provided," and in statutes I think very often it is done, too. I don't think you would find the draftsmen for Congress saying, in a revenue act, "as provided in the preceding paragraph," but I think they would say, "the preceding paragraph (b)," perhaps, "Section 'blank' of this Act." I don't think you would ever use language as general as "the preceding paragraph" in careful draftsmanship.

MR. HAMMOND: Then, "of the preceding paragraph of this rule"?

MR. LEMANN: Yes, that is what I suggested. The criticism is, either don't do it at all or make it more precise.

DEAN MORGAN: "the first sentence of this subdivision (b)".

MR. LEMANN: It is plain enough, I guess, without any, but I think it not very good draftsmanship.

PROFESSOR CHERRY: No.

MR. HAMMOND: "as provided in the first sentence of

the preceding paragraph of this subdivision of this rule".

DEAN MORGAN: "of this subdivision (b)".

MR. LEMANN: That is right.

MR. HAMMOND: "the first sentence of this subdivision (b) of this rule".

JUDGE DOBIE: If this paragraph isn't right, you would be out of luck.

MR. HAMMOND: I want to say something about striking out the word "judgment" in those cases. I thought you had trouble that the thing that they entered was called a judgment.

THE ACTING CHAIRMAN: That is true. As a matter of fact, they call it almost any old thing. It may be called a judgment.

MR. HAMMOND: That is why I stuck "judgment" in.

THE ACTING CHAIRMAN: I know there is that difficulty. I don't know quite how you are going to meet that. What they do is to enter a decree and enter a judgment, and then they appeal from it.

DEAN MORGAN: "other form of decision" is enough to include a thing that they call a judgment but which, by our definition, is not a judgment because it is not final and appealable. That is the difficulty. We define a judgment, don't we?

MR. HAMMOND: Let's see that now.

THE ACTING CHAIRMAN: It is in Rule 54(a), which is

just before this, you see. It is in the same rule.

DEAN MORGAN: It is just too much to disregard it there. "includes a decree and any order from which an appeal lies."

THE ACTING CHAIRMAN: It seems to me that either you have to change that definition--

DEAN MORGAN (Interposing): Or you have to knock it out here.

THE ACTING CHAIRMAN: --which could be done, but we have hung to that in all the rules, practically, or you have to leave it out and take your chances that they still may violate that. I recognize that. You can't do the impossible, really.

MR. HAMMOND: I appreciate that fact.

PROFESSOR CHERRY: What Eddie said here is "The entry of any order or other form of decision, even though it is called a judgment ...." It shouldn't be, but it has been. The trouble is where it has been called a judgment, isn't it?

MR. HAMMOND: You could probably make it "The entry of any form of decision, whether called a judgment or order ..."

PROFESSOR CHERRY: Our only trouble is where they call it a judgment. Where they don't call it a judgment, we probably are not having trouble.

THE ACTING CHAIRMAN: "The entry of any form of decision, however designated ...."

PROFESSOR CHERRY: I was wondering if something like

that might do it.

THE ACTING CHAIRMAN: What do you think of that? "The entry of any form of decision, however designated ...."

DEAN MORGAN: Yes.

THE ACTING CHAIRMAN: You have to repeat it on down.

DEAN MORGAN: I don't know whether you have to do that now.

THE ACTING CHAIRMAN: You have to repeat it some, but not very much; not enough to do any harm, I should think.

MR. OGLEBAY: You have to repeat it in the fifth line from the bottom.

DEAN MORGAN: "shall not terminate the action as to the claims or demands for relief adjudicated by the form of decision".

JUDGE DOBIE: You have to repeat it in the fourth line from the bottom, "or other form of decision, however designated".

MR. DODGE: If you say "or other form of decision", you identify it.

DEAN MORGAN: If you leave order in.

THE ACTING CHAIRMAN: "The entry of any order or other form of decision, however designated". Now go down to the fifth line from the bottom. "shall not terminate the action as to the claims or demands for relief adjudicated by the order or other form of decision".

DEAN MORGAN: That is right.

THE ACTING CHAIRMAN: And why can't you say "it"; "it is subject to revision".

MR. DODGE: "such order or decision".

THE ACTING CHAIRMAN: Not "such". "and the order or other form of decision is subject to revision", if you want to repeat it.

DEAN MORGAN: I think you might as well repeat it, to make it absolutely sure. It isn't going to hurt anything.

THE ACTING CHAIRMAN: All right. Now, Mr. Morgan moves the--

MR. HAMMOND (Interposing): Just one point.

THE ACTING CHAIRMAN: All right, go ahead.

MR. HAMMOND: I cut out "demands for relief" up above, but I notice I didn't cut it out down in the fifth line from the bottom.

THE ACTING CHAIRMAN: Perhaps I ought to speak a little on that, Eddie. I would like to have you think of that. When I made the original draft, the reason I put in demand was that I was a little afraid that there was some tendency to say that a claim for relief is equivalent to a cause of action, and I wanted to make all the claims that might arise out of a single cause, to use the old expression. I put in something to make it broad, and that is why I put in "all claims or demands."

DEAN MORGAN: You can put it in up at the top.

THE ACTING CHAIRMAN: I wonder if it wouldn't be just as well to have it in. That is really what I am coming to. Put it this way: Suppose that some court comes along and says, "Why, a claim for relief really means cause of action," and then you change the words "claim for relief" to "cause of action" throughout, and you might have this old question arising; whereas, if you put in "claims" and "demands," you have a word of art and a word of science, too, and it would be more inclusive.

What do you think about that, Eddie?

DEAN MORGAN: I don't know. Up here you have "all claims for relief".

MR. HAMMOND: He had "or demand" in his draft.

DEAN MORGAN: He had "all claims or demands for relief", that is right.

MR. DODGE: "claims for relief and claims or demands for relief".

MR. HAMMOND: What is the difference?

DEAN MORGAN: Are you thinking about a claim, the word "claim," and then a demand for relief as another thing? Is that right?

THE ACTING CHAIRMAN: I was putting in this little bit of history. We actually did leave out the words "cause of action," and we used the words "claim for relief." From a

single cause of action you may have many rights of action, to use that terminology. If you literally define "claim for relief" as being a cause of action, you may have several rights. When I say "all claims for relief and demands," I am in effect saying "all causes of action and rights therefrom," getting it to an inclusive form.

MR. DODGE: I think in the rules generally we have used the expression "claim for relief," not supplementing it by the words "or demands."

THE ACTING CHAIRMAN: That is of course true.

MR. DODGE: And I don't quite understand what the words "or demands" add.

THE ACTING CHAIRMAN: What do you think?

PROFESSOR MOORE: It is new.

THE ACTING CHAIRMAN: Do you think it is worth putting it in or not?

MR. DODGE: All the way through the early rules I notice the reference is to claims for relief.

THE ACTING CHAIRMAN: I am inclined to think that probably it doesn't add much.

DEAN MORGAN: I think you might as well leave it out.

THE ACTING CHAIRMAN: If this doesn't do it, possibly "or demands" won't either.

DEAN MORGAN: No.

THE ACTING CHAIRMAN: It should be uniform, it is true.

MR. HAMMOND: Strike it out, then, in the fourth line from the bottom.

DEAN MORGAN: No.

THE ACTING CHAIRMAN: And also in the sixth line.

MR. HAMMOND: That is right.

JUDGE DOBIE: Isn't "demand for relief" the term that you more frequently find?

MR. DODGE: Not in these rules.

THE ACTING CHAIRMAN: It is demand for judgment.

MR. HAMMOND: Yes.

THE ACTING CHAIRMAN: "Demand for judgment" is the term we use. In this same Rule 54(c) we talk about a demand for judgment.

JUDGE DOBIE: Yes.

THE ACTING CHAIRMAN: I think this is now in pretty good shape. Do you have any more? Mr. Morgan still moves the adoption. All those in favor will say "aye"; those opposed. It is so voted. (Carried)

DEAN MORGAN: How about the note?

MR. LEMANN: Didn't we vote to put in all those?

THE ACTING CHAIRMAN: Nobody raises a question on 55. Rule 56. This is a provision that was agreed on last time, and down at the foot, the alternative draft of Rule 56 is tied up with alternative Rule 12. Unless you like, I don't know that we need go back over that. If you want further explanation, I

can give it to you very shortly, but the two are tied in very closely together.

DEAN MORGAN: I think so. This is the one in case the alternative is not adopted.

THE ACTING CHAIRMAN: That is it, yes.

