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FRIDAY MORNING SESSION

March 26, 1954

The meeting of the Advisory Committee on Rules for Civil Procedure reconvened at 9:30 o'clock, William D. Mitchell, Chairman of the Committee, presiding.

CHAIRMAN MITCHELL: Gentlemen, I suggest that we get started.

JUDGE CLARK: I think it would be a good thing to take up now and settle some matters that were put over. The first one would be the note, shall I say the famous note, on Rule 8(a)(2), the Ninth Circuit matter. Mr. Lehmann has done his stint. I have seen it, and I think it is fine. I suggest that we have Mr. Lemann present it and see if we can dispose of it.

MR. LEMANN: I believe copies have been distributed. The only change I have made is to write a paragraph to go in at the end of the first page of my redraft of Senator Pepper's suggestion. I think this would go in at the end of the first page, and then the note would conclude with the second page of the redraft. Everybody has it, I assume.

There was a change to take out the words "of opinion" because my attention has been directed to the fact that it is tautological to say "consensus of opinion" because "consensus" means consensus of opinion.

PROFESSOR MORGAN: Yes. I didn't have the nerve to suggest it.

MR. LEMANN: The note would conclude with the general statement which appears in the last paragraph of the redraft as a summary of the Committee's views.

JUDGE CLARK: The way this would go is that Mr. Lemann's note is a short first paragraph, then a longer second paragraph, then would appear this insert at the beginning of the third paragraph, and then what is now the final sentence would become the final sentence of the third paragraph and complete the note.

CHAIRMAN MITCHELL: Does the final draft of the note make the assertion that the opinion in the Dioguardi case was not intended to hold that no facts or occurrences need be stated?

JUDGE CLARK: Yes. Would you like to see it?

CHAIRMAN MITCHELL: No. I just wanted it there because that case has been thrown at me so much.

MR. LEMANN: Yes, it is specially referred to. That is one of the things I put back in the redraft, to be sure that nobody could say that we were just sticking our heads in the sand about it.

JUDGE DOBIE: I move the adoption.

MR. LEMANN: Also in the added paragraph that I drew I referred to he fact that there had been some minority criticism of the rule, in deference to Senator Pepper's suggestion at our first session at this meeting that the Ninth

Circuit might otherwise think that we were trying to deny that there had been some criticism.

CHAIRMAN MITCHELL: It has been moved that the draft be accepted. If there is no objection, that is agreed to.

JUDGE CLARK: All right. One other matter was that brought up by Dean Pirsig under the pre-trial rule, Rule 16, the suggestion of an addition which might cover the so-called "Big Case" or the protracted litigation. Dean Pirsig?

DEAN PIRSIG: This would be an addition to Rule 16, which begins, "In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider," and then there are six headings of matters to consider. I propose the addition to that list of the following.

JUDGE CLARK: Just a minute, Dean. Yours would be (6), and what is now (6) would become (7), I take it.

DEAN PIRSIG: That is right. What would then be (6) would read as follows:

"Where protracted litigation of an action is probable, the assignment of the action to a designated judge for the direction and disposition of all matters thereafter arising preliminary to trial, including deposition and discovery, before the trial of the action."

JUDGE DOBIE: Was any question seriously raised about the validity of that in connection with three-judge courts?

I take it if they are referred to one judge, the actions of the one judge would be confirmed by the court, wouldn't they?

JUDGE CLARK: I should not think there would be any doubt. It is not intended to override statutes. I should say if there is some feeling that that is not clear, it would not be difficult to put in an "except" clause there, "the assignment to a single judge except where otherwise required by statute," some words to that effect.

CHAIRMAN MITCHELL: Would there be any objection to putting in a note in amending Rule 16 referring to the Prettyman Report and stating that we are of the opinion that substantially everything they recommend the courts now have the power to do, so that we cover that situation? I studied that report with that point in mind, and I reached the conclusion that the judge could do so without any amendment to the rules. I think it would be stimulating to the judges if we had a note mentioning that report. It is a landmark in the subject. It would show that we have considered that problem and think the rules are broad enough as they stand.

JUDGE DOBIE: Your idea is that that would appear in the note.

CHAIRMAN MITCHELL: Yes. You wouldn't object to a note like that, would you?

JUDGE DOBIE: No. I think it is fine. I am now going to move the adoption of Dean Pirsig's suggestion and also

the note along the line that you have indicated.

MR. PRYOR: I second the motion.

MR. LEMANN: Could we hear that read again, Dean Pirsig?

PROFESSOR WRIGHT: I have it.

"Where protracted litigation of an action is probable, the assignment of the action to a designated judge for the direction and disposition of all matters thereafter arising preliminary to trial, including deposition and discovery, before the trial of the action."

MR. LEMANN: Then there will be a reference to the Prettyman Report, I understand.

CHAIRMAN MITCHELL: In the note. Without objection that is agreed to.

JUDGE CLARK: That is to be inserted in the rule, not just a note. We will have both. Is that the idea?

CHAIRMAN MITCHELL: The idea is to have his paragraph (6) in the rule, and a note explaining that we have considered the Prettyman Report and believe that everything that is recommended in there a judge can do. If you want to add anything in the note about three-judge courts, not trampling on that statute, you can do that.

JUDGE CLARK: My final question was whether you want anything in the text or just in the note about the three-judge court.

CHAIRMAN MITCHELL: I think it ought to go in the note.

MR. PRYOR: The only question I have, which is not much of a question, is that I wonder if the proper place for that is not in Rule 16 on pre-trial procedure. It starts out, "In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider" these various things. Are the attorneys and the court going to consider this question raised by the additional thing?

CHAIRMAN MITCHELL: Why not?

MR. PRYOR: I am just wondering if it should not go in a separate rule rather than in this rule, that is all.

CHAIRMAN MITCHELL: It really is a pre-trial matter.

JUDGE DOBIE: I believe that is the place for it.

MR. PRYOR: It is a direction of the court, isn't it?

CHAIRMAN MITCHELL: First, there ought to be a limitation on the number of exhibits.

MR. PRYOR: I am not questioning the wisdom of the rule.

CHAIRMAN MITCHELL: Where would it be more appropriate, in your opinion?

MR. PRYOR: As I suggested, I am just wondering if it should not go in a special rule, a separate rule. It is a direction of the court; it is not something that the attorneys

have anything to do with, it seems to me.

CHAIRMAN MITCHELL: What is your pleasure about that?

JUDGE DOBIE: I would rather have it go in here. I think it is bad, unless it is essential, to put in a new rule where you can cover it under the old ones.

JUDGE CLARK: I don't mean to forecose it at all, but you may remember my suggestions in May were for a separate discovery rule, which was rejected at that time. You can always reconsider, but at that time we thought it undesirable.

MR. LEMANN: A separate discovery rule?

JUDGE CLARK: In protracted litigation cases, much like this. The general idea there was that it was unnecessary, that it could be done. Of course it is still unnecessary, but perhaps it is less markedly surplusage to put it in here. I think that was the objection before, that if we put it in discovery that might have raised some question about it, it made it seem that you had to have it in, and so forth.

MR. PRYOR: I am not objecting to it. I am just raising the question.

CHAIRMAN MITCHELL: If anybody has a motion to put it in some other rule, it will be submitted.

MR. TOLMAN: It is really a sort of calendar device for the judge, is it not? We have a rule, 79(c), which speaks of calendar.

CHAIRMAN MITCHELL: The whole tone of the pre-trial

rule is that the court take hold of the issue and deal with delay, surplusage, and all that sort of thing; and it seems to me that this is an appropriate place to put it in.

JUDGE DOBIE: General, I renew my motion that it be put here as indicated by Dean Pirsig, with a note.

CHAIRMAN MITCHELL: It has been moved that the material we have talked about be put in the pre-trial rule. Is there any objection to that? If not, it can go in as planned.

JUDGE CLARK: We were discussing and I think we had substantially finished our discussion of Rule 50(b). Does anybody want to bring up anything further? Monte, you had some threatening mien last night, didn't you?

MR. LEMANN: Some what?

JUDGE CLARK: Some threatening mien, m-i-e-n.

MR. LEMANN: I was asking what was finally decided with respect to the material following the first paragraph, and I think that was disposed of.

JUDGE CLARK: I think it was.

CHAIRMAN MITCHELL: I thought we disposed of everything there.

JUDGE CLARK: We adopted all of (c), putting that first sentence of (c) up earlier.

PROFESSOR MOORE: Including the last sentence about cross-appeal?

JUDGE CLARK: Yes.

DEAN MORGAN: That is what I was wondering about. Bill's notion was that that ought to be rephrased. Isn't that right, Bill?

PROFESSOR MOORE: I would leave it out altogether.

DEAN MORGAN: I wouldn't.

JUDGE CLARK: On that, I am not very sure how much we need it. Of course, our authority is Moore's Federal Practice, paragraph 50.15, "Cross assignments of error by appellee is ground for new trial."

PROFESSOR MOORE: But that is not a cross-appeal, Judge.

JUDGE CLARK: We ought not to have a cross-appeal.

DEAN MORGAN: That is exactly the point, but what Bill says here is "bring up for review the ruling of the trial court on such motion for new trial." What he is insisting upon is that you don't appeal on the ruling with reference to the motion for new trial, because that is non-appealable, but that the errors which were considered on the motion for new trial. I should think if you bring up for review the ruling of the trial court on the errors alleged in the motion for new trial, you would meet Bill's point, and you would hit exactly what Roberts meant in his opinion.

JUDGE CLARK: There is no review, according to protestation, in the federal courts on the rulings on the weight of the evidence as to a new trial. You may have review of

rulings like rulings on the admission of evidence.

DEAN MORGAN: That is what I mean.

JUDGE CLARK: It would make it all very heavy, but of course you could say "bring up for review, so far as reviewable, rulings of the court, or you could say as you suggested --

DEAN MORGAN: But am I mistaken and is Bill mistaken in saying that you cannot on an appeal from the judgment allege errors of the court in denying the motion for a new trial?

JUDGE CLARK: I think that is correct, according to protestation.

DEAN MORGAN: What I do, of course, is assign the same errors, because I have already got them in the record. Isn't that right, Bill?

PROFESSOR MOORE: Yes.

DEAN MORGAN: So, according to his motion, you could say, "the rulings on the errors dealt with or alleged or specified in the motion for new trial."

PROFESSOR MOORE: That is not the same thing that Roberts was talking about.

DEAN MORGAN: I think it is.

PROFESSOR MOORE: Suppose the trial court denies a motion for judgment notwithstanding the verdict, and the defendant appeals. Roberts said that the plaintiff ought to have the right to cross-assign errors for the purpose of

defending his judgment in, say, the exclusion or admission of testimony which, although he recovered the verdict, if the appellate court says under the circumstances it should be set aside, he can say, "Because the errors were prejudicial to me, I am entitled to a new trial."

DEAN MORGAN: I think his objective was to have the whole case settled on the one appeal, it seems to me, instead of having him go back and make a motion for new trial and assign all the kinds of errors he would on a motion for a new trial. He makes a motion for new trial not only on the grounds of the insufficiency of the evidence, but on a lot of grounds.

CHAIRMAN MITCHELL: Maybe I am wrong, but I got the impression that what Roberts was driving at was that if a motion in the alternative had been made below, even though the court granted the motion for judgment notwithstanding the verdict, he would go ahead and decide whether, if that should be set aside on appeal, there should be a new trial, in order to avoid a second appeal. Isn't that what he was driving at?

DEAN MORGAN: Exactly.

CHAIRMAN MITCHELL: Does this accomplish that result?