MR. HAMMOND: I have a note here from Mr. Tolman, who says: "There is so little real difference between the majority and the minority of the Committee in regard to the time at which a motion for summary judgment may be made that I would not burden the court with the controversy."

THE ACTING CHAIRMAN: I wonder, too, first, whether Major Tolman really read it, because after all, if he means that there is so little difference between the majority and minority on Rule 12, that would be another question. There is a big difference. If he is limiting his ideas to Rule 56 alone, he hasn't studied what we have put before him. Furthermore, again I must say that I don't quite think it is fair for the majority, on a matter on which we are as divided as this, not only to vote the minority out but to say they must shut their blooming mouths. It ain't the American way.

PROFESSOR CHERRY: I thought you were going to come around to saying that the majority ought to agree with the minority.

THE ACTING CHAIRMAN: What did you say?

PROFESSOR CHERRY: I think the practical effect of

the Major's suggestion is that the majority ought to agree with the minority. He knows blamed well the minority is going to speak.

JUDGE DOBIE: In this 56, the only thing you do is cut out that ", at any time after the pleading in answer thereto has been served," is it?

THE ACTING CHAIRMAN: The only change in the main rule is to cut out the time limitation, yes.

MR. HAMMOND: Yes.

JUDGE DOBIE: We all agreed on that, didn't we?

THE ACTING CHAIRMAN: Yes.

MR. HAMMOND: Except Mr. Lemann, who wasn't here last time.

PROFESSOR SUNDERLAND: Why not say "at any time"? If we don't say anything about it, one wonders what about the time. Wouldn't it be clear if we just said "at any time"?

THE ACTING CHAIRMAN: I have forgotten. Why didn't we say "at any time"? Why was that?

PROFESSOR MOORE: I think that would be a good addition.

MR. LEMANN: What is the language now appearing in 26, the corresponding rule? Rule 26 is after the commencement of the action. The point we are discussing now is Mr. Sunderland's query as to whether we ought not merely to delete the reference to pleadings and to insert that the party may

move at any time for a summary judgment. I suggested that perhaps we should use the corresponding language which we use for taking a deposition.

THE ACTING CHAIRMAN: I should think that is all right. "at any time after commencement of the action".

MR. LEMANN: Unless, maybe for variety, we would like to use different words. It gives some (what do you call it) frills and flexibility. We sometimes seem to make a point of using different words where we mean the same thing. I don't know whether that creates some uncertainty in the profession, which is accustomed to looking for reasons where none exist.

DEAN MORGAN: That is for stylistic purposes.

THE ACTING CHAIRMAN: I don't want to bring up anything here, Monte, but our alternative does say just that: "at any time after the commencement of the action".

MR. LEMANN: I was going to find some other merit in your alternative, perhaps. I won't permit myself.

THE ACTING CHAIRMAN: I don't know. I'll have to look it over and see what is wrong with it.

MR. HAMMOND: That would mean, then, if you put in "after the commencement of the action", to do it before pleading has been served.

DEAN MORGAN: Oh, yes. That is what we say. That is what it is for.

PROFESSOR SUNDERLAND: No one would suppose you would

say that you could do it before the beginning of the action, would they? So why put in "after the commencement of the action"?

MR. LEMANN: Where is this happy language in the alternative 56?

MR. DODGE: I can't find it.

THE ACTING CHAIRMAN: It is on page 15 of this draft.

MR. DODGE: Show it to me. Where is it?

THE ACTING CHAIRMAN: Page fifteen of this draft.

MR. LEMANN: Read it to me on the point that we are now discussing.

THE ACTING CHAIRMAN: What we do is to take out the time statements of the two top subdivisions. Then we expand (c) to gear it into what we have done previously in 12.

MR. LEMANN: That is not too artistic, because to that extent (c) overlaps (a).

THE ACTING CHAIRMAN: Oh, no, it doesn't, not in the alternative.

DEAN MORGAN: This is just telling them that either party may do it with or without affidavits, and then (c) is the time when made.

MR. LEMANN: (c) is the time.

THE ACTING CHAIRMAN: Why not move to substitute the alternative for the ancient one here, unless it is geared up with 12 and you don't want to take it separately?

MR. LEMANN: Why not, if it has merit in it--as to which I am expressing no final opinion. (Laughter)

THE ACTING CHAIRMAN: Do I understand that you want now to move to substitute alternative Rules 12 and 56?

MR. LEMANN: I haven't committed myself expressly, but back to where we are on this point. If we are working on 56(a) on page 51, the point made by Mr. Sunderland, as I look at it, is that (a) should specify that it may be done at any time.

DEAN MORGAN: After commencement of the action.

PROFESSOR SUNDERLAND: Why add "after commencement of the action"? It couldn't possibly be before. Nobody would suppose that he could do it before the action.

MR. LEMANN: I suggest that we use the language we used in 26, as I have a weakness, apparently, for saying the same thing when I mean the same thing, and in the same way--

DEAN MORGAN (Interposing): That is too bad. That shows you have no originality!

MR. LEMANN: That's right. But perhaps the language of 26 should be changed. Turn back to page 27 of our material, Mr. Dodge.

MR. DODGE: This alternative on page 15 doesn't seem to me to differ in any very material respect.

MR. LEMANN: He says that when he gets down here to (c), he specifies time.

MR. DODGE: Yes.

MR. LEMANN: He says we don't specify time.

MR. DODGE: The only difference is that in one case it is after answer and in the other case it is at any time.

MR. LEMANN: We are going to take out after answer now, you know.

MR. DODGE: What else is in the alternative Rule 12 or Rule 56 on page 15? Isn't Tolman right when he says it really isn't important enough to put up an alternative rule?

DEAN MORGAN: No, no.

THE ACTING CHAIRMAN: Mr. Dodge, do you really think it is fair to shut us out from a statement of our views? because the suggestion has been made several times that we should not be permitted to put up our views. This is an integral part of the whole problem as to 12. There is nothing separate.

MR. DODGE: I am not talking about 12.

THE ACTING CHAIRMAN: Rule 56. As a matter of fact, I am afraid that you haven't done us the honor of reading the alternative, because you would see how it is tied up. What we do in our alternative Rule 12 is to provide that the motion (what we use for the demurrer) shall be made as a summary judgment under Rule 56. Then here we specify the time when it shall be made, and it gears right into what we have done under Rule 12.

MR. LEMANN: Just to refresh my memory, will you

explain to me why (I know there is some reason that I would get if I stopped to analyze it, but you can spout it out without my stopping to do that) couldn't we review putting in your alternative; why couldn't we also ourselves put it on page 51 and, instead of using the language we are going to use, why wouldn't the language that you propose fit in with our Rule 12? You can give me an answer quickly.

DEAN MORGAN: It will here on (a) and (b), Monte, but it won't with (c), and (c) is altogether different.

MR. LEMANN: Let's see why. That is what I want to focus my mind on. I could get it, but you can hand it to me immediately.

DEAN MORGAN: Look here. Alternative (c): "A motion by a claimant may be made at any time after the commencement of the action. A motion by a defending party may be made before serving a responsive pleading within the time and in the manner permitted by Rule 12(b); or it may be made at any time after a responsive pleading has been served or where no pleading is required."

MR. LEMANN: What is wrong with that with our majority Rule 12(b)?

DEAN MORGAN: I don't know.

PROFESSOR MOORE: The majority Rule 12(b), as you have now voted it, doesn't provide for service of summary judgment.

DEAN MORGAN: Your 12(b) doesn't have a summary judgment.

THE ACTING CHAIRMAN: Rule 12(b) has the ancient demurrer. That is what you wanted.

DEAN MORGAN: You haven't a summary judgment in 12(b).

PROFESSOR CHERRY: Oh, yes.

MR. LEMANN: We haven't anything to exclude it, have we?

JUDGE DOBIE: Don't you find that some of these things may be considered under certain circumstances as a summary judgment under Rule 56?

MR. LEMANN: You take our page 51 now, straying a little bit from Mr. Sunderland's point. What does that provide? That simply provides for (a), and (b) would stay as it is.

DEAN MORGAN: That is right.

MR. LEMANN: That would mean no change.

DEAN MORGAN: All right. You don't need any change.

MR. LEMANN: I suppose the only way you would need any change would be if you wanted to emphasize the fact that the defending party could do it before serving the responsive pleading, which is now emphasized in the alternative Rule 56 on page 15, but which doesn't appear in the present draft of 56(b), and maybe we ought to take that over. You don't object to our adopting some of it. Without suppressing the alternative

rule at the point where you wish to state it, you wouldn't object to our doing you the compliment of borrowing some of your ideas, would you?