MR. LEMANN: Yes. It says there must be a conditional ruling by the district court. I asked yesterday what happened if he didn't do it, and I was told that he has to do it, that he is told to do it, that it is unthinkable that he would not do it. Then I took a look at the language of our original

proposal in 1946, and I find we had a sentence in there to cover the case where he might not do it, so evidently we thought then it was thinkable that he might not do it. On page 107 of our report, lines 67 through 72 read:

"In case the district court has refrained from ruling upon the motion for a new trial when granting the motion for judgment, and the judgment is reversed on appeal, the district court shall then dispose of the motion for new trial unless the appellate court shall have otherwise ordered."

That does not seem to be in the present draft. Perhaps it should not be. I am just directing your attention to it.

JUDGE CLARK: Let me suggest that if Roberts had not raised the question and talked about cross-assignment of errors, and so on, I don't quite see how there could have been any question about it, because over and over it is stated in the cases and we go on the theory that you affirm the judgment for any good reason, not necessarily the reason the court may have gone on. I don't see why that would not cover it.

Another way, if you wanted to spell it out, is to follow somewhat the language Roberts used. This is a good deal what he used, I think a little improvement on it. You can say "bring up for review all errors of law," which is the expression he used, "alleged by the appellee to nullify any judgment on the verdict." I think that would do it and perhaps make it

clearer, only again I should suppose that would be almost a truism of law. The appellee, having won, could now assign any ground, I think, to sustain his winning, and therefore it may not be necessary. If it was spelled out, how about this?

DEAN MORGAN: I think that would take care of the notion that a ruling on a motion for new trial is not appealable. That is the thing that is worrying Bill. I think we ought, if possible, ot prescribe a procedure which will get the case settled once for all on a single appeal.

JUDGE CLARK: How about this thing? This language would be a substitution in the final sentence and a half, beginning with the word "review."

DEAN MORGAN: Where is that, in (c)?

JUDGE CLARK: Page 49 of my September draft, the last sentence.

DEAN MORGAN: Yes, that is right.

JUDGE CLARK: I will read the whole sentence as it would be with this modification.

"An appeal from a judgment granted on a motion for judgment notwithstanding the verdict shall of itself, without the necessity of a cross-appeal, bring up for review all errors of law asserted by the appellee to nullify any judgment on the verdict."

CHAIRMAN MITCHELL: Suppose the court below has refused to grant judgment notwithstanding the verdict but on

the alternative motion has made an order granting a new trial, and then that case goes to the court of appeals, the party appealing wanting judgment notwithstanding the verdict. Suppose the court grants it. He hasn't anything to do about the motion for new trial, has he? Why bring up any question about the new trial if the court of appeals has decided that it was a proper case for judgment notwithstanding the verdict? That disposes of the possibility of a new trial.

JUDGE CLARK: I think that would. That is one possibility for the appellate court. You see, this is an endeavor to give the appellate court power to do various things without requiring it to start over. In that event you wouldn't need anything more. However, in the event that a motion for a new trial has been granted in the trial court, the appeal comes up and is going to put over the point that there should be a reversal for judgment on the verdict, this provision now would not allow the appellee -- that is the one who got the motion set aside in the trial court -- to say, "Even so, because there were errors in the conduct of the trial, to wit, in the admission of such-and-such evidence, therefore the motion for new trial must stand."

CHAIRMAN MITCHELL: You mean the order for new trial, the alternative order.

JUDGE CLARK: Yes.

MR. LEMANN: You put a case, Mr. Mitchell, where the

appellate court felt there should be a judgment notwithstanding the verdict; but suppose the other case where the appellate court did not think that and then the argument would come whether there should be a new trial. I understand the purpose of the discussion is to give some way by which that could be passed on on the appeal.

CHAIRMAN MITCHELL: But the appellate court has no business to pass on it. It is not an appealable order. If the lower court in the alternative has granted new trial in the event the judgment is set aside, that is the end of it.

MR. LEMANN: Suppose he denied it. He can do it either way, as I understand it. Suppose he denied it, suppose he denied the motion for new trial, isn't that reviewable?

CHAIRMAN MITCHELL: I never understood you could appeal on that.

MR. LEMANN: I should think you could. Suppose there had been serious errors committed. The trial judge does not think so. He says, "The instructions were properly given, the case was properly conducted, and I deny the motion." I should think that would be reviewable.

JUDGE CLARK: I think you have to make the distinction that Roberts was trying to make in errors alleged in law. I don't think you can deny it so far as it is based on the weight of the evidence. That is for the trial judge. I think you can bring up any rulings as, for example, rulings on

on evidence.

MR. LEMANN: And errors in charging.

JUDGE CLARK: Yes. That necessarily then goes to the question, if there is error, was the error sufficient to require new trial?

DEAN MORGAN: You rely on the original ruling rather than on the denial of the motion.

CHAIRMAN MITCHELL: I don't like the clause as it stands. It looks as if the question of granting or denying a motion for new trial is a matter for the appellate court. I have always understood that that is the end of it.

JUDGE CLARK: Frankly, I don't think it is very necessary, for the reason that I stated.

CHAIRMAN MITCHELL: I think it is safer to leave that last clause out and say "An appeal from a judgment shall bring up" thus and so, and let the court of appeals apply what it thinks the law is, their right to consider a motion for new trial and their denial or granting of it.

MR. LEMANN: Why isn't the language of our original draft better than the language which is now proposed, Mr. Reporter?

CHAIRMAN MITCHELL: Read it.

MR. LEMANN: The language of our proposal apparently was identical with the language of the draft on page 49 down through the sentence ending in the middle of the sixth line on

page 49, and then we have the following language in our 1946 proposal which does not now appear:

"In case the alternative motion for new trial has been conditionally denied and the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court. In case the district court has refrained from ruling upon the motion for new trial when granting the motion for judgment, and the judgment is reversed on appeal, the district court shall then dispose of the motion for new trial unless the appellate court shall have otherwise ordered."

CHAIRMAN MITCHELL: There is one thing about that that sort of gags me, and that is that Roberts has said that the trial judge must pass on the motion for new trial on the supposition that the court might set aside the judgment, and you are assuming that the trial court has neglected to do what Roberts says he must do.

MR. LEMANN: I think it happens, and may happen. I don't think we ought to be blindly bound to follow the language that Roberts wrote, without the benefit of the kind of discussions that we have here, for example.

DEAN MORGAN: Certainly you ought to have it mandatory on the trial judge to pass on the motion for a new trial. Many of them won't if you put it your way.

MR. LEMANN: The preceding language says that he shall

do it. This is only to cover the case if he has not, and this says then he shall do it when it comes back from the appellate court, unless the appellate court says something to the contrary, which, if the appellate court follows Roberts, I should suppose it never would do.

You have to look at the whole language together. We have it in here. It is in the preceding language of the material now submitted, and it is also in the preceding language of our 1946 draft that the district judge is to do it. The language which I just read is to cover the situation if he overlooks doing it or fails to do it. It says that then he must do it unless the appellate court says something different. This is the sort of thing that I think it pretty hard to follow without the language right in front of you. It would be for me.

It does seem unfortunate that we are not able to draw a simple rule that would give wide, complete power of action in the proper way, without taking so many words to say it.

CHAIRMAN MITCHELL: If it had not been for Roberts' opinion as to the practice, if the upper court set aside the lower court's order in granting judgment notwithstanding the verdict, it would necessarily and naturally remand the case to the district court to consider the motion for new trial, but Roberts says he must have done it in the first place. It seems that it would be assumed that he had disobeyed the previous sentence in the rule in failing to pass on the motion. Could

19 they not still remand the case and direct him to pass on it?

DEAN MORGAN: Surely.

CHAIRMAN MITCHELL: If that is so, why do we need any so-called cross-appeal?

MR. DODGE: The draft in 1946 was different from this one, because it made it discretionary with the trial court whether or not to pass on the motion for new trial. You have to read the subsequent language in connection with that.

CHAIRMAN MITCHELL: Roberts thinks he ought not to have any discretion, that he ought to pass conditionally on the alternative motion, so that in the event the judgment is not allowed to stand in the court of appeals, he has disposed of the question, which is a trial court question, whether there should be a new trial.

JUDGE CLARK: This is all declaratory. This is an attempt to regularize and make clear and state the procedure at which Roberts was aiming there. How much we need to tell what is so is always a question of proper phrasing, I suppose. I am inclined to think that this is gilding the lily more than we need to. I think we might as well leave it out of the rule.

DEAN MORGAN: If you were down in Tennessee you would not think so. I can tell you that right now. We had a case just recently where the district judge said, "That might be all right for Washington, but it just won't go here." He wouldn't even follow the form. He held demurrable a motion

to dismiss a pleading that was squarely within the form. There is no use in your thinking, because most judges do these things as a matter of course, that all of them are going to do them. If they have directions they are likely to do it; if they haven't directions, they are not likely to do it.

CHAIRMAN MITCHELL: Let us take the case where the motions in the alternative have been made below and the trial court has denied judgment notwithstanding the verdict, which puts him up against the alternative motion for a new trial, and he makes an order granting or denying that. Why should there be any review of it?

DEAN MORGAN: If he grants the motion for new trial, you have to have it, that is all. Then you can appeal from the judgment. On your appeal from the judgment you can assign the errors that were made in rulings during the trial.

CHAIRMAN MITCHELL: You mean the judgment after new trial.

DEAN MORGAN: Exactly. I see what you mean. Whether, after judgment in the new trial, you can assign errors in the first trial? Is that the idea?

CHAIRMAN MITCHELL: You said the judgment. I wanted to know where there would be any judgment until the new trial was had.

DEAN MORGAN: That is right. If the new trial is granted, then there is no way of reviewing the first trial, as

I understand it, under the federal system.

CHAIRMAN MITCHELL: I think we are getting tangled up here by this last sentence. We are assuming that the trial court hasn't done what the rule requires him to do.

DEAN MORGAN: But here you have an appeal from a judgment granting a motion for judgment notwithstanding the verdict. That puts it in the same situation as if a new trial had been denied. If you deny a new trial to me and judgment is entered against me, I can appeal from that judgment and assign the errors. Isn't that right?

CHAIRMAN MITCHELL: Assign he errors on the second trial.

DEAN MORGAN: I am not talking about a second trial. I am talking about a case under this last sentence in the first paragraph on page 49, "An appeal from a judgment granted on a motion for judgment notwithstanding the verdict . . ." The verdict has been set aside and judgment granted for the defendant. On an appeal from that certainly you can review the errors that occurred during the trial under this situation and the language which Charles read from the opinion of Roberts.

CHAIRMAN MITCHELL: I always thought that in the federal courts the granting or denying of new trial on any ground was not reviewable, that the trial court could settle that.

DEAN MORGAN: After the denial of a motion for new

trial, when judgment is entered you are in practically the same situation as if no motion for a new trial had ever been made. When judgment is entered without any motion for a new trial, you certainly can assign the errors that occurred during the trial, errors in ruling on evidence and in the charge to the jury. Isn't that right?

JUDGE DOBIE: Yes.

DEAN MORGAN: It certainly always was true. Then when the judgment notwithstanding the verdict is granted, you have the same situation.

CHAIRMAN MITCHELL: This brings up for review the ruling of the trial court on such motion for new trial.

DEAN MORGAN: We haven't got that yet. We haven't any motion.

CHAIRMAN MITCHELL: We have a motion, but no order.

DEAN MORGAN: Exactly.

CHAIRMAN MITCHELL: This whole problem arises by making the motions in the alternative.

DEAN MORGAN: If the judges obeyed this, you would have a motion for new trial passed on conditionally.

CHAIRMAN MITCHELL: Why should the court of appeals be fiddling with that when it is going to set aside the order granting the new trial?

DEAN MORGAN: They are not going to set aside the order granting a new trial. They now have this judgment before

them, the proceedings below. They say that ruling was wrong, and then they will look at the ruling of the trial court with reference to the new trial.

CHAIRMAN MITCHELL: If he has denied it, that is one thing.