THE ACTING CHAIRMAN: No. I think you can do very well. As a matter of fact, if you start borrowing, it will be fine. I think that in the end you will clarify your Rule 12. I think that will be the result.

MR. LEMANN: That is all right. We are not proud.

THE ACTING CHAIRMAN: But don't you see, Monte, under your draft of the two rules, Rules 12 and 56, a defendant moves under Rule 12 for dismissal, and nothing is said about affidavits, and I think you intend that affidavits shall not be used. I think that is going to be a question of ambiguity in your rule, but as I understand what you want, you don't want affidavits there.

MR. LEMANN: Wait a moment. See if I get this right, Mr. Dodge. We intend that under Rule 12 a man may still file a motion to dismiss, or a demurrer, you see, and he doesn't have to have any affidavit for it. Then we intend to permit that--

THE ACTING CHAIRMAN (Interposing): Do you mean to prohibit affidavits? That is the question.

MR. LEMANN: No.

PROFESSOR CHERRY: Not the way it is worded now.

MR. LEMANN: But we also want to leave the door open for this defendant if he wishes to proceed for summary judgment,

and he would proceed under Rule 56.

THE ACTING CHAIRMAN: That is just what I say. You see, what you have is that the defendant can make, first, a motion to dismiss. It is overruled. The next day, he makes a motion for summary judgment under Rule 56. That is what you have.

MR. LEMANN: That is right.

THE ACTING CHAIRMAN: Under the rule that we have drawn up, we restrict the defendant to only one motion at a time, and the effect of Rule 56(c) as we have drawn it is that a defendant makes one motion before his answer, which can include all these things--summary judgment, and so on. But he makes only one; he can make only one. That is the meaning of the expression here that he can make a motion "within the time and in the manner permitted by Rule 12(b)". That means a single omnibus motion.

MR. LEMANN: Yes. We could take that part out, if we wanted to, for our purposes here in 56. Then you stated (I think I got the point you emphasized; I wanted to bring it out) that your main desire is to say that a man can't do both things at separate times.

THE ACTING CHAIRMAN: That is right.

MR. LEMANN: He can't demur and then move for summary judgment.

THE ACTING CHAIRMAN: That is right.

MR. LEMANN: Whereas, we would permit him to do that. That is the difference between us.

THE ACTING CHAIRMAN: That is it. Yes, I think that is correct.

MR. LEMANN: That illuminates my thinking.

THE ACTING CHAIRMAN: You have to add one thing that goes along with it. Of course, after his answer, you also permit him to move for judgment on the pleadings, and then he also can make a summary judgment. That is, he can do the same thing after answer, and again under our rule the only thing he can do is what we call a summary judgment. You see, we are leaving out the motion for judgment on the pleadings or, to put it another way, it is swallowed up in our summary judgment.

MR. LEMANN: You have a merger, just an omnibus thing.

DEAN MORGAN: That is it.

THE ACTING CHAIRMAN: That is it.

MR. DODGE: I see how your Rule 12 covers that, but I don't see how your substitute Rule 56 brings about that result. It seems to me that Rule 56, as you have revised it, would be consistent with either form of Rule 12.

THE ACTING CHAIRMAN: I don't mean to say that you may not be able to make use of our Rule 56(c). If so, we graciously offer it to you. All I was intending to say was that this form of wording, we think, is an essential of our alternative Rule 12.

DEAN MORGAN: It is not essential to yours, that is all.

THE ACTING CHAIRMAN: It is not essential, but it may be highly desirable and I recommend it for your earnest study, and we think it is essential for the combination we have. That is the point.

MR. LEMANN: Your Rule 12 says that you can't do both things.

DEAN MORGAN: That is right.

MR. LEMANN: You have to do it all at one time.

THE ACTING CHAIRMAN: That is it.

PROFESSOR SUNDERLAND: Charlie, would your rule prohibit this? The plaintiff doesn't know that he has any basis for a summary judgment, and he puts in some of these other motions. Later on, he discovers that he does have a ground. Would you say that he couldn't then make a motion for summary judgment? The facts existed all the time and were always available, but he didn't know about them.

THE ACTING CHAIRMAN: Under that, of course, the way we have it, he could do two things. If the motion has been heard, and there isn't a question of amending or changing, then he couldn't change that, and there would be only one thing he could do. He could file his answer.

PROFESSOR SUNDERLAND: And he would have to go to trial before he could ever raise the point of summary judgment.

THE ACTING CHAIRMAN: No, we haven't shut him down that much. You can still do it at different stages of the case. We haven't shut it down entirely. Of course, there might be an abuse under our rule, but I think there is less chance of it. What he can do is to move on this omnibus motion before his answer, and if he is turned down, he files his answer, and he still can do it over again, for anything we have said.

DEAN MORGAN: That is right.

THE ACTING CHAIRMAN: The judge might not pay much attention to it.

DEAN MORGAN: "at any time after a responsive pleading has been served or where no pleading is required."

PROFESSOR SUNDERLAND: Then you can do it at the two stages that Mr. Lemann speaks of. You can raise your objection first on a motion, and you can raise your objection later on a motion for summary judgment.

THE ACTING CHAIRMAN: Yes, that is true. That is, we allow two motion whacks for the defendant. Mr. Lemann allows a minimum of four.

PROFESSOR SUNDERLAND: Oh, we don't have two.

DEAN MORGAN: We have the demurrer, judgment on the pleadings, and the motion for summary judgment.

THE ACTING CHAIRMAN: Yes, a minimum of four.

PROFESSOR SUNDERLAND: But the demurrer and the

judgment on the pleadings have to come together.

DEAN MORGAN: Oh, no.

THE ACTING CHAIRMAN: No, no. They couldn't.

PROFESSOR SUNDERLAND: If they are available at the same time.

DEAN MORGAN: No.

PROFESSOR SUNDERLAND: That is what our Rule 12 says, that if they are available, they all have to be put in at once. Everything available at the same time must go in at the same time.

THE ACTING CHAIRMAN: In that sense, yes, but a motion for judgment on the pleadings is usually made after answer and is usually made in contemplation of what comes in on the answer and reply.

DEAN MORGAN: Motion for judgment on the pleadings can be made only after the pleadings are closed.

THE ACTING CHAIRMAN: Yes.

MR. DODGE: Haven't we got now really only the question whether in the substitute 56(a) we should insert the words "after the commencement of the action"?

DEAN MORGAN: Monte raises the question whether you shouldn't insert (c) from it.

MR. LEMANN: We got over to that, but let's stick first to (a).

DEAN MORGAN: Oh, yes; no doubt about that.

MR. LEMANN: (a) was the first point which Mr. Sunderland really raised. I said that I thought we ought to make it more explicit, and I suggested that we use the same language we used in the amendment to Rule 26. All you would have to say is "may after the commencement of the action", I suppose.

THE ACTING CHAIRMAN: Mr. Sunderland says it is tautological, but I don't know that that is any final objection.

MR. LEMANN: Let's go back and change the language on page 27.

THE ACTING CHAIRMAN: He asks, how can there be any before the action commences? How can you have a motion for summary judgment in an action that has not commenced?

PROFESSOR CHERRY: The same would be true under 26.

MR. LEMANN: I think it might sound a little better to say "at any time after the commencement of the action".

PROFESSOR SUNDERLAND: I think that is all right.

MR. LEMANN: So moved. Mr. Sunderland moves that Rule 56(a)--

THE ACTING CHAIRMAN (Interposing): Mr. Sunderland moves, and Mr. Lemann seconds.

MR. LEMANN: That Rule 56(a) be amended from the form shown on page 51 by inserting in line two after the word "may" the words: "at any time after commencement of the action".

PROFESSOR SUNDERLAND: I second it.

THE ACTING CHAIRMAN: All those in favor will say "aye"; those opposed. The "ayes" have it, and it is so voted.

MR. LEMANN: Now, paragraph (c). Do we need anything more under (c) or (b)? I think "at any time" is there, isn't it?

DEAN MORGAN: You see, it is a party against whom it is sought. He wouldn't be a party until after he had been served.

MR. LEMANN: That is right. It seems to me we don't need any help from you, Dean Clark. It is repudiated.

DEAN MORGAN: That is what we tried to tell you, but you wouldn't listen to us.

THE ACTING CHAIRMAN: The thing of it, Monte, is that you thought we had something better.

MR. LEMANN: You are the one who referred to that alternative rule and said we took care of it.

THE ACTING CHAIRMAN: You thought we had something better about (c). Of course, that is true. We do have.

DEAN MORGAN: It is not up our sleeve. It is there.

THE ACTING CHAIRMAN: I have a suggestion--a question, at least--on this recent Supreme Court decision, but before we take that up, is there anything else in 56? If not, I wish you would take a look. I don't know whether we should do anything about this or not. Have you read that, Edson?

PROFESSOR SUNDERLAND: Yes. I don't know what we

should do, if anything.

THE ACTING CHAIRMAN: If you will look at this memorandum of recent decisions.

DEAN MORGAN: Oh, yes.

THE ACTING CHAIRMAN: I hope you will notice that I didn't pepper you with stuff in advance, at least. It was only when you got down here.

DEAN MORGAN: Don't rub that in, because I overlook the stuff in advance.

THE ACTING CHAIRMAN: I know you do. Now turn over to Rule 56. That is on the third page and over on the next page. This is the case decided a week ago Monday. You will notice the facts involved. Summary judgments had been granted below in the Fifth Circuit. The case had been tried, I think, four times before.

DEAN MORGAN: And then get a summary judgment finally?

PROFESSOR CHERRY: That what we say, "at any time"!

DEAN MORGAN: That is like the Wilkins v. Sears case, where they tried the case for thirteen months, and then the verdict was decided on the ground that there was no evidence to go to the jury.

MR. LEMANN: Would this have been avoided by any alternative rule of the minority?

THE ACTING CHAIRMAN: No. This is a question of what

the Supreme Court has done to our existing rule.

MR. LEMANN: I think you ought to provide a rule to avoid four trials of a thing like this.

THE ACTING CHAIRMAN: I don't think we could even do a thing like this. That isn't the point, really, that I brought this up for.

You will see that the defendant moved for a summary judgment, averring that there existed no reasonable basis for dispute that during the period in question there was a market price at the wells and that it did not exceed three cents per m.c.f. In support of the motion, affidavits, a stipulation of facts and several exhibits were filed. The plaintiff resisted the motion on the ground that it was inadequately supported on the face of the defendant's papers. Summary judgment for the defendant was granted by the district court, and the circuit court of appeals affirmed.

Mr. Justice Jackson, speaking for the Court, quoted the last sentence of Rule 56(c): "The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that, except" (notice this "except" clause, because it suddenly assumes a great importance) "as to the amount of damages, there is no genuine issue of any material fact and that the moving party is entitled to a judgment as a matter of law." He emphasized the phrase "except as to the amount of damages"

and said: "Where the undisputed facts leave the existence of a cause of action depending on questions of damage which the rule has reserved from the summary judgment process, it is doubtful whether summary judgment is warranted on any showing."

I will stop right there and say that that is just something that I never saw in the rule before. I thought our reservation of "except as to the amount of damages" meant that we entered a general judgment finding liability.

MR. LEMANN: Just sent the issue of damages to the jury.

PROFESSOR SUNDERLAND: The same as a default.

DEAN MORGAN: The same business as a demurrer or default.

THE ACTING CHAIRMAN: You see what the rule now means.

He went on: "But at least a summary disposition of issues of damage should be on evidence which a jury would not be at liberty to disbelieve and which would require a directed verdict for the moving party."

He then concluded that the defendant had failed to show that it was entitled to judgment as a matter of law, since the evidence supporting the motion depended in part upon expert testimony which was not subject to cross-examination except upon trial.

Mr. Chief Justice Stone and Mr. Justice Reed dissented. The Chief Justice conceded, however, that Rule 56(c) "excludes

from the summary judgment procedure any issue as to the 'amount of damages', where there is an admitted right of recovery but the amount of damages is in dispute."

MR. LEMANN: All right, read the next sentence. That makes me wonder.

He contended, nevertheless, that "the Rule does not exclude from that procedure the issue of damage vel non when that is decisive of the right to recover", referring to Rule 56(d) in support.

Do I understand from that that in that case the issue of damages went to the whole right to recover? If so, I could understand that it might follow that you couldn't maintain the summary judgment because the whole case depended on the question of damages. It seems to me that is what that sentence implies. Doesn't it?

THE ACTING CHAIRMAN: Look at the next sentence.

MR. LEMANN: What were the facts? I think we would have to know a little more.

THE ACTING CHAIRMAN: We tried to state them in the first paragraph, you see.

The controversy involved the price to be paid to the landowners by lessees of a natural gas development. The contract price was one-eighth of the value of the gas taken, calculated at the rate of market price and no less than three cents per thousand cubic feet. Whether or not there was a

cause of action turned on whether the "rate of market price" during a certain period was above the fixed minimum of three cents per m.c.f.

As a matter of fact, they had paid the three cents, as I remember. They had paid the three cents, and this was a suit to get more, you see.

Under the state law this involved a determination as to whether there was a market price at the wells. Then the defendant moved for a summary judgment, averring that there existed no reasonable basis for dispute that during the period in question there was a market price at the wells and that it did not exceed three cents per m.c.f., which is the amount the defendant had been paying, all right.

MR. LEMANN: I don't see anything wrong with any of this language under the rule. Speaking for the majority, Jackson said, "You can't get a summary judgment because the affidavits leave some room for doubt as to what might be held. They show that the case isn't one that you could disregard a jury finding on. Therefore," he said, "you can't get a summary judgment because it is not beyond controversy whether the market value exceeded this three cents. As it isn't beyond controversy, you can't get a summary judgment." I don't see anything wrong with that.

Then Stone and Reed came along and said they didn't think that you could deny summary judgment merely because there

were expert witnesses involved.

DEAN MORGAN: That is it. It wasn't beyond controversy. Jackson said it wasn't beyond controversy because it depended upon expert testimony, and Stone said, "Well, you have affidavits from experts, and you have no denial at all or anything tending to deny them by the defendant."

MR. LEMANN: Didn't they deny the expert testimony on the other side? I would have thought they must have.

DEAN MORGAN: It says they didn't. That is the point. That is what Stone says, and the credibility of the expert is what Jackson is talking about, because he wasn't subject to cross-examination.

MR. LEMANN: He says, ".... the opposing parties did not present any probative evidence in challenge," but that doesn't mean they didn't deny it. Reading these two paragraphs together, I would get the impression that the defendants who were resisting summary judgment said, "While we don't give you any expert testimony ourselves, we don't give you any independent evidence, we do challenge this expert testimony and we would like to cross-examine these guys, and we are entitled to cross-examine." You can't just assume that what they say makes it so, and Jackson said, "You are entitled to cross-examine."

DEAN MORGAN: That is right.

MR. LEMANN: Stone said, "Well, no, not if you haven't any evidence on the other side."

DEAN MORGAN: It doesn't have to be expert, but it has to be some kind of evidence, instead of just saying, "Stand up and prove it."

THE ACTING CHAIRMAN: Let me say there are two different matters worth our consideration here. The first is the matter that you are now considering, Monte, and that is whether on the main issue you have summary judgment or not. Of course, you can say that this is a kind of thing about which judges might differ; it is very easy to differ on a thing like this, and I think probably that is all we can say.

I do feel a good deal of sympathy with the Stone point of view. I think the idea of a summary judgment is to smoke out the other fellow, and he can't simply sit back and say, "Why, I am not going to show anything now. I am simply going to claim my right of cross-examination," and so on. I don't quite think that is a good way to work it, but I mean I suppose there is a chance of a difference of opinion there.

MR. LEMANN: What I am pointing out to you, among other things, Charlie, is that I think you are unjustified in your comment that this shows that our phrase, "except as to the amount of damages", is a blind phrase. I don't think it does support that comment, because this was a very unusual case. What we meant by "except as to the amount of damages", as Mr. Sunderland has said, is a default case, a personal injury case, or some other case where liability is claimed, and all you have

to do is fix the damages. Here was a case where the so-called damages went to the whole basis of the cause of action, and I don't think that that justifies any stricture on our rule as to its being blind in that regard.

THE ACTING CHAIRMAN: Just a minute. I was then going to turn to what I think is the central question, and that is on the meaning of this phrase, and it seems to me to come up particularly in that sentence of Mr. Justice Jackson's where he emphasizes the phrase and he says, ".... the undisputed facts leave the existence of a cause of action depending on questions of damage which the rule has reserved from the summary judgment process". That is the part that seems to me to say something that we didn't intend the rule to say, "on questions of damage which the rule has reserved from the summary judgment process". The rule hasn't reserved damages as such, according to our intention.