DEAN MORGAN: If he has denied it, if they reverse and he has denied a new trial, then the appellee should be allowed to interpose things to show that the new trial should be granted.

CHAIRMAN MITCHELL: I prefer to leave this out and let the lawyers wrestle with it on the basis of what they think Roberts intended to be the rule. If we don't say anything about it, then Roberts' opinion may control it.

DEAN MORGAN: Yes, that is right. If we say what Roberts' opinion says, then we will control it. Isn't this sentence practically from Roberts' opinion?

JUDGE CLARK: That is where it started. Of course, his term was "cross-assignment of errors of law."

DEAN MORGAN: That is right.

JUDGE CLARK: Frankly, we are trying to get away from the expression, "cross-assignment."

DEAN MORGAN: Yes, surely. We don't want cross-assignment.

JUDGE CLARK: To that extent it is a modification, but Roberts is the man who started all this, yes.

DEAN MORGAN: Yes.

JUDGE CLARK: The last that I read you would be more in the language of Roberts, although still not completely his, because he said that the appellee may cross-assign, and so on.

MR. LEMANN: Could we put it something like this? I am sure what I will dictate is full of holes, but I suggest a set of rules reading like this:

1. A motion for judgment notwithstanding the verdict shall always be deemed to embody a motion for new trial. That is Dean Pirsig's point.

2. If the motion for judgment notwithstanding the verdict is granted, the case will end and the case will be terminated in accordance with the judgment, and the unsuccessful party in the lower court may appeal. There shall be no necessity for any cross-assignment of errors.

I am trying to get the points in.

3. If the motion for judgment notwithstanding the verdict is denied, the losing party may appeal. If the upper court holds that the motion should have been granted, that will end the case. If the upper court holds that the motion was properly denied, the upper court shall remand the case to the district court -- and it is at this particular point that we get in trouble.

DEAN MORGAN: You have all the rest of it right in this rule.

MR. LEMANN: If the upper court holds that the motion

should not have been granted, then the question is what happens to this new trial. Isn't that right? That is the district judge's business. If the district judge has granted a new trial there is the new trial and there is no appeal from that ruling. If he denies the motion for new trial, then your appeal is not from the denial but from the judgment entered upon the verdict. That is right, isn't it?

JUDGE CLARK: If I may suggest it, it seems to me that what Monte has done is to write a West Company's headnote of the rule here. You know what the West Company's headnotes are. They are good endeavors.

MR. LEMANN: "E" for effort.

JUDGE CLARK: Sometimes they don't get in everything.

I really don't believe that you have added anything to what we have. It seems to me you have made in some respects more language, and it would have to be done over. What you are doing, of course, is to try to cover the same things.

Mr. Chairman, wouldn't it be a good idea and wouldn't it bring it to a head if you asked for a vote on either one of two propositions? I think this would cover it. There could be other alternatives, but I think this really makes the alternatives: The first would be leaving out the last sentence of that first paragraph on page 49, and the second, or alternative, would be putting it in in the last language that I gave, errors of law, and so forth. Wouldn't that cover it,

Eddie?

DEAN MORGAN: That is exactly what I would like. I don't want to continue the debate any longer. As a matter of fact, I doubt very much whether it is worth it. I wish you would put the second one first, because the first one might go through and I would want to vote against that qualification, that is all.

JUDGE DOBIE: Let's put the second one.

JUDGE CLARK: Do you want me to read the language again? Do you have the language?

MR. DODGE: I don't see why you need that second sentence. It deals with an appeal by the plaintiff from an order for judgment notwithstanding the verdict, and the question of the ruling of the trial court on the motion for a new trial is wholly immaterial except in the rare case where a fellow moving for judgment notwithstanding the verdict has also coupled it with a motion for new trial.

DEAN MORGAN: That isn't a rare case.

MR. DODGE: That is a very rare case.

MR. LEMANN: Under Dean Pirsig's amendment would it be a rare case?

MR. DODGE: We have left in here the fact that it is optional with the defendant, who, as Mr. Pryor said yesterday, is perfectly satisfied with the verdict if the verdict is smaller than the amount he offered. It is only in that rare

kind of coupling of a motion for new trial by the defendant with his motion for judgment notwithstanding the verdict. I don't see why you need to couple this by saying that if the plaintiff appeals from a judgment setting aside the verdict, on that motion the plaintiff, without cross-appeal, can bring up for review the ruling of the trial court on the motion made by the other side, in the rare case where he makes such a motion, supplementing his motion for judgment notwithstanding the verdict with a motion for new trial. The rulings that we are talking about are on his motion, and we are giving the plaintiff the right, without the necessity of cross-appeal, to bring up for review the ruling of the trial court on such motion for new trial. He has appealed from the final decision granting the alternative judgment. I don't see that it is important to specify that he may in connection with that motion argue on any rulings of law which the court may have made in the alternative on the defendant's supposed motion for new trial.

JUDGE CLARK: Mr. Dodge, the court would have to do this, and you are not suggesting that there is any way that the appellate court could stop itself from doing this: I think it is a necessity for the appellate court to consider all errors to see what final judgment should be entered.

MR. DODGE: Yes.

JUDGE CLARK: In other words, I think this is a clear statement of existing law.

DEAN MORGAN: In your jurisdiction it might be rare for them to do that, but in Minnesota when I was there I practically never saw a motion for judgment notwithstanding the verdict that was not made in the alternative. It was a very, very rare situation.

CHAIRMAN MITCHELL: All that Roberts is trying to do is to say that the trial court ought to act additionally on that motion for new trial, so the upper court knows whether it shall grant judgment notwithstanding the verdict or allow it to stand.

MR. DODGE: An appeal from a judgment granting a motion for judgment notwithstanding the verdict shall bring up all questions of alleged error in the trial court.

DEAN MORGAN: That is what it is.

JUDGE CLARK: As a matter of fact, Mr. Moore has given me a sentence which says just that and would be a substitute for that. This is the sentence Mr. Moore wrote, and I don't see why this doesn't cover it. I think it is what you are saying.

"An appeal from a judgment granting or denying a motion for judgment notwithstanding the verdict shall bring up for review all reviewable errors against either the appellant or the appellee."

MR. DODGE: I think that is much better than this.

DEAN MORGAN: I would be glad to take that.

JUDGE DOBIE: I move that we adopt that.

MR. DODGE: I second the motion.

CHAIRMAN MITCHELL: Any further discussion? All in favor of that motion say "aye"; opposed. It is agreed to.

JUDGE CLARK: I think that now completes Rule 50.

We come now to Rule 52. We agreed to make a modification separating "Findings of fact shall not be set aside unless clearly erroneous" from the other statement as to the opportunity of the trial judge to observe the witnesses. We had two or three slight differences in formula. I now like and will recommend the formula which I have provided in my March draft on page 24, which is not greatly different. It is the one that Mr. Pryor added some suggestions to, and they cover it. The original formulas appear on page 51 of the September draft. You have two there. I suggest for choice the one on page 24 of the March draft, which would read then this way:

"Findings of fact shall not be set aside unless clearly erroneous. In the application of this principle regard shall be given to the special opportunity of the trial court to judge of the credibility of those witnesses who appeared personally before it."

JUDGE DOBIE: That doesn't mean, does it, that where the finding is based on depositions, you can set it aside without its being clearly erroneous?

JUDGE CLARK: I should think not. We can't be sure

what the courts will do with this, but our intent is to push courts away from it.

JUDGE DOBIE: Yes.

JUDGE CLARK: We hope to do it by making that first sentence stark clear by itself. That will be a direct mandate: "Findings of fact shall not be set aside unless clearly erroneous."

JUDGE DOBIE: That would apply to depositions and everything. I think that is all right. We have had that point raised before, Charley.

JUDGE DRIVER: I move the approval of that.

JUDGE DOBIE: When it comes up on depositions and the judge did not see the witnesses, it is not so strong.

CHAIRMAN MITCHELL: He hasn't had a special opportunity to see them.

JUDGE DOBIE: He still cannot set it aside unless it is clearly erroneous.

CHAIRMAN MITCHELL: I assume that a motion has been made to adopt the Reporter's draft as set forth on page 24 of the later report. All those in favor of that draft say "aye"; opposed. .That is agreed to.

JUDGE CLARK: Now we come to Rule 54(b), our judgment rule. On that the suggestion before was that we did not need to make any change and that there ought to be a note specifying the kind of cases. There have been quite a few cases, and we

have tried to set them forth. There has been some suggestion that we have too many cases. There is some difficulty, because if this note is to be informative I should think perhaps it ought to have some more cases than elsewhere.

CHAIRMAN MITCHELL: You are on page 55 of your September draft?

JUDGE CLARK: That is right. As a matter of fact, we added some more in our March draft beginning on page 25, because the courts are still struggling with all this. If you will look at page 26 of our March draft, you will see some rewriting of the note.

CHAIRMAN MITCHELL: What is your proposal now on Rule 54?

JUDGE CLARK: I have no proposal, and there was no proposal for amendment. The proposal before was that a note be written calling attention to the general state of authority and indicating particularly on one point, namely, the joint parties situation, that we thought the trend of authority, which was to consider those as separable claims for judgment, was correct, and that is what is done here.

The rule is operating all right in a certain area, in the area, one might say, where it is clear. There are two outer areas -- I wouldn't quite call them fringe areas because they are closer than that -- where there has been some difficulty in approach. One was whether the trial judge, by giving this

finding under 54(b) could cover the case and make it appealable in the situation where joint defendants or more than one defendant were involved. The suggestion was made that technically that might be considered still a single claim, and hence this rule would not be available. As a matter of fact, the cases have pretty much gone the other way and have said that in that case they are separable claims for the purpose of this rule and that the trial judge may separate in that case. As I said, that is the case of more than a single party.

I stated that in the case of defendants, where perhaps it comes up the most, but I don't see why the same proposition may not apply as to plaintiffs.

That is the first group of cases that we have set forth here. We have indicated approval of that approach.

There is a second group of cases dealing with what has come in the law to be known as a collateral order, sometimes spoken of as litigation which is an offshoot of the main case. The view of textwriters, including Professor Moore and a writer in the Virginia Law Review, and elsewhere, is that the offshoot situation is not covered by Rule 54(b). The cases on that are not at all clear. For the most part, they have not definitely considered it. They have not just taken the issue and threshed it out.

That part we also covered by material in the note. We straddled the fence, more or less, because I thought we had

33 to.

What I have been giving you on these two issues is covered in the drafts. The cases on the first one start on page 56 of the September draft, and that is done over on page 26 of the March draft. Then the collateral order or offshoot situation is discussed beginning on page 58 of the September draft, and a substitute provision is given on page 27 of the March draft.

Let me say that all of this is in a way a little textbook discussion. I think that was the general idea. In many aspects this rule has been working well, but on these controversial matters there has been some difficulty and it was thought it would be helpful to work it out this way.

Let me add for information one other matter. The federal judges, notably the Judicial Conference, under a committee headed by Judge Parker, has been considering the question of proposed legislation. After two or three years of discussion, circularization, and reports back from the judges, Judge Parker's committee recommended to the Judicial Conference a form of bill which applies generally, which would add a section to the appeal code. It would add a subdivision (d) to 28 U.S.C. Section 1292, which in effect would carry the principle of 54(b), namely, the finding by the district judge in general on interlocutory orders which in the contemplation of the district judge are likely to present controlling questions of

law. The district judge may then so state in his opinion. Then a party can take it to the court of appeals, and if the court of appeals decides to hear it, it is a kind of double-check. In those cases a hearing can be had.

At that time the Judicial Conference voted in favor of the legislation, making certain statements suggesting that it would be limited. The Judicial Conference has already rejected broader arguments for appeal. I think the general tenor of the Judicial Conference was not to go very far. At an earlier meeting it had definitely voted against complete appeals in interlocutory matters.

On this somewhat limited situation of a kind of double-check, first the trial judge and then the appellate court, the Judicial Conference voted to recommend that legislation, with Judges Stephens and Magruder voting in the negative. They didn't want any change and asked to be so recorded. That is in the minutes of the Judicial Conference meeting last September 24 and 25, at pages 27 and 28.

I presume what has happened is that that has been recommended to Congress.

MR. TOLMAN: There has been no legislation introduced, Judge Clark.

JUDGE CLARK: At any rate, that brings up to date what the judges have been doing.

MR. LEMANN: Is this the committee that Judge Borah

is a member of? Isn't Judge Learned Hand also a member of that committee?

MR. TOLMAN: No, Judge Hand is not a member.

MR. LEMANN: That is immaterial.

MR. TOLMAN: It is the committee that Judge Borah is on. It also considered the condemnation rule.

MR. LEMANN: What is the change that the Conference recommends in our rule? Is this the matter that Judge Frank brought up?

JUDGE CLARK: Yes, Judge Frank brought it up with a broad proposal, which was voted down at the previous meeting of the Judicial Conference. That is, the bar suggestion has been rejected by the judges. I think it is a fair but general statement to say that this proposal extends the principle of 54(b) to all cases. You see, 54(b) is limited to multiple claim cases, and that is broader that way.

MR. LEMANN: Couldn't we accomplish that by changing the rule?

JUDGE CLARK: We were asked that, you know. Judge Parker's committee asked that directly, and everybody drew away from it then and didn't want to do it. They thought it was a matter of legislation.

MR. LEMANN: On account of its being an appellate proposition?

JUDGE CLARK: There is that question. I think we

have gotten along pretty well by raising these questions, but it is a fact that Judge Learned Hand, among others, and Judge Frank in particular have raised questions whether we were not dealing with the jurisdiction of the courts. With those two distinguished mavericks questioning it, that is one thing that has made this rule something of a question around the country. If they had only kept still I think everybody would have been happy, but they did not and that raises the question.

MR. LEMANN: But they don't bring the rule into this proposed statute.

MR. TOLMAN: No. The statute makes no reference to the rule.

MR. LEMANN: It assumes that our rule is valid as far as it goes.

MR. TOLMAN: Yes.

MR. LEMANN: Yet, if the doubts which have led to the suggestion of this statute are valid, they would be equally applicable to our rule. Is that right?

JUDGE CLARK: No, I don't think that is necessarily so. That is, if one thinks this general step desirable, there is a strong argument for doing it beyond Rule 54(b), because Rule 54(b) is in any event limited. Rule 54(b) applies only to the one case where there are multiple claims.

JUDGE DOBIE: Under this new legislation if the district judge makes the certificate, which is optional with

him, and then it is also optional with the appellate court, you can review any interlocutory judgment regardless of whether they are multiple claims or not. If in the opinion of two courts it is so vitally bound up in the case that that will dispose of the whole case, I think we had better leave that to Congress. I don't think we should consider it here.

JUDGE DRIVER: Perhaps I could make it clear by an illustration that came up in my district in a condemnation brought by the government against a land owner. You have one plaintiff, one defendant, one issue -- the amount of compensation to be paid for land taken for public use. The government had an opinion. Under the option, if they condemned, the price of the land would be the option price. It just so happened that a number of years had gone by and, as a matter of fact, the jury found the price of the land to be about ten times the amount of the option price.

The first question that I had to decide was whether the government's option was valid. I held that it was not. Both sides wanted to appeal and get that case settled by the court of appeals, but we all agreed that there was no way under existing law and rules by which it could be done. So, we had to go through a ten-day trial, with expensive expert witnesses. If the court of appeals reverses me and holds that the government's option is valid, that is all wasted time and expense, and they may very well do so because it is a very close

question.

There is a case where there should have been an appeal before we went to trial on the issue of compensation and submitted it to the jury, but that cannot be done under existing rules.

As I recall, Judge Clark, at least one doubt or controversy on this request for appeal from interlocutory orders is whether the appellate court or the district court shall have control over those appeals, and to what extent each shall have. My position is that the district court should have it because the court of appeals will almost always grant it. They haven't time to look at a case and decide whether or not it should be appealed. That is a different point of view.

MR. DODGE: That is a very valuable feature of the Massachusetts practice which I tried in vain to get incorporated in these rules years ago. Wherever the trial judge is of the opinion that an interlocutory ruling made by him affects the merits of the controversy and for some reason there ought not to be a long and expensive trial before that is determined, he may report the case to the Supreme Judicial Court. That is a very valuable feature of our practice. It ought to be in the federal system, but it is not.

MR. LEMANN: Just about what you said is what is in this proposed statute, except that first you have to get the district judge to say so, and then the court of appeals has

to exercise its discretion to adopt his recommendation. They are not bound to.

JUDGE DOBIE: You have two checks, Monte. First, the district judge has to make that certificate. If he does not make a certificate, that is the end of it. It is not appealable. If he does make it, then it is optional with the appellate court whether or not they will review it. But it is a question of appellate jurisdiction, it seems to me, because the statute says very clearly that the circuit courts of appeal, or the courts of appeal as they now are, shall review final judgments with only the specified exceptions -- receiverships, admiralty, and things of that kind. I think it is a question in appellate jurisdiction and we ought to leave it alone. I am heartily in favor of it.

MR. LEMANN: I can see the difference between the subject matter of this proposed statute and the subject matter of our rule, because our rule does not give an interlocutory order at all; it is a final disposition as to one claim.

CHAIRMAN MITCHELL: Can there be any doubt about the fact that the rule-making power is not broad enough to allow a court to promulgate rules which regulate or extend the effect of the appellate jurisdiction of courts of appeal? Is there any doubt about the fact that you cannot do that sort of thing by rule?

JUDGE CLARK: Of course, when you state it that way

your question is a leading one. I should say no, there can be no doubt it has not the power, but that doesn't settle all the questions. It does not really touch any question about the existing 54(b), I think, which has been well sustained. The only real objection was made by Judge Learned Hand in a single case, and the other cases have not followed it. I don't believe you would need to get into that particularly because we are not going to do anything about it.

So far as the proposed new statute is concerned, I don't know that that is our province. I will say, if anybody is interested, I have generally opposed wide appealability because I think that that would destroy the possible effect of deposition practice, among other things. We have seventy-five motions twice a week on the motion calendar in New York, of which forty, say, are for relief under depositions. If every one of those were subject to appeal, I don't see how you would get anywhere. As a matter of fact, I went along with this limited one, and I worked a great deal with Judge Parker in its drafting. Quite a little of the language of that provision they have adopted is language which I suggested. I am quite ready to go along with that.

Quite a few of the judges are worried about even that much. Judge Stephens wrote a long memorandum opposing any extension, as did Judge Magruder. I know that Judge Medina, my colleague, is very much opposed to any extension of that

kind. I think there is a possibility still that the district judges will be too easygoing when a lawyer comes up to them, but nevertheless I think we have to trust the district judges somewhat. I decided to go along with Judge Parker's general idea, and therefore I am on record, if it means anything, as approving and somewhat fostering this legislation.

To come back to the business at hand, I suppose that you could give a push to the legislation if you wanted to, but that is not really our function. The particular question is that here is this informatory note. Do you want to do anything about it?

CHAIRMAN MITCHELL: Your proposal is to make no change in the text of the rule.

JUDGE CLARK: That is right.

JUDGE DOBIE: I make that motion.

CHAIRMAN MITCHELL: But you want to provide a note that does what?

JUDGE CLARK: As a matter of fact, to go back in the history a little, I did try to suggest a modification of Rule 54(b) which would make clear what I thought the cases were holding. At that time it was the view of the Committee that the rule was all right and we had better not try to make that sort of change, that is, so to speak, endorsing change. At that time the suggestion was made, Why not in the note call attention to these cases and in particular cases on joinder, and express

some approval of it. That is what the note was intended to do.

MR. LEMANN: When we get all of this before us, Charley, how many instances will we have where we have just made notes explaining why we do not think a change is necessary and calling attention to current decisions approving or disapproving? We have done that in a number of cases, haven't we?

JUDGE CLARK: I can't tell how many there will be. Of course, you can see that we are doing them. One might say that the notes come to have an increasing function. I don't know why that is not all right. Perhaps the most notable case of what you say is Rule 8(a)(2). That is what we are doing there. Other cases have come up from time to time here, and I cannot really be sure of the number at the moment without checking back. You may remember that this morning in connection with the protracted litigation case it was suggested that we put in a note calling attention to the Prettyman Report, and so on.

MR. LEMANN: Here you have a very long note. I see Dean Pirsig raised a question about whether it was desirable, and I had that reaction when I first read it. Then I see that Professor Moore thinks it doubtful that there ought to be an amendment to the rule. See page 25 of your March material.

CHAIRMAN MITCHELL: I would like, as Chairman, to be able to state what the proposal is. I made one statement that I thought was true, that we propose no amendment to Rule 54. Is that so or isn't it?

43 JUDGE CLARK: At the moment, which means as distinguished from last spring, there is no proposal for amending the rule. If anybody would be interested in a proposal, I will go back to it, but I thought that was settled.

CHAIRMAN MITCHELL: My mind is as clear as mud on this thing. Is the question whether in the note we shall endorse a proposal to amend the statute? Is that the question?

MR. LEMANN: No.

JUDGE CLARK: No, nobody has raised that, and I was not raising it. I brought up the question of this proposed statute for your information, because you have known and there has been question from time to time that there was this movement among the judges, and it has now come to what I take it is a final conclusion so far as the judges are concerned.

MR. TOLMAN: That is correct.

CHAIRMAN MITCHELL: What would this note do, if we put it in? Can we get a short statement of just what the note would accomplish, if we put it in?

JUDGE CLARK: Yes, I think so. Let me say as to the length of the note, and so on, that was --

CHAIRMAN MITCHELL: I am not talking about the length of it. I want to know what the note intends to do.

JUDGE CLARK: I think the note would say in substance: The Committee is in accord with the judgment of the cases which say that the application of Rule 54(b) to the multiple parties

situation is valid or is correct.

MR. LEMANN: If you stopped with that, I think I might be for it, but what you have done is to refer to some law review articles and say they are very scholarly productions but you don't think they are right and that you think the cases have been correct in not following the scholarly articles. You say that over about four or five pages. Isn't that about right, Dean Pirsig? Then you end up by saying that Professor Moore, as I refresh my memory by glancing over this quickly, apparently shares the views of these scholarly writers and thinks that the courts have been unscholarly and that the rule ought to be amended, and we disagree with him.

If we are not going to amend it, I don't think we ought to labor the point by so extensive a note. We will let the Reporter and his associate write a law review article themselves, as they often do.

JUDGE CLARK: We probably will.

MR. LEMANN: You probably will, but don't put in so long a note to say that all this has been said and there is so much argument about it, and yet we think it is plain. If we think it is plain, I think we should say we think it is plain.

Am I right that the courts have not had any trouble about it on the whole?

PROFESSOR WRIGHT: They are having some trouble more recently, in fact, since our September draft. Perhaps the

most striking is the Fifth Circuit, which just this winter came out with a case in which they said that there we serious doubt about this question, and they explicitly left the question open. In that particular case they at least indicated that they were not ready to jump in with the First and Second Circuits.

JUDGE DOBIE: I think we applied it in the Clarksville case.

JUDGE CLARK: I think you applied it very sensibly, yes.

MR. LEMANN: Why would it not do to say for the benefit of the unenlightened Fifth Circuit just what the Reporter said a few minutes ago, that we think the construction placed by the Fourth Circuit, and so on, is correct, and that notwithstanding these articles in the law reviews, citing them, it is not necessary to amend the rule.