MR. LEMANN: It has reserved damages from the summary judgment. I think it has. If Jackson meant that we meant to exclude the whole case from the summary judgment process, he was wrong, but we did mean to exclude the point of damages from the summary judgment process.

DEAN MORGAN: The amount of damages.

MR. LEMANN: I mean the amount of damages.

DEAN MORGAN: Not the existence of damages.

MR. LEMANN: The amount of damages.

DEAN MORGAN: All right, that is what we intended to exclude. Here, this depended on the existence of damages, not on the amount of damages.

MR. LEMANN: That is right in this case. That is why this case didn't involve that phrase.

DEAN MORGAN: I know, but he says it does.

MR. DODGE: He says it is doubtful.

DEAN MORGAN: He is throwing a doubt on the whole question.

PROFESSOR SUNDERLAND: No. He says that in a case where damages are a part of the cause of action itself, he thinks we can't use the summary judgment process; in other words, where there is no liability, unless you can show damages.

DEAN MORGAN: That is right.

MR. LEMANN: We have said generally that you can't apply the summary judgment process to the determination of damages.

THE ACTING CHAIRMAN: I don't think we have said that, no. I think what we intended to say was that where damages are disputed, you nevertheless can have summary judgment for the rest; and I think we intended to say, and I thought we had said, that where there is no issue as to damages (that is, if you want to put it the other way around, where the amount of damages is not disputed) you can get summary judgment. If I understand what he means, he says--

MR. LEMANN (Interposing): He says it is doubtful. He doesn't deny that. He says it is doubtful, doesn't he?

DEAN MORGAN: I know, but we don't want to leave it with any doubt.

MR. LEMANN: You don't think it is doubtful?

DEAN MORGAN: I think it may be.

THE ACTING CHAIRMAN: I didn't think it was doubtful until I read what he said. I might add this (I don't know that this adds much except that it shows the view of a commentator): I had looked at the case, and I hadn't paid very much attention to it and thought it was probably something about which reasonable men or judges were differing and that that was all there was to it. I got a letter from Mr. Willis, who is now the Managing Editor of the Federal Rules Service. The others are in the Navy or elsewhere. He said, "We are greatly disturbed about this. I have written a commentary on the decision suggesting that Mr. Justice Jackson has misinterpreted the rule. Will you look it over?" I have his comments that he intends to print. I read them over, and I talked with Mr. Moore. I wrote back to Mr. Willis and said that I thought he was correct. I presume that means that in a week or so his commentary is coming out, discussing it along the line I have been saying here.

PROFESSOR CHERRY: Did we really need to say anything in (c) about damages? In (a) we already had the statement that he moves "with or without supporting affidavits for a summary

judgment in his favor upon all or any part thereof." If in (c) we simply said that, even though upon his motion for judgment on all of it, he doesn't show that he is entitled to that, any remaining showing which he is not entitled to judgment on remains for trial, without specific damages, that would have taken care of the difficulty that has crept in. Whereas we didn't specify any other issue, we did specify damages just as a particular one of those that would often be in that category.

THE ACTING CHAIRMAN: Yes, I think that is so.

MR. LEMANN: We have Stone referring to the language of (d), which says in the second sentence: "It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy". Isn't that plain?

PROFESSOR CHERRY: I would leave that out.

DEAN MORGAN: That is plain.

THE ACTING CHAIRMAN: I should think so. Justice Stone, the Chief Justice, referred to that part of the provision.

I don't want to read all this, but here is a little of the commentary of Pike, Fischer, and Willis, "On summary judgment as to damages in Sartor v. Arkansas Natural Gas Corp., the Court said," and so on. He quotes what the court said and this provision that I have quoted, and he has underlined

"except as to the amount of damages, there is no genuine issue". Then he goes on. This is the Federal Rules Service.

"While it is not intended to criticize the final result of the case, it is believed that the doubt which the Court expresses is unwarranted by the rule. The italicized language in Rule 56(c) does not mean that questions of damage are reserved from the summary judgment process in that summary judgment can never be granted on matters of damage. What the rule means is that the existence of a genuine controversy as to the amount of damages is no bar to summary judgment, if there are no other issues in the case.

"This interpretation of the rule seems to me the more reasonable one, since there is nothing so peculiar about the issue of damages that it should not be susceptible of summary determination in a proper case. Indeed, the Rule 56(d) expressly provides that if summary judgment is not granted on the whole case of all the relief asked, if trial is necessary the court shall make an order specifying the facts that appear without substantial controversy, 'including the extent to which the amount of damages or other relief is not in controversy,' and on the trial the facts so specified shall be deemed established.

"On the other hand, the amount of damages will often be the only matter in the case as to which there is any room for contest, but in such case there is usually no reason not to

grant summary judgment subject to a later determination of the amount of damages by a court or jury."

Then he goes on quoting district court decisions to that effect. He cites several and discusses them.

PROFESSOR SUNDERLAND: Suppose we add to this thing that statement you just read, that where there is an issue of damages, the judgment shall be subject to a later determination as to the amount thereof. Just put that in, and that would make it clear.

MR. LEMANN: The real point in this case, the real thing they decided, was that if the plaintiff relied on expert witnesses, and the defendant denied the correctness--

THE ACTING CHAIRMAN (Interposing): It has to be the other way around, not that it makes any difference.

MR. LEMANN: That the moving party relied on expert witnesses, and the resisting party had no evidence of his own, but simply denied the correctness of the statements of the experts; that in such a case you couldn't have a summary judgment. That is the really important point in the case. You think that is wrong.

MR. HAMMOND: I think it is a little more than that.

DEAN MORGAN: I think he has to bring some kind of evidence. It seems to me that this raises exactly the same kind of question as whether verified denial prevented the striking of an answer as sham at common law.

PROFESSOR CHERRY: I don't know that it does when you get into expert evidence on a topic of this sort, because that stuff may all fall to pieces on cross-examination.

DEAN MORGAN: It may, of course. It seems to me the defendant can show why or wherein, rather than just simply deny it, as Monte says.

MR. LEMANN: Is that all he did?

DEAN MORGAN: I don't know.

MR. LEMANN: Mr. Hammond, were you going to say something?

MR. HAMMOND: I think there was a little more than that in it. There was an affidavit of the attorney for the defendant in there.

THE ACTING CHAIRMAN: No; for the plaintiff, affidavit of the plaintiff analyzing the expert testimony and saying in effect that it was no good.

MR. HAMMOND: It was of the plaintiff?

THE ACTING CHAIRMAN: Yes. The defendant moved.

MR. HAMMOND: It was of the party against whom the motion had been filed.

MR. LEMANN: I wonder why he didn't get some experts of his own, to get affidavits. That would have been so easy and would have saved us all this talk.

MR. HAMMOND: There was also in the case, Mr. Lemann, the fact that the jury in these previous trials had decided

that there was a market value in excess of this three cents on the day which followed the period covered by the claim. In other words, there had been a verdict of the jury which had established a market price, we will say, on March 1 of a given year, and the period covered in this claim went up to February 28. So the counsel in this case contended that it couldn't have changed, that it wouldn't have been three cents on February 28 and four-and-a-half cents on March 1, and the jury found it was four-and-a-half cents then.

DEAN MORGAN: Was there any evidence in the case from which the jury could have found it? Why did they have the other trial?

MR. HAMMOND: The facts are a little complicated, but this covered a different period from the period covered by the third trial. I have forgotten why, but that is a fact.

MR. LEMANN: Isn't it correct to say, in any event, that before we could proceed to change this rule because of that decision, we ought at least all of us to have read the opinion before we came to vote any change? If we are not going to consider any change, then we can pass on. If we are going to consider that that decision renders clarification necessary, I think we all ought to read it, because we have heard enough to indicate that it is a rather unusual case.

MR. HAMMOND: It is a most unusual case, and I suggest that that is probably--

DEAN MORGAN (Interposing): All your reading of the decision won't change the language of Mr. Justice Jackson to the effect that where the cause depends on the amount of damages, it is at least doubtful whether a summary judgment can ever be granted.

MR. LEMANN: Let's look at the briefs, too.

PROFESSOR SUNDERLAND: He doesn't quite say that. He says, "Where the undisputed facts leave the existence of a cause of action depending on questions of damage".

DEAN MORGAN: I grant that. I think that is clearly wrong.

PROFESSOR SUNDERLAND: It is the existence.

DEAN MORGAN: All right. That is clearly wrong. It is clearly wrong, because if the evidence is undisputed that there is some damage, then you get summary judgment. Jackson says you don't or at least that it is doubtful that you will. I think there is absolutely no doubt about that question. He would be practically saying that in any action in a case at common law where damage is of the essence, you are never going to get a directed verdict or you are never going to have summary judgment. That is practically what he is saying.

PROFESSOR SUNDERLAND: I don't think he said that. I think that isn't right.

MR. LEMANN: How would you draft language to make it so plain that he wouldn't say it again?

DEAN MORGAN: I would strike out the part about "except as to the amount of damages".

MR. DODGE: And put it in at the end of the paragraph?

DEAN MORGAN: I would delete it where it is now.

PROFESSOR CHERRY: It has occurred to some of us, Mr. Chairman, that we might use some of our rules on Mr. Justice Jackson. Why shouldn't we tender him a fee to come from next door? The expression seems to be doubtful to us. Why not submit interrogatories or give him a fee to come from next door one of these days and tell us--

MR. LEMANN (Interposing): --what a declaratory judgment is.

THE ACTING CHAIRMAN: That might be a good idea. I will say this, Eddie: Mr. Moore suggested, just as you did, that the way to do this is just simply to strike out "except as to the amount of damages".

PROFESSOR MOORE: Then you have it in the next paragraph, if there is any issue as to the amount.

PROFESSOR CHERRY: That is what I was getting at. Get those words out.

DEAN MORGAN: If he is entitled to judgment, he is entitled to judgment.

MR. LEMANN: If you took (c) alone, you would say the sentence would read: "The judgement sought shall be

rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of any material fact and that the moving party is entitled to a judgment as a matter of law."

If you stopped there, Justice Jackson would come along and say, "Well, you can't have it in this case because there is a material difference; there is an issue as to one material fact."

DEAN MORGAN: What?

MR. LEMANN: The issue of the amount of damages. He say, "Therefore, you can't get it." Up to this point I think Justice Jackson would be correct. Then you would have to come to (d) and be sure that you had made it foolproof, you see.

PROFESSOR MOORE: Mr. Lemann, Justice Jackson said two things. First, he said that you never can have a summary judgment where damages are a part of the cause of action. Then he said, "If I am wrong on this, you can't get it in this case because there is a genuine dispute of fact."

MR. LEMANN: That is right.

PROFESSOR MOORE: We think he is wrong on the first proposition, don't we?

DEAN MORGAN: And he may be all right on the second.

MR. DODGE: He didn't lay it down flatly.

PROFESSOR MOORE: Yes. I am wrong on that. He said

it was doubtful.

MR. LEMANN: The point is that when so eminent a jurist as Mr. Justice Jackson is doubtful, the rule needs clarification. That is the argument of Justice Morgan?

DEAN MORGAN: It is perfectly clear that it is doubtful when he tells the whole profession that it is doubtful.

THE ACTING CHAIRMAN: When seven justices of the highest court of the land tell the profession that the rule is doubtful.

MR. LEMANN: As I understand it, they don't commit themselves to all the language used in an opinion, or they would never get through. It has to be very bad language for them to question it, notwithstanding their bricks at each other. A good deal of the language that gets by represents the writer's opinion.

PROFESSOR CHERRY: They don't throw all the bricks they might; isn't that right?

THE ACTING CHAIRMAN: That is always a problem. I have worried about that often at times, and I have discussed it with Learned Hand.

PROFESSOR CHERRY: What do you do?

THE ACTING CHAIRMAN: We have discussed how far we were bound by what our colleagues said. One of his answers was to laugh and say, "You should have been on the Court when Mann was here."

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PROFESSOR CHERRY: I just wondered. With you, do you stand for everything that Learned Hand puts in an opinion where you don't dissent?

THE ACTING CHAIRMAN: It sometimes gets worrisome just how much we do. As a matter of fact, we are always accused of doing it. There isn't any doubt about that. When the lawyers come back, the least little expression in the case is taken as though it were immediately gospel.

SENATOR LOFTIN: When a judge wants to protect himself, he says, "I concur in the result."

THE ACTING CHAIRMAN: Yes, and then the author of the opinion doesn't like it very well and asks, "What's biting you?"

DEAN MORGAN: But when one of the best judges on the court of last resort says your language leaves him in the air, it ought to be clarified. I don't think I see how you can debate that, Monte.

MR. LEMANN: I didn't challenge it. I was just trying to develop the argument pro and con. I rather think that is correct. If he said it is doubtful, we had better make it plain.

THE ACTING CHAIRMAN: What do you say would be the loss, if any, to the rule, of just striking out those doubtful words?

MR. DODGE: I was wondering whether paragraph (d)

would then fully cover the situation.

PROFESSOR CHERRY: That is the point I was raising.

MR. DODGE: If the question of damages is distinct from the question of liability, you want a judgment entered for the plaintiff and the question of damage is reserved, (d) doesn't exactly cover that. It calls for a finding as to material facts not controverted. You might strike out the words "except as to the amount of damages" and add a sentence there to the effect that "Where the only genuine issue is as to damages, distinct from the question of liability, judgment may be entered for the plaintiff."

THE ACTING CHAIRMAN: I should think so.

JUDGE DOBIE: Would the "amount of damages" be better?

DEAN MORGAN: Yes, the "amount of damages".

MR. DODGE: I didn't try to get at the exact words, but it seems to me that something like that would remove the difficulty caused by that expression of doubt.

DEAN MORGAN: That is what ought to be done, I think.

MR. LEMANN: Would you then change (d), or would you have some repetition in (d)?

MR. DODGE: Leave (d) as it is. That is the extent to which the amount is not in controversy. We are speaking now where the only controversy is as to the amount of damages, distinct from the question of liability.

PROFESSOR CHERRY: I don't know. You are leaving in

what is now in (c), Mr. Dodge?

MR. DODGE: No. I am striking out "except as to the amount of damages".

DEAN MORGAN: Then adding a sentence.

MR. DODGE: Adding a sentence at the end that you may have judgment for the plaintiff if the question of damages, which is not part of the question of liability, is the only question as to which there is a dispute.

MR. LEMANN: Let me ask you this. As I understand it, judgment shall be entered if there is no genuine issue as to any material fact. Then we are going to take damages out. Then (d) comes along and says you can enter that judgment if some of the facts are not doubtful. You can enter an order if some of the facts are not doubtful, but others are. That is not a judgment.

MR. DODGE: That is an order specifying the facts that appear without substantial controversy, and then directing appropriate proceedings to finish the case.

MR. LEMANN: But now the first two lines of (d) say: "If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked". That is a final judgment.

THE ACTING CHAIRMAN: You mean under (d), the partial one is final judgment?

MR. LEMANN: Yes.

THE ACTING CHAIRMAN: I should think that our 54(b) excellently took care of that and said it was not final.

MR. DODGE: Don't you think we can deal with it the way I suggested?

THE ACTING CHAIRMAN: I think that is fine. I don't see why that isn't all right.

JUDGE DOBIE: Well, I make that motion.

THE ACTING CHAIRMAN: Any discussion?

SENATOR LOFTIN: Second.

JUDGE DOBIE: What Mr. Dodge suggested there--

MR. DODGE (Interposing): Leaving to the Reporter to put in the proper words.

THE ACTING CHAIRMAN: --was to strike out "except as to the amount of damages in (c) and to make a separate sentence along the line that he gave.

JUDGE DOBIE: Showing that where there is no question as to liability and the only question is as to the amount of damages, then a summary judgment can be granted.

THE ACTING CHAIRMAN: Yes. Then (d) stands as it is. All right, are you ready for the question? All those in favor will say "aye"; those opposed. It is so voted. (Carried) That is all on 56.

On 58 there are two matters of some importance. The first one, I think, is the change of the language in 6 and 7, and you will see that I have suggested a change in it on page

53. I hope that that can be made. I understand Mr. Morgan agrees. I think there were some others. I rather think Major Tolman did.

MR. HAMMOND: Yes, he did.

THE ACTING CHAIRMAN: I will explain the reason for it. First, I think it is a shorter, more direct statement, anyway, and it might stand just simply as a matter of language. But the main reason that I had in mind was that some clerks, not all, seem to be very reluctant to enter judgment, and they hold the matter off and require what is almost a specific, absolute direction from the judgment. I mean more than a finding. A judge may say, "Judgment is therefore to be entered for the plaintiff," and the clerk won't take that but will wait until the judge writes something out. "I direct that judgment be entered so-and-so," which is really quite unnecessary, and I think a good many of the clerks do not require that. For example, the clerk in the District Court of Connecticut, who is an old hand and handles it very well, won't require that, but some other clerks will. That means that you are going back to the judge in very simple cases, where it isn't necessary.