JUDGE CLARK: I am of course perfectly willing to do that. The reason that I put all this in was that I thought you ought to know the whole story, concealing nothing, not even pulling down an "Iron Curtain" on Professor Moore; in fact, perhaps chiefly that I did not want to seem to shut him out in the cold.

Of course that is what I want to do. There isn't any doubt about that.

CHAIRMAN MITCHELL: If we considered a proposition to amend Rule 54, are we not up against the question whether we

can tamper with the appellate jurisdiction of the court of appeals? We run afoul of that question.

JUDGE CLARK: I don't think you do, but that is a question that would take several pages, I found, when I discussed it. I discussed it in that Lopinsky case. I went into what I thought was a rather complete discussion of the background of our rules and the reason that we decided that we could touch as much of appellate practice as we did in the rules. You remember, this question came up originally away back, and then you asked me to make a report. I made a report, which was then published as an article in the Harvard Law Review, on the power to make these rules touching appellate practice.

If there is any question about Rule 54(b), I think there is question about a great many more other rules. As I have said, I have set it forth at length, and I don't think there should be a shadow of doubt about the question. I think it was very regrettable that Judge Learned Hand, without any argument and without any background of looking at what we had done, threw some doubt on it.

JUDGE DOBIE: Of course, we have not hesitated to prescribe procedure in the district court on appeal, such as notice and things like that, and I think that is some of the best work that we have done.

JUDGE CLARK: There are a lot of things of that kind.

47 JUDGE DOBIE: I move that the rule be adopted as is, without any change, and that the Reporter be instructed to write such a note as he thinks suitable, taking into consideration Mr. Lemann's suggestion that possibly the note could be shortened.

MR. DODGE: I second the motion.

CHAIRMAN MITCHELL: All in favor of that proposition say "aye"; opposed. It is agreed to.

PROFESSOR WRIGHT: Could I raise one question so I will have some guidance as to where we go? Should we discuss the question of collateral orders at all in this note? Dean Pirsig raised the proposition that we should not even mention that.

JUDGE CLARK: Mr. Lemann, how about this? This deals with the other main question. We have already disposed, as I understand it, of the question involving joint parties according to your suggestion. The other question was the so-called collateral order or offshoot. That is not settled, and our note says in effect that it is not settled. I think Dean Pirsig's idea is not to say anything about that, and I don't care. Another way would be to raise it and to say that it has not been settled.

MR. LEMANN: Is it Dean Pirsig's idea to say what you have just said or to say nothing?

DEAN PIRSIG: To say nothing.

MR. LEMANN: I think I would prefer Dean Pirsig's alternative.

MR. DODGE: Aren't those notes designed to be shortened materially before they are published? Aren't they primarily for our assistance rather than for permanent publication?

JUDGE CLARK: Yes, Mr. Dodge. We have made them as complete as we did because we thought that nobody could complain here about their completeness. We might not want them published. If they were insufficient for you, however, they would be bad. When it comes to publication, that is quite a different question about how much we want to put in.

MR. LEMANN: As I understand it, you have labeled as "Comment" what was intended for our private instruction, and you have labeled as "Note" what you are tentatively proposing to give to the public.

JUDGE CLARK: That is right.

MR. LEMANN: I understand that we have voted realizing that the comment was not to be published in any event. We have heretofore adopted a pious admonition, if I may so term it, to the Reporter, to curtail the extent of the notes. I think we voted that the first day. If not, if there is any doubt about it, I would like to renew the admonition.

JUDGE DOBIE: Do you want to vote on whether or not you want to mention the collateral issue?

JUDGE CLARK: No, I don't know that we need that. I take it that the general consensus of opinion is that we should not do it.

JUDGE DOBIE: I am inclined to think so.

DEAN MORGAN: What bothers me about this, Charles, is that there must be a lot of litigation on it. You have such a big group of cases. It is a matter of considerable doubt, and it does seem to me that we ought to do something to clear it up if we can.

CHAIRMAN MITCHELL: I have always supposed that the Rule 54(b) which we adopted, giving the district court the power to say whether the judgment is final or not, amounted to this: The question of whether it is final depends on whether the district court has reserved any jurisdiction to do anything further in the matter. If he comes out and makes a certificate, "I am through. I am not reserving any further control over the subject," then by operation of the district court's own decision it becomes a final judgment, and we are not violating the statutory rule that the court of appeals can consider only final judgments. It is a question of whether or not the district court has reserved jurisdiction.

That is all that we did in this rule. I don't know what we can do to increase the power of the district court to say whether or not the court of appeals has jurisdiction. I think it is a matter of statute. Jurisdiction is substantive.

JUDGE DOBIE: What have we before us now?

CHAIRMAN MITCHELL: We have a motion to leave the rule as it stands and to put a short note, in the Reporter's discretion, on the subject.

DEAN MORGAN: Didn't we pass that?

CHAIRMAN MITCHELL: No, we have not acted on that. Do you want a vote on that motion? The motion is that we not change any part of Rule 54 and that the Reporter is authorized to draw a short note, in his discretion, saying what he pleases about it.

MR. LEMANN: That is not unreviewable.

JUDGE CLARK: This all comes back to you after we get through with it.

CHAIRMAN MITCHELL: Can't we get through with it at this time by taking a vote on it?

DEAN PIRSIG: I would like to include in that motion that no reference be made to collateral orders unless we come to some agreement on it within the Committee.

DEAN MORGAN: Why do you want to omit that?

DEAN PIRSIG: Read the last paragraph on page 59, which summarizes the note, "Because the authorities are thus divided," and so on.

DEAN MORGAN: I don't want that in.

DEAN PIRSIG: I don't see the purpose of the note.

DEAN MORGAN: That is quite right.

JUDGE DOBIE: I will accept that amendment.

DEAN MORGAN: I just wonder, if the committee doesn't have any notion on these collateral orders, whether they ought not to be treated in exactly the same way as these others, because some of them are of equal importance.

JUDGE DOBIE: I will accept that amendment. The motion, then, is that there be no change in this rule; that the Reporter be permitted to write a short note on the subject omitting any reference to collateral orders.

CHAIRMAN MITCHELL: All in favor of that motion say "aye"; opposed. That is agreed to.

JUDGE CLARK: That will bring us up to Rule 56. May I just ask this for general instructions when I get out the draft that is coming around to you. The comment, as you correctly stated, was for your benefit here. This is going out to the public, still not final. Should I use the comment for that purpose, perhaps changing it where necessary because of a lot of the things which we will have settled? In other words, do you think that in the draft which goes out there should be some comment, some explanatory comment, proposed notes, or just proposed notes?

JUDGE DOBIE: That is hard to answer. I would be perfectly willing to leave it to the discretion of the Reporter.

JUDGE CLARK: Maybe that is the best we can do at the moment, then.

MR. LEMANN: I am personally inclined to omit the comment. This draft is going to a somewhat narrower group than those to whom we distributed our original draft of rules, as I recall our vote. We did not think it necessary to send this out as widely as we did the first draft of the first rules.

CHAIRMAN MITCHELL: Do I understand that the Judicial Conference has reached the conclusion that we cannot tamper with the question of the right of appeal to the court of appeals?

MR. TOLMAN: They did not consider that question themselves. They merely approved a statute which would change the interlocutory appeals.

CHAIRMAN MITCHELL: Which means they thought it was a statutory matter. I understand, as I tried to state a minute ago, that on the question of the power to affect the appellate jurisdiction of the court of appeals, all we have ever attempted to do was to have the trial court say whether he reserved any further jurisdiction or whether he did not; and if he repudiated the idea that he was going to do anything more about it, then by operation of his own action it was a final judgment and was within the federal statute allowing appeal to the court of appeals. I can't see that we can go any further than that.

JUDGE CLARK: It is only fair to remember that Judge Parker asked us if we could do anything by rule. I suppose they went ahead further when we said, no, that we thought we had done the limit.

53 CHAIRMAN MITCHELL: We are down now to the summary judgment rule, Rule 56, as I understand.

JUDGE CLARK: Yes. The first suggestion there is to put in a provision such as in New York allowing summary judgment either way whenever one motion is made. There has been some doubt about that, but most of the district judges have held that there was that power. Take the case that the plaintiff moves for summary judgment, and the court decides that the case is right for summary judgment for the defendant. This would so provide.

We approved the principle, and at the foot of page 59 of my September draft there are alternative proposals.

DEAN MORGAN: There is another one on page 28 of your March draft.

JUDGE CLARK: That is right. On page 28 of the March draft we have Mr. Pryor's slight emendation of my second alternative. I want to say that the second alternative is the one that I favor, anyway; and, therefore, if I were making the suggestion, I would say that those two proposals on page 28 of the March draft are the ones I would like to consider.

DEAN MORGAN: I move the adoption of Mr. Pryor's suggestion in 56(c) on page 28:

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

543 JUDGE DOBIE: I think that is better than the "not only."

DEAN MORGAN: I don't want the "not only" in there.

JUDGE DOBIE: I agree to that. I second Mr. Morgan's motion.

JUDGE CLARK: That is all right. Does everybody have that? That is the second one which appears on page 28 of my March draft.

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

That is what you moved, isn't it, Eddie?

DEAN MORGAN: Yes.

JUDGE DOBIE: I second that motion.

CHAIRMAN MITCHELL: All in favor of that say "aye"; opposed. That is agreed to.

JUDGE DOBIE: It has been done a number of times, Charley.

JUDGE CLARK: That is true. There is a little doubt about it.

The other proposal is to add something to (e), and that appears in my September draft on page 60, with the addition over on page 61, the underlined provision on page 61, with alternatives stated for certain of the details. You will note from the comment, the above language, including the first

alternative, was approved by the Committee. The second alternative is, however, suggested and recommended by the Reporter.

To go back, "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon," the original proposal was "mere denials set forth in a pleading" but I don't think that is quite broad enough and we ought to expand it a little and say, "the mere allegations or denials of his pleading, but must answer in detail as specific as that of the moving papers, setting forth the material facts as he believes and intends to prove them to be. If he does not so answer under oath, summary judgment shall be entered against him."

JUDGE DOBIE: That is mandatory.

DEAN MORGAN: I move the adoption of that amendment.

MR. PRYOR: I second the motion.

CHAIRMAN MITCHELL: Is there any further discussion? All in favor of the proposal say "aye"; opposed. It is agreed to.

JUDGE CLARK: Mr. Wright calls to my attention that our friend, Mr. Hildebrand, sent in a suggestion about Rule 57. I have not studied it. Do you know what it is?

PROFESSOR WRIGHT: It is terrible.

CHAIRMAN MITCHELL: I don't know. Hildebrand has never attended a meeting, and up to this time he has never showed the slightest interest in anything we have done. He never answered

56 any telegram I ever sent him about anything. I think he has been jacked up a little by the Court, because he comes along with a letter apologizing for not attending and then making this suggestion. It came in at the last minute, and we did not have time to distribute it. So I don't know anything about it. Is it any good?

PROFESSOR WRIGHT: Mr. Mitchell, if I may say so, I should think that this suggestion you can reject easily. He suggested that we add language to Rule 57 which says in effect if there is no diversity of citizenship the court should not give judgment in a case where the jurisdiction depends on diversity of citizenship.

JUDGE DOBIE: He didn't suggest that if the judge be drunk he shouldn't try the case? A brilliant suggestion!

JUDGE CLARK: I wouldn't approve of that. He is still a judge, isn't he? (Laughter)

I have added a suggestion about another rule, Rule 58, appearing in my March draft, page 30. The matter of entry of judgment does cause some difficulty with counsel. There has been some difficulty right along, and it is accentuated because state practices often differ. I don't think there is any permanent solution to that, because state practices are likely to be different in different parts of the country. One of the great problems has been that it has been so different in New York, where the lawyers really claim to control the judgment

57 and write it up any time they feel like it, and the judge signs the judgment.