The reason we added the words here where we changed "there be no recovery" to "all relief prayed for be denied" was that we wanted to hit cases such as bankruptcy discharge, where the direction was that the discharge be denied, and some clerks had felt that that wasn't covered by the explicit

language of the rule. So there was voted at the last meeting the provision that "all relief prayed for be denied". That is a step along the line, and the intent is quite all right, but I fear that language is still too technical, and the very case that I gave you where the judge in his memorandum says, "Judgment therefore should be entered denying the discharge," isn't quite in our language.

Therefore, I want to make a simpler and more direct statement, not using words that seem technical, like "praying for relief," and so on. Simply say: "When the court directs that a party recover only money or costs or that all relief be denied, the clerk shall enter judgment forthwith upon receipt by him of the direction;"

DEAN MORGAN: Strike out the "prayed for"?

THE ACTING CHAIRMAN: Strike out the "prayed for" and "the entry of a judgment", and so on.

DEAN MORGAN: Yes. "that all relief be denied".

MR. DODGE: That would be applicable to an injunction or a specific performance where the relief was denied.

DEAN MORGAN: Yes, all relief denied.

MR. HAMMOND: Why strike out the words "the entry of a judgment"?

THE ACTING CHAIRMAN: It is the same idea. In the first place, why in the world are they necessary? This rule is on the entry of judgment, and there is no gain in putting them

in. Directly, you take them out anyhow. The additional affirmative reason is that if you are going to have a clerk who requires a definite statement, he can say that you have to have a statement, "I direct that judgment be entered for so-and-so," and unfortunately there is a tradition in New York in the state courts that the judges wait until they get a formal order, and then they mark on it "entered," and sign their initials. What all this results in is that you are not having any entry of judgment until you have had a formal drawing up of a judgment by counsel.

I think I told you before of a case where I sat in the district court and directed judgment to be entered forthwith for so many dollars damages, and I found sixty days later that the judgment hadn't been entered at all. I found it out simply by the fact that they then submitted a judgment to me to be endorsed as approved, when it was for a simple entry of money and costs.

Here again I can't say that the rule will settle all this. The rule may not. If a clerk won't enter judgment, I don't know anything in the world that can make him. I don't think even a mandamus would. Nevertheless, I think you can make it as simple and direct and as free of ambiguity as possible.

DEAN MORGAN: How does yours read now?

THE ACTING CHAIRMAN: "When the court directs that a party recover only money or costs or that all relief be denied".

DEAN MORGAN: That is what I wanted to know. You strike out the entry of the judgment. I agree.

THE ACTING CHAIRMAN: Is there any objection to that? Shall I take it that that is accepted?

There is one other point to be raised. The other point is the point at the end, which we have considered, and I bring it up only because Mr. Mitchell seems to be somewhat doubtful. I am a little surprised on the whole, because I am quite sure that earlier he was not. Our lines 12 and 13 read: "The entry of the judgment shall not be delayed for the taxing of costs." I think we have discussed this many times.

DEAN MORGAN: Have we the minutes of the last meeting? I thought Mr. Mitchell was for that. I thought he said that you ought not to delay the entry of judgment for the taxing of costs.

THE ACTING CHAIRMAN: I know he was for it in May, and quite strongly for it.

DEAN MORGAN: Yes.

THE ACTING CHAIRMAN: I am not sure. I will be perfectly frank that I thought in October he was weakening, but I don't know whether that is very important, because it is quite clear that now he has weakened.

DEAN MORGAN: Yes.

THE ACTING CHAIRMAN: In his memorandum he says: "In New York, the state law requires that, to be recorded in a

county clerk's office so as to be a lien on real estate, a judgment must be complete, with no unfilled blanks as to amount. Accordingly, the Federal District Court for the Southern District has a practice and local rule that entry of judgment be not made until the amount of the judgment is completed by inserting costs," and so on.

"I do not see any objection to that practice. After all, the man who gets the judgment is the one to bring about taxation of costs. Instead of the underlined sentence in lines 12 and 13, why not substitute the following:

"'The entry of judgment may be postponed by the clerk until costs are taxed or waived.'"

All I can say is what I have said earlier, that I hope that isn't done. I think that is quite unfortunate. I don't think the objection made by the clerk in New York is one that necessarily need hold up all the judgments. It is perfectly easy to provide for an endorsement of the costs at the foot of the judgment or to provide, if you wish, for supplemental order as to costs, or, in the particular case involved, the filing of the judgment in the New York local records can be delayed until it is filled in. After all, in the district court that issue is only a small part of the total number of judgments. I can't tell, of course, without having counted noses. I should have liked to have done it. If I had thought, I might have had it done. But it is perfectly obvious that

of the hundreds of judgments entered in the Federal court, only a very small proportion are going to be filed in the local land records. I mean they are judgments involving bankruptcy and admiralty and patents and unfair competition, and so on. Once in a while, if you have a judgment of copyright infringement, it is conceivable that the defendant author might have some land, and you would want to file the judgment there, but that is a very unusual case. It isn't very likely.

What I am saying is that you are making the entry of judgments in all cases delayed for what, even at best, is only a very small proportion of the cases. It hasn't been necessary before. In the cases that we put in in the footnote to 52, it is well settled in the decisions that the judgment is not to be held up for the entry of costs, and it seems to me that this local practice which has developed in Southern and Eastern Districts of New York is just a violation of the rule, and is unnecessary. It doesn't seem to me that all over the country, not merely the one place where this has come up (that is, the Southern District of New York and the Eastern District), you should delay the entry of simple judgments really just to satisfy a local worry that I don't think is very well founded.

JUDGE DOBIE: Is there any objection to that sentence?

MR. LEMANN: Mr. Mitchell makes some.

JUDGE DOBIE: Only Mr. Mitchell?

MR. LEMANN: Judge Clark, I notice you say, on page

52, the last paragraph, line 5, "although the federal rule is of long standing and well settled." What Federal rule do you refer to there? Obviously not our rule.

DEAN MORGAN: The entry of judgment immediately, without waiting for taxation of costs.

MR. LEMANN: Where is that rule?

JUDGE DOBIE: Practice.

THE ACTING CHAIRMAN: "Rule" is perhaps wrong. It is the Federal law, the Federal decisions. We went into those decisions very thoroughly, and those decisions are very clear and explicit. I think maybe in the note we ought to change "rule".

MR. LEMANN: Those are cited from a long time back: 1856, 1897. That is prehistoric.

PROFESSOR SUNDERLAND: How is that done, as a matter of mechanics where you have to pay the costs? How do you grant the judgment?

DEAN MORGAN: Charlie, you have just shown how doubtful the rule is.

THE ACTING CHAIRMAN: I have shown what?

DEAN MORGAN: How doubtful it is at the present time. It has been established for so long, it is time to upset it.

THE ACTING CHAIRMAN: Oh, I see.

MR. LEMANN: No; because a rule handed down last week is no better than a decision handed down fifty years ago.

THE ACTING CHAIRMAN: I think there are various things that can be done, but let's take the simplest thing. The judgment is entered, and it is a final order, but suppose that it isn't taken in the land records then. Suppose there is a difference between the time of the entry of the judgment, say five days, and the time that it becomes properly filable in the land records. That then means that for five days it isn't noted in the land records, but that is all it means.

MR. LEMANN: I asked Mr. Dodge what his practice is. Our practice is that you get judgment for so many dollars and costs, and that is all the judgment ever says. It never undertakes to fix the amount of costs. You come along afterwards by supplemental proceeding and tax your costs, and you get another judgment fixing your costs.

PROFESSOR SUNDERLAND: But your judgment is final where it merely says "and costs." That is final.

MR. LEMANN: That is final, and that is all we ever had. Mr. Dodge says that in Massachusetts, as I understand him, that is also their practice in actions at law, but in suits in equity they have to fix the costs before they get final decree. Is that right?

MR. DODGE: That is right. The distinction is simply that the present practice in equity in Massachusetts requires that in the final decree, if you want costs and get them, costs taxed in the amount of so many dollars must be in

the decree. It is perfectly simple to change that and have the decree call for costs to be taxed.

MR. LEMANN: If we decide to eliminate this, isn't there a provision in the Federal law that the states must provide for the recordation of Federal judgments?

THE ACTING CHAIRMAN: I think it is the other way around.

MR. LEMANN: Income tax liens, I know.

THE ACTING CHAIRMAN: I think it is this way: that the Federal judgment is a lien, except that the state law may require that it be recorded to be a good lien. That is, it is a kind of negative thing. If the state law is quiet--

MR. LEMANN (Interposing): Mr. Mitchell says you must fix the costs in New York law. He says, "In New York, the state law requires that, to be recorded in a county clerk's office so as to be a lien on real estate, a judgment must be complete, with no unfilled blanks as to amount."

I was just wondering whether we could cover his New York situation and perhaps similar situations by an express provision that a judgment could merely say, "Costs to be taxed," and it would be final in that form.

PROFESSOR CHERRY: It wouldn't be any good. New York law would prohibit it.

MR. LEMANN: I would ask, could New York law prohibit such a judgment validly made and recorded?

THE ACTING CHAIRMAN: I don't know. I don't know this specific law. I know the clerks view that it must be filled out, and there may be a specific statute. I always thought it was probably a construction of the New York law. I don't know enough about it, but I doubt that it is a statute. I think it is probably a decision of the New York County Clerk, who says, "Why, look. There is something that isn't in here," and he probably refuses it. You can't mandamus him and expect to get anywhere.

MR. LEMANN: Probably it is a New York decision.

THE ACTING CHAIRMAN: Passing that, I don't know, although I should think it would not be irrational to say that if the New York recording system is reasonable enough so that it fits in with the Federal law, then the Federal law must comply with the state system. You see, the idea of the Federal system is that the Federal judgment must be a lien , and if it is not taken care of by state law, it is a lien from the date of judgment, and in those states the title search has to go to the Federal court and search the Federal district court clerk's office. But if the state law has a recording system, then the Federal lien must follow the reasonable recording system of the state law, and I guess that this probably would be all right then.

As to your next point, which is whether we shouldn't provide for taking care of it, as a matter of fact, I don't see

why these cases don't really do it. Some of these cases leaving the thing blank; some of them just say, "or costs", and there are holdings that the judgment is entered at once and is final. I don't know of any that particularly talk about what happens in the state law. It is true they talk about Federal law. Nevertheless, there are cases where the costs were not actually taxed. I wonder if they don't cover it adequately.

MR. LEMANN: I shouldn't think we would want to adopt Mr. Mitchell's substitute, which would be a clear invitation to postpone entry of judgment.

DEAN MORGAN: Neither should I. I think that would be terrible.

MR. LEMANN: The only point, really, I should think, is whether we shall insert it notwithstanding his misgivings as to whether we should leave it alone.

THE ACTING CHAIRMAN: I should think the only thing that you would put in (and I wonder if it is very necessary) would be something like this: "The entry of the judgment shall not be delayed for the taxing of costs, but they may be added either to the foot of the judgment or by a separate order." I think that is the idea, but is that very necessary? Also take the other alternative, which I should think, if I were a lawyer, was the simplest thing to do. I would file my judgment in the record in the district court clerk's office. Then, under the Federal law, it would be final, and so on. I would tell the

clerk, "You have to accept it because that is the law." But then, if I didn't have the costs taxed, I would go around two days later and say, "Here are the costs. Now give me a certified copy for the land record." What harm has been done?

The only harm is that for two days I haven't been able to file it in the land record, and I haven't got that much notice to innocent purchasers; but, of course, under Mr. Mitchell's rule or under the state law, I wouldn't have it anyway. I mean, I am no worse off, am I? I am in a sense a little better of on questions of finality and execution through the marshal, and so on. I have it immediately, and I get notice as soon as I have a right to have notice under the state law.

MR. LEMANN: Of course, your illustration is unrealistic because the fellow who would do it in two days wouldn't give you any trouble. It is the fellow who waits two months and longer to tax his costs who makes the trouble. Why did you say you wanted to add that last sentence, "The entry of the judgment shall not be delayed for the taxing of costs"? Has it been some trouble to Clark, J., in his general field of observation of cases, or has anybody kicked about it? because I shouldn't think practically it was very important to add it. People who do business the way we do or the way they do in Massachusetts law go ahead and enter the judgment right away, as you want it done, and it is only in a few places that

I should think this point would ever arise.

THE ACTING CHAIRMAN: I have had a good deal to do with the places where it does arise. The Southern District and the Eastern District now have adopted their own rules, in which they provide that the judgment shall not be entered in the Federal office until the costs have been taxed. I think that is a violation of our rule and that it is also a violation of the decisions. There is one of these cases, The Washington, that is cited on page 53, where our Court said in 1926 that failure of the clerk thus to enter judgment is a "misprision" "not to be excused", and I think that maybe these district court clerks who follow their own district court rules conceivably may be subject to an action of damages.

MR. LEMANN: Do your district court rules sanction misprision?

THE ACTING CHAIRMAN: You say "your." Of course, they are not mine.

MR. LEMANN: Do the rules of the district courts in your circuit sanction and actually direct the commission of misprisions?

DEAN MORGAN: That is right.

THE ACTING CHAIRMAN: That is it.

MR. LEMANN: Isn't the remedy to go to your district judges and ask them how they can do such a thing?

MR. DODGE: What is misprision?

MR. LEMANN: If they persist after having their attention called to it, I doubt if they would change it because of our rule. "Misprision" sounds much worse to me than a rule of the Advisory Committee.

THE ACTING CHAIRMAN: Of course, you have to take these things as they exist. That can all be so, but you can't now get a judgment entered in New York as our Rule 58 provides. I mean in those two districts in New York. So far as I know, you can in the other two districts in New York. You can't get a judgment, because the clerk won't do it. You can try and mandamus him, if you will, but you don't get it. That is just the situation.

JUDGE DOBIE: I think we ought to put it in, anyhow, whatever they do in New York.

MR. LEMANN: The Chairman will have his blood run a little extra cold, but I am willing.

THE ACTING CHAIRMAN: It seems to me that, fairly considered, there is now a very definite ambiguity. Of course, we can sit here and say, as I do say and am perfectly willing to say, that those two district court rules are quite illegal, but certainly the lawyers aren't going to say that. The lawyers are intimidated by those rules.

DEAN MORGAN: Let me ask you this: What is the practical importance of this? Is it that the plaintiff delays the game or that he can prevent the defendant from getting up

to a certain term of court on appeal, or what is the practical disadvantage of the New York rule, if they want to do it that way?

THE ACTING CHAIRMAN: Maybe it doesn't make any difference, of course; maybe it does, but the practical effect of the New York rule is that the clerk never enters the judgment. I never have been able to get him to enter a judgment. As I said, I write down in black and white, "The clerk is directed forthwith to enter a judgment," and two or three months later they come up and ask, "Why hasn't the clerk entered the judgment?" In fact, in one case where I sat in the district court, a three-judge court, the parties wanted to appeal (it was this City of Yonkers case) and they wanted to go immediately to the Supreme Court to get a stay for abandoning the trolley line up to Yonkers. We wrote our decision and directed that the clerk should enter judgment immediately. Then I told the lawyers to go down to the Supreme Court and ask them for a stay. They came back and said, "The clerk says it will be several days before the judgment is entered." I said, "Well, what does 'forthwith' mean?" They said, "The clerk says he can't enter it until he gets the copies that the lawyers have drawn up, that have been approved by the court."

So I went down and said, "Here, now, this is the judgment." I wrote it out myself.

Maybe that is all right, I don't know. Maybe our

rule doesn't mean anything which says that the clerk in certain cases shall enter the judgment. Actually, in New York they don't do it, and I don't know how you are going to make them if you give them various ways out of it. It seems to me that this is a desirable thing to have, or else what in the world does our rule mean in those big districts, which says that the clerk shall enter judgment forthwith? I just dare you to get a judgment forthwith in New York. You just don't get it.

MR. DODGE: Those delays are not all on account of costs.

THE ACTING CHAIRMAN: No. Of course that is true. I mean that is only one thing. The other was the entry of judgment. That is a matter we tried to correct, also. But the clerk has just established his practice, which he justifies in large measure by the district court rule and by this costs rule.

DEAN MORGAN: To bring the matter to a head, I move the adoption of the rule as it is suggested here.

JUDGE DOBIE: I second the motion.

THE ACTING CHAIRMAN: All those in favor will say "aye"; those opposed. It is so voted. (Carried)

... The meeting adjourned at 6:20 p.m. ...