Our purpose and practice in the federal rules have been opposed to that. I think on the whole it has worked pretty well, but every now and then a bad case comes up where something has happened otherwise.

Partly because of some of the cases that I cited in the comment and note here and partly because the editors of the Federal Rules Service came up with a long comment saying we ought to do something about it, I thought that it might be well to add or to insert in Rule 58 a sentence that I think is only what is now the rule but which I think specifies it more.

Rule 58, as you know, provides for immediate entry of judgment in certain cases and does, of course, indicate that the judge may hold it up if he wishes. If he doesn't hold it up, the judgment is entered immediately and becomes effective when noted in the civil docket.

The suggestion here is not to change that, but to allow the first two sentences to remain as is. Those sentences are:

"Unless the court otherwise directs and subject to the provisions of Rule 54(b), judgment upon the verdict of a jury shall be entered forthwith by the clerk; but the court shall direct the appropriate judgment to be entered upon a special verdict or upon a general verdict accompanied by answers to interrogatories returned by a jury pursuant to Rule 49. When

58 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; but when the court directs entry of judgment for other relief, the judge shall promptly settle or approve the form of the judgment and direct that it be entered by the clerk."

I would add this right there:

"If an opinion or memorandum is filed, it will be sufficient if a specific direction as to the judgment to be entered is included therein or appended thereto; and any such direction either for an immediate or for a delayed entry of judgment is controlling and shall be followed by the clerk."

I do think that is somewhat helpful.

Some question has been raised whether you could have the judgment directed in the opinion, and so on.

I would say the argument against including this is the old one against gilding the lily, that it is not necessary. The argument for it is that apparently some judges and some lawyers cannot read, and if you spell it out a little more that will help them.

MR. TOLMAN: Judge Clark, didn't your court give an opinion that the clerk should do this sort of thing, and this is just a statement of what you said in the opinion?

JUDGE CLARK: I think so, yes. I tried to make it so.

MR. TOLMAN: That is the Wissahickon Tool Works case,

59 which you cite there.

JUDGE CLARK: Yes.

DEAN PIRSIG: Wouldn't this encourage a practice that really ought to be discouraged, of treating an opinion or a memorandum as sufficient for purposes of entry of judgment? It not only saves the case; would it not also invite a practice which I think we ought to discourage?

JUDGE DRIVER: I was wondering, Judge Clark, in what case this would be applicable. It would be in a case tried before the court, without a jury, would it not, where a memorandum is written?

JUDGE CLARK: That is right.

JUDGE DRIVER: There could not be a direction of entry of judgment to the clerk unless the findings and conclusions were included in the memorandum, because you would not be ready for entry of judgment until you had set your findings. I think it is an atrocious practice to put formal findings of fact in a memorandum to be published and in books to be purchased at the expense of lawyers, law schools, and so on. I don't think that is any place for it. Of course, that is a different question. I don't think that is any place for findings and memorandum. It is not goodpractice to put them in, in my judgment.

JUDGE DOBIE: Are you opposed to this, Judge?

JUDGE DRIVER: I don't think it would do any harm,

60 but I don't see where it would do much good except in those cases where the judge puts his formal findings in the memorandum, and not many judges do that.

JUDGE DOBIE: Of course, very frequently counsel submit an appropriate order at the end of the opinion. When that is handed down, of course the clerk cannot enter the judgment until counsel have prepared it and it has been approved by the court.

JUDGE CLARK: Let me say more directly in answer to Dean Pirsig that I think the practice should definitely be encouraged of having the direction as promptly as possible and in the opinion when the case is ready for it. I think there is great difficulty in these cases in getting the judge to make clear that he has ended the case when he has. Right along the trouble has been that the judge would make an opinion, and nobody would know, and the lawyers being of the idea that they could put in the judgment whenever they wanted to, the case kicks around in some cases two years. It is the most amazing thing how lawyers can delay as they do. Then they will submit an order to the judge. In the Wissahickon case cited here it was not their fault. The judge had completely decided the question and said the motion for summary judgment should be granted. Then the lawyers did nothing for almost a year. They then turned up with a very formal, long document which they had signed and proceeded to move from that time

61 for appeal, and so on. There was no reason for that whatsoever. All the work had been done, and the case was really ended by the previous action.

According to our present Rule 58 I think there is no question that we tried to speed it up that way. A reason for delay, as I say, is that they do it differently in the state courts. Then, the judge tolerates it.

JUDGE DOBIE: He ought not to.

JUDGE CLARK: I know, and sometimes they don't. Of course, if the judge has not tolerated it, we don't know anything about it. That is one difficulty about appellate practice, anyway. When the thing has worked right below we don't hear anything about it. When it has worked poorly, it comes up to us and we start talking about it. I know that Judge Murphy a while ago was presented with a new judgment long after the time, and he refused to sign it. He said that is all settled; it is all done. That was correct.

I suspect that a good deal of the time the judge doesn't even bother to read it. The lawyer will come in and say, "Here is the judgment. Will you sign it" and, by George, they do sign it. Then you have the question, which is the judgment? Is it the decision made last year or is it this new formal document?

JUDGE DOBIE: An opinion is not a judgment.

JUDGE CLARK: The clerk is directed to enter judgment

62 for the defendant, then the clerk notes that in the docket, and it is a judgment by our rules now.

JUDGE DOBIE: Yes.

JUDGE CLARK: I won't say that this will ever be completely corrected. Lawyers being what they are, and judges being tolerant, too, I think that you are going to have these questions coming up.

MR. LEMANN: I see that the gentleman who wrote the note in the Federal Rules Service has suggested an amendment, if you are going to make one, that seems to indicate that he thinks the difficulty is the judge's signing it. His amendment is slightly different from yours. You took part of his language, but not all of it. If you were going to amend it -- and my present reaction is against the amendment -- I think you would stop to consider his further point, because he has two sentences which you did not adopt.

JUDGE CLARK: Of course, I brought it up so that you would consider it.

MR. LEMANN: Yes, that is right.

JUDGE CLARK: None the less, I am against his proposal because his proposal seems to me just to encourage the kind of delay I have in mind. His proposal in effect is that you never have any judgment until the judge, as a second step, so to speak, signs some other formal document.

MR. LEMANN: If you are not going to go with him all

63 the way, aren't you just inviting trouble by referring to his comment? Some lawyers are going to think that his amendment should be adopted. I think you would be stirring up argument.

CHAIRMAN MITCHELL: Do I understand that this proposed amendment to Rule 58 is connected in any way with the problem as to whether a judgment can be entered before the findings of fact have been made?

JUDGE CLARK: No, not at all; but of course on that I should hope that this would push the judge. The judge ought to make his findings when he makes his decision. The appellate courts have said that the canned findings of counsel are no good, but we have no prohibition against their doing it and, in spite of admonitions, I think district judges will continue to take canned findings of the winning party.

JUDGE DOBIE: I think this is in a way gilding the lily, but I don't think it does any harm and I think it is very important that judges do hand it down. We have the abominable rule in our court that the minute the opinion is concurred in by the judges, the clerk immediately draws a judgment. We have the silly idea down there that it is the job of the judge to attend to his business, completely foreign, of course, from most of the American courts. I don't think it does any harm, and it might do some good. It is sort of gilding the lily. I move its adoption. It may help. I don't see how it can hurt.

MR. LEMANN: Do you want to consider the further

suggestions that are made by the author of this note? He wants to go further.

JUDGE CLARK: No. Of course, it depends on the way you are looking. I wouldn't put it that way. He wants to retreat, I would put it, not go further.

MR. LEMANN: I think if the note should be made clearer in other respects, it might be desirable. On the whole, as you say, you cannot completely guard against the inefficiency of lawyers and, unfortunately, judges are charitable. My inclination would be against it. It is just putting something in to be putting it in. That is about what it amounts to. It is reasonably clear on this point already, I think. As Mr. Pryor says, if they won't read what is in the rule now, they won't read what is in the amendment, will they?

CHAIRMAN MITCHELL: There is a motion to include this in the rule. All in favor of it say "aye"; opposed, "no."

... There was a division ...

CHAIRMAN MITCHELL: All those in favor raise their hands; those opposed raise their hands. As I get it, it is carried five to four.

JUDGE CLARK: Now I think we come to Rule 60. This is our famous rule on mistakes, Rule 60(b). This is a rule which I think has done a good deal of good service. Of course there are some outer fringes that are sure to raise problems, and this does.

CHAIRMAN MITCHELL: Where is it dealt with in your reports?

JUDGE CLARK: The original discussion back last fall started at page 64 of the September report. As a matter of fact, there have been certain developments since, and you will find those referred to beginning at page 32 of the March report, the most recent one.

The first proposal would deal with this long sentence, "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence," and so on.

There was some question as to whether there should not be some modification so as to take out the supposed limitation to one year. I say "supposed limitation" because while it was provided that there should be a one-year limitation as to divisions (1), (2), and (3), that limitation actually did not apply to the other provisions and you could almost always move or at least attempt to move under the other provisions.

This particular amendment was made and suggested by Dean Pirsig. I objected to it and urged that it be not made, as you will see if you will follow down in the comment. I think Dean Pirsig has revised his suggestion, and I think I have his present suggestion correctly stated on page 35 of my March draft.

As I understand, what he has in mind now is to say:

"The motion shall be made within a reasonable time, and for reasons (1), (2), (3), and (6) not more than one year after the grounds therefor have accrued and are known to the moving party."

This differs from the proposal that I originally made, which would require that the motion shall be made "without undue delay after the grounds therefor are known to the moving party." Dean Pirsig would substitute a maximum one-year period for the more flexible "without undue delay."

Do you want to say something more about your proposal, Dean Pirsig?

DEAN PIRSIG: I think it has two effects. One would extend the time of reasons (1), (2), and (3) from a fixed one-year limitation from the time of judgment to a one-year limitation from the time that the grounds accrued and are known to the party. As for (6), any other ground, a general catch-all, which is now without any time limitation, I suggest the same limitation, one year after the ground has been discovered.

At the last meeting of the Committee I was inclined to be opposed to Judge Clark's original proposal that there be no time limitation and that it be only a matter of reasonable time, leaving that to the discretion of the court. Since that meeting I have read some of the cases, and the more instances I see, at least I was more impressed by the arbitrariness of

67 of the one-year limitation after judgment. It doesn't have any relation to the merits of the case. It doesn't have any relation to the diligence of the moving party. There are some very real hardship cases that are not met by that arbitrary limitation.

So, as Judge Clark has pointed out, the tendency of the courts has been to take these hardship cases and put them in the catch-all subdivision, (6), which has no time limitation.

My suggestion is that what you want is possibly some reasonable limitation on disturbance of the judgment. It ought to have some relation to when the party discovered the grounds rather than to the entry of the judgment.

CHAIRMAN MITCHELL: Of course, Rule 60(b) was promulgated in order that there should be definite finality of judgment. We abolished the rule that the end of the term ended the jurisdiction, which left no finality at all in the cases with which 60(b) deals, no time limit and no term limit. The purpose of this rule was to put an end to motions in the same litigation. If they were not made within the fixed time limit, from that time on you were limited to seek your remedy in an independent action, if you had any.

The question in my mind is that your proposal would impose a limit that does not exist now, would it not, in subdivision (6)?

DEAN PIRSIG: It would further extend the time within

68 which the motion could be made.

CHAIRMAN MITCHELL: Not extend it, but limit it. You say now there is no limit.

DEAN PIRSIG: It would limit (6), and it would extend (1), (2), and (3).

MR. PRYOR: I was opposed to the specific limitations on (1), (2), and (3) because it seemed to me that the hardship cases invited the use of (6). I go along with Dean Pirsig's suggestion of putting in a specific limitation, but making the time begin to run with the discovery of the grounds.

JUDGE CLARK: The background of this was my original proposal, which was to take out the definite time limit and make it a reasonable time, frankly because the rule was not in one sense honest. I mean by that that while it seemed to state a definite time limit, by moving the pegs around, specifically by going under (6), you got away from it. So I thought it would be better to make it general.

There was some objection made that that seemed to be taking away some possible elements of finality. I don't think it was because I don't think those elements really exist. They may represent a hope, but that is all.

Dean Pirsig is in effect, I think, accepting the major part of that but is saying that perhaps we can speed the thing up by saying that you have only a year after the reasons under (6) have occurred. I have no particular objection to that.

69 I think that is more in touch with reality; perhaps it is as much in touch with reality in judicial decisions as we can make it. I thought our formalistic rule did not state what actions the courts were doing and would do.

DEAN MORGAN: You can always bring a separate action.

JUDGE CLARK: That is true. That is an additional point.

DEAN MORGAN: Under this, if they can't bring a motion within a year after discovery, it would be awfully hard to show grounds for a separate action to set the thing aside.

MR. PRYOR: I move the adoption of Dean Pirsig's suggestion.

CHAIRMAN MITCHELL: Is that the one shown on page 64 of the September report?

MR. PRYOR: No.

JUDGE CLARK: No, that is not the one.

CHAIRMAN MITCHELL: Will you read the proposal?

JUDGE CLARK: Yes, I will read it so the reporter will have it. It is found on page 35 of the March draft. The following would be the second sentence of Rule 60(b):

"The motion shall be made within a reasonable time, and for reasons (1), (2), (3), and (6) not more than one year after the grounds therefor have accrued and are known to the moving party."

JUDGE DOBIE: Would it be wise to put in there, "known

70 or should have been known"?

MR. PRYOR: No.

DEAN MORGAN: No.

CHAIRMAN MITCHELL: You would have to dig up extraneous facts as to when the moving party knew about it before you would know whether or not the judgment was final.

JUDGE CLARK: Of course, there is no doubt that this takes away a formal statement of finality, and to that extent you may say it is weakening the proposition of finality. But then I come back to my other proposition that it is not what we do; the courts have already done it. The judgment is not final and courts will not have it as final when they think there is some major reason for change as on the surface might seem to be stated by Rule 60(b).

See cases collected and authorities cited in Moore's treatise and Moore's article on relief from federal judgments.

JUDGE DOBIE: Do you object to this amendment as Dean Pirsig has drawn it?

JUDGE CLARK: No, I am quite ready to take it.

CHAIRMAN MITCHELL: What do you think about it, Professor Moore?

PROFESSOR MOORE: I would be in favor of it.

JUDGE DOBIE: I move its adoption, Mr. Chairman.

CHAIRMAN MITCHELL: All in favor of it say "aye"; opposed. It is agreed to.

71 JUDGE CLARK: There are two more propositions about this same rule. One of them is that Dean Pirsig would suggest an addition, which appears on that same page 35 of my March draft, to say:

"When the motion is to set aside a judgment by default any doubt shall be resolved in favor of the motion."

I agree with the sentiment fully, but it does not seem to me that we need to state it. It seems to me that other provisions care for that. Rule 55, which is the default section, contemplates reopening, and it seems to me that it is sufficiently covered there. I might say that there has been a decision from the District of Columbia, I believe, in the last number of the Federal Rules Service, in a suit against Eastern Air Lines, which said just this about reopening for default. The court should be somewhat tender in giving an opportunity. So, it seems to me that you don't need this.

DEAN PIRSIG: I am inclined to agree with that.

JUDGE CLARK: I have one matter more on this rule, and that is discussed on page 32 of my March draft. It has been brought to a head by a recent decision in the Third Circuit, although it has been inherent in the situation from the beginning. This will show you what the point is. I suggest the insertion of another sentence, probably as a third sentence:

"Such motion does not require leave from an appellate

72 court, though the judgment has been affirmed or settled upon appeal to that court."

For some years courts have been sort of toying with this idea. This is when a case has been appealed and affirmed. This is not while the matter is pending before the appellate court, because then of course the jurisdiction is in the appellate court. It is when the appellate court is finished and through, that then if you want to do anything about the judgment you have to ask permission of the appellate court. The rule developed before our rules, and on what basis I have never been able to see, except a kind of tradition. There wasn't any statute or anything like that, but there were case authorities that in that instance you had to ask the appellate court for permission.

I know from time to time we have received these requests. The reason that it seems to me foolish is that it is a pure formalism so far as we are concerned. It comes up on a motion, and we know nothing about the case then. Probably it was decided by some of our predecessors ten years or so before. We cannot know what the new grounds are. The matter should be tried out, so to speak. We can take care of it on appeal. This sort of gesture in advance it seems to me is one of those formalisms that we are supposed to get away from.

Actually, in the case of Butcher & Sherrerd v. Welsh, 206 F. 2d 259, the court even went so far as to grant a

73 mandamus and prohibition requiring a district judge to vacate his order granting a new trial on the ground that his permission had not been secured. That happens to be a rather hard case where probably District Judge Welsh, who did it, probably should not have done it; but I see no reason why that could not have been taken care of by the ordinary processes, which would have been the ordinary appeal without this sort of thing.

The question has been brought up in several cases.

CHAIRMAN MITCHELL: Back of it, I suppose, is the idea that when the court of appeals has rendered judgment and its mandate has gone down, it cannot be departed from unless the upper court permits it.

JUDGE CLARK: That is the general idea; but it can't be departed from anyway except that you have the conditions under 60(b), and if you have the conditions under 60(b), that there was mistake, fraud, and these others --

JUDGE DOBIE: That never has been before the appellate court.

JUDGE CLARK: That is right. How can the appellate court act sensibly on this without any record of any kind? This is a matter which has not been tried out. As I say, that makes this matter of request the utmost formalism that I can think of.

MR. LEMANN: You have only one case. If you don't add something here, would somebody argue that the appellate court cannot review the action of the district court in

74 permitting this? You wouldn't want that, would you? You wouldn't want the district court to have the final word. Would somebody imply that from this amendment? This amendment is suggested only by this Third Circuit decision?

JUDGE CLARK: No, I don't think so. If you will look on page 34, you will see that this has been discussed in a great many cases.

MR. LEMANN: Do you think it would be worth while to add a clause that the action of the district court may be reviewed by the appellate court, or do you think that would be difficult to do?

CHAIRMAN MITCHELL: You could meet that by saying, "Such action does not require prior leave of court."

JUDGE CLARK: I think that is a good idea.

MR. LEMANN: I think that would cover it.

JUDGE DOBIE: I move that it be adopted.

CHAIRMAN MITCHELL: That is the proposal on page 32 of the March report, amended to insert the word "prior" before the word "leave." Is there any objection to that? That is agreed to.

JUDGE CLARK: The next rule that I call to your attention is Rule 62. Look at page 36 of my March draft. This comes in as a suggestion which I have in my own mind rejected, but nevertheless I bring it before you. Mr. Fischer, of Philadelphia, in a letter of last October urges that the

75 automatic ten-day stay before execution should not apply to default judgments. He says:

"No reason suggests itself why, in an uncontested proceeding where a defendant has not exerted himself in twenty days, he should have an additional ten days. On the other hand, it sometimes is of the greatest importance that an execution on an uncontested judgment issue forthwith."

Mr. Fischer's purpose can be achieved by inserting at the end of the first sentence of Rule 62(a) the following words: "but this provision shall not apply to a judgment entered under Rule 55(b)."

The Reporter personally is inclined to doubt the wisdom of such a change or the need for so much hurry. Under Rule 55(b)(2) the judgment is entered after only three days' notice; the present rule gives just a little more leeway before finality descends.

I think I should say a little bit more. Generally I should think that there was more reason for less haste in a default case than in other cases. If there is any point in Mr. Fischer's proposition, it ought to apply generally. I did bring before you some suggestion of modification of the execution rule when I brought in a suggestion that the court in particular instances might dispense with the necessity of this ten-day limit, having in mind more the contested cases because there might be some matters that would come up which

might require more haste. At that time you didn't like that proposition, and I am not sure it is a wise thing in those cases. A judgment is a doom of one kind, and it may be this is not necessary. In any event, I do reiterate that it seems to me that his question is much more to the point in non-default cases, and in default cases we had better not hurry any faster than that.

JUDGE DOBIE: I agree with that. I move that Mr. Fischer's suggestion be rejected.

PROFESSOR WRIGHT: This letter was addressed to Henry P. Chandler.

MR. TOLMAN: It was addressed to our office.

CHAIRMAN MITCHELL: Is there any contrary view? It is agreed that Mr. Fischer's point be rejected.

JUDGE CLARK: The next that I have down is this matter of condemnation. We have discussed what should be done about the pending bill in Congress, and Mr. Mitchell is going to write a letter, kindly or otherwise, I think.

I think we did not finally decide whether or not we were going to do anything on Mr. Pryor's proposal, or did we? I think we put it over, didn't we, and we were going to consider it some more here. That is the matter of the bill in Congress dealing with subdivision (h) of 71A.

CHAIRMAN MITCHELL: This appears on page 38 of the March report.

77 JUDGE CLARK: We turn for the moment to subdivision (k), which involves the Stude case. I think everybody was going to study that case night and day until now and, having studied it, we await your proposals.

MR. LEMANN: I read the case in the court of appeals' opinion. I think the conclusion finally reached was correct, because it was not an original proceeding in the district court. They had started in one court, and then they were trying to fit the procedure in the federal court on top of the procedure in the state court. It seems to me that is rather difficult to do. The railroad had started out in the state court and invoked state procedure. They could have gone to the federal court to begin with, as I understand it, but they did not. Isn't that right, Judge Driver? They invoked the state procedure and had a sheriff's jury, which is really a commission which is appointed by the sheriff. They got an award and didn't like that award, so then they took it to the federal court to appeal from that, which the state statute said they could have done in the state court. They could have appealed in the state court from the finding of the sheriff's jury and had the case tried over again by a full jury.

CHAIRMAN MITCHELL: How can you take an appeal from a state court to a federal court?

MR. LEMANN: That is about what the court held finally, that it could not be done. They held it was not a

78 case applying to the federal court at the beginning. That is not before us. They had no occasion to consider our rule, really. I think the case is right. Why shouldn't the railroad company make up its mind where it wants to go to begin with? Mr. Pryor's amendment would permit the railroad company to start out partly in the state tribunal and then go to the federal tribunal.

CHAIRMAN MITCHELL: The statute says that you can go in a federal court in the first instance, but there is nothing in the statute that I know anything about that allows an appeal from a state court to a lower federal court.

JUDGE DOBIE: There are a number of cases -- and I am sure you have run into some of them -- that hold that as long as this is an administrative proceeding you cannot remove it; it is not a suit. Some of them hold that after you have gone through an administrative proceeding and it has developed, in a proper case it may be removed. I have not read this Stude case. I wonder if they made the point that it was not a suit, but an administrative proceeding. I would like to ask the Reporter about that.

JUDGE CLARK: What is that?

JUDGE DOBIE: In the Stude case did they make the point that this thing was not removable because it was merely an administrative proceeding and not a suit?

MR. PRYOR: Yes.

79 JUDGE CLARK: As I interpret it, yes.

JUDGE DOBIE: It ought not to be removed. It has been held a number of times that the compensation cases under the Workmen's Compensation Act are mere administrative proceedings and that you cannot remove them.

MR. PRYOR: In this case the condemnor brought ten condemnation suits, and after the sheriff's jury under our state law had awarded damages, they removed those cases to the United States district court. Contemporaneously with a motion to remand made by the property owners, each property owner attempted to comply with the Iowa statute by filing petition in the United States district court. That was the subject of the motion to remand. That was really the situation.

CHAIRMAN MITCHELL: As I understand it, you have used the expression "appeal and removal." I think there wasn't anything that amounted to removal; and the court of appeals, as I read it here, said that they could not appeal, that there was no statutory right of appeal from state court to federal district court.

DEAN MORGAN: They talked about appeal, didn't they?

CHAIRMAN MITCHELL: They treated it as not removable. They emphasized the words in italics, "right of appeal."

MR. PRYOR: My only suggestion was that in 71A(k) the words "or commission or both" be deleted. That would leave the right to trial by jury if the state statute so prescribed,

as it does in Iowa.

CHAIRMAN MITCHELL: I don't believe I get your point.

MR. PRYOR: Do you have 71A(k)?

CHAIRMAN MITCHELL: I have page 38. I don't have that rule before me.

MR. PRYOR: I am referring to the rule.

JUDGE DRIVER: If you look at the rule, it becomes apparent.

CHAIRMAN MITCHELL: What is your proposal as to (k)?

MR. PRYOR: To strike the words "or commission or both" in the next to the last line and the last line.

JUDGE DOBIE: What are we on now?

MR. PRYOR: 71A(k). We are considering Rule 71A, subparagraph (k).

JUDGE DRIVER: I think what Mr. Pryor proposes is that when condemnation is brought under state law and the federal court has it only by reason of diversity jurisdiction, then instead of following the state practice you have the right of trial by jury in every case where it is demanded, but not a right, following the state practice, to trial by commission or both.

CHAIRMAN MITCHELL: The purpose, as I understand it, was that if you had a diversity case under state power of eminent domain, you should not be able to shop for a more advantageous method of trial by removing.

81 MR. PRYOR: You have that in every diversity case, don't you? In every case the nonresident defendant can sue either in the state court or in the federal court, if there is enough involved.

CHAIRMAN MITCHELL: I know, but these condemnation cases sometimes involve a state law that gives jury trial and sometimes involve a state law that gives a commission trial.

MR. PRYOR: Our law provides for both commission and trial by jury.

CHAIRMAN MITCHELL: That is the state practice.

MR. PRYOR: I know it, but where your case is in the federal court by reason of jurisdiction over a diversity situation, why could not this Committee prescribe a rule, and the Court adopt it, that would govern the procedure in the federal court?

CHAIRMAN MITCHELL: The Committee was of the opinion that if you were resorting to state statutes giving the right of condemnation, you would have the same kind of tribunal in the federal court that you would have had in the state court.

MR. PRYOR: Apparently that was the opinion of the Committee when the rule was drawn.

CHAIRMAN MITCHELL: Why shouldn't it be that today? What reason is there for saying that you should have one right in federal court and another and different right in the state court in a state condemnation case?

82 MR. PRYOR: You have the same right. You have the right to trial by jury. We had a great deal of confusion over this in connection with the nine-foot channel cases in the Mississippi River, where the islands were to be submerged. If the land on the island lay west of the thread of the stream it came under Iowa law and they had to have a sheriff's jury make an award; then there was an appeal to the district court, and then there was a jury trial. If the land lay east of the thread of the stream, it was in Illinois, and you had just one trial, which was in the district court. It would be governed now by our rule on condemnation, of course.

JUDGE DOBIE: Of course its application is not limited in any way to condemnation suits.

MR. PRYOR: Yes, it is in the condemnation rule.

JUDGE DOBIE: I see. I beg your pardon. I see that it is, absolutely.

PROFESSOR MOORE: Mr. Pryor, didn't the Committee put two alternatives up to the Court, and the Court adopted what is now subdivision (k)?

MR. PRYOR: I can't answer that, Mr. Moore.

CHAIRMAN MITCHELL: I have the report with the two alternatives which we passed up to the Court. The first one is the one that was adopted.

MR. PRYOR: I wonder, if that were true, if the difficulty that is presented by the Rock Island case, in which

there were three dissents, would not persuade the Court that it would be better to have "or commission or both" out of there.

CHAIRMAN MITCHELL: The fundamental idea back of the thing was that if you were following the state statute allowing condemnation, you should have the same practice in the federal court on removal that you would have had in the state court. That is the underlying idea.

MR. PRYOR: That is true, and we do have, except that we still have to have the two trials under this rule.

CHAIRMAN MITCHELL: But the state statutes allow it. If you are operating under a state statute which gives the power of condemnation, why should you have a different practice?

MR. PRYOR: It seems to me that a citizen of another state who is given the power by our statute to condemn, the power of eminent domain, ought to have the same right in the federal court in this kind of case that he would have in any other kind of case. He is not given that right now under this rule because he has to go through this unnecessary procedure of a sheriff's jury.

JUDGE DRIVER: You said that was submitted as an alternative?

CHAIRMAN MITCHELL: Yes.

JUDGE DRIVER: I know that Justice Frankfurter particularly feels strongly on the point that in condemnations under state law you should strictly follow the state procedure.

84 He wanted to be sure there was no disturbance of the state procedure by these rules.

CHAIRMAN MITCHELL: That is provided in the alternative that was adopted.

JUDGE DRIVER: They rejected the other, didn't they?

CHAIRMAN MITCHELL: They did.

JUDGE DRIVER: What was the other? Did it provide for jury trial?

PROFESSOR MOORE: If the state practice provided for jury and commission and both together, why is it that you would not have a duplicate and just have the jury?

JUDGE DRIVER: That was the alternative. I have always been in favor of Mr. Pryor's proposal, but I doubt whether you could get it by the Supreme Court. I think I took that position before when we adopted the procedure. I would rather see jury trial in all diversity cases.

CHAIRMAN MITCHELL: There is the question of Congress, too.

MR. PRYOR: Of course Congress can upset it.

JUDGE DOBIE: They have been very touchy about this whole condemnation mess, Mr. Pryor.

MR. PRYOR: I felt that it was my duty, coming from Iowa where this case arose, to raise the question.

CHAIRMAN MITCHELL: You said there were three dissents. On what point? What would they be dissenting about?

85 MR. PRYOR: There were.

JUDGE DOBIE: Frankfurter and Black dissented.

JUDGE DRIVER: I think probably it should be referred to the Iowa Legislature.

MR. PRYOR: It wouldn't get very far there. They are too busy deciding whether or not to have colored oleo.

JUDGE DOBIE: I wouldn't tamper with that rule.

PROFESSOR MOORE: Frankfurter said that that is all nomenclature and that what the condemnor attempted to do in federal court in that case should have been an independent suit in federal court. The majority kept taking the position that what the condemnor was trying to do was to take an appeal, which he could not do.

JUDGE DOBIE: Frankfurter said it was not an appeal, that it was practically an original suit.

MR. PRYOR: It is practically quibbling over words.

MR. LEMANN: Can you say that invoking a state jury to fix your damages in taking property is just an administrative proceeding? If you can, Frankfurter was right. If that is not dorrect, then he was not right. Isn't that correct, Mr. Moore?

PROFESSOR MOORE: I think that is it.

MR. LEMANN: It seems to me it goes far beyond the usual understanding of an administrative proceeding and is not within the rule that says you must exhaust your administrative remedies before you can go to the federal court. Here the

railroad elected to go to the state court and get the sheriff's jury to fix the amount.

MR. PRYOR: The state court had nothing to do with it.

MR. LEMANN: Where did they go?

MR. PRYOR: The first thing they have to do is to get a certificate of necessity from the State Commerce Commission. That is filed with the sheriff. That is the sheriff's basis of authority for calling a jury to fix the damage. Then the court has nothing to do with it until there is an appeal from that sheriff's jury. They call it an appeal from the sheriff's jury to the state court.

CHAIRMAN MITCHELL: Did the condemnor have to start the way he did? Could he have started the condemnation case in federal court to begin with?

MR. PRYOR: I don't think so, under this decision. Maybe I interpret it wrong.

MR. LEMANN: They reserved that point, apparently, because in the last sentence of the majority opinion, the Supreme Court said:

"The Federal Rules of Civil Procedure do have elaborate provisions for procedure in the federal courts in condemnation proceedings. It is obvious that the petitioner was not proceeding under these rules. Whether it could so proceed in an original action in the United States District Court for the Southern District of Iowa is not before us."

87 JUDGE DRIVER: Suppose he had brought his suit initially in federal court under diversity jurisdiction, following this rule how would he go about impaneling a sheriff's jury? I would like to know that. If I had the problem, how would I do that?

MR. PRYOR: Mr. Moore made the suggestion to me yesterday -- and I don't know but that I would follow it if I had to condemn some land -- to go into the federal court with my certificate of necessity, which I would have to get in any event, and ask the marshal to impanel a jury to award the damages, on the theory that the marshal is in the same position as the sheriff under state law, and proceed from there. I think that is the way I would do it in view of this decision.

MR. DODGE: The marshal would know what it was all about.

MR. PRYOR: And he might not do it.

JUDGE DOBIE: Mr. Chairman, I would like to make a motion, if I may. I think it is evident from what has been said by Mr. Pryor that we are playing with dynamite when we mess with this rule. I don't believe this is important enough, and we might get tangled up with the Supreme Court. I move that the suggestion be not adopted.

MR. PRYOR: I don'tmean to take any drastic action. It was just a suggestion.

CHAIRMAN MITCHELL: Is there any further discussion?

88 The question is whether you want to adopt the amendment or not. All in favor of adopting it say "aye" --

JUDGE DOBIE: They haven't heard it over there.

CHAIRMAN MITCHELL: No, your motion was that it be not adopted.

JUDGE DOBIE: My motion was that it be not adopted.

DEAN MORGAN: You don't have to make that motion.

JUDGE DOBIE: I just want to bring it to a head.

CHAIRMAN MITCHELL: The motion is that we reject the proposal. All in favor of rejecting it say "aye"; opposed. It is rejected.

PROFESSOR WRIGHT: Judge Clark stepped out for just a minute.

The next point is a very minor one that Leland Tolman has brought up on 81(f), which does not appear anywhere in the material. Leland points out that we no longer have Collectors of Internal Revenue, that we now have Directors of Internal Revenue, and that the rule ought to be changed in conformity with that so it will say that "the term 'officer' includes a Director of Internal Revenue," and so on.

MR. TOLMAN: It is a matter of changing the terminology of the rule, Mr. Mitchell, so it will conform with the present title of the office. There is no longer a Collector of Internal Revenue. They are all District Directors of Internal Revenue.

JUDGE DOBIE: I move its adoption.

89

JUDGE CLARK: I don't think there can be substitution. We have a case now pending against the widow of Helvering.

MR. TOLMAN: I know. I would leave the provision for the widow of a deceased Collector, because there are cases still pending on that.

JUDGE DOBIE: What would you substitute, "or Director"?

MR. TOLMAN: Yes.

JUDGE DOBIE: Is "or Director" satisfactory?

MR. TOLMAN: Leaving "Collector" in and putting in also "Director."

JUDGE DOBIE: I move that the words "or Director" be added.

JUDGE CLARK: Is "Director" enough, or must it be something else?

MR. TOLMAN: I think District Director is the correct title.

JUDGE CLARK: Will you check on that?

MR. TOLMAN: Yes.

JUDGE CLARK: Fine.

CHAIRMAN MITCHELL: That is agreed to.

JUDGE CLARK: The only thing left is the forms and Rule 86(d), if you will look at page 38 of the March draft. That is to put in something as to the effective date of the amendments. The Attorney General is quite anxious that we do

something about that substitution rule. I suppose we should have it. Previously we put in something of this kind.

CHAIRMAN MITCHELL: I thought you were on Rule 86.

JUDGE CLARK: I am.

CHAIRMAN MITCHELL: Is there anything about substitution in that?

JUDGE DOBIE: It is just about the date when the rules take effect, isn't it?

JUDGE CLARK: There isn't anything about substitution in that rule but, as I say, the Attorney General in discussing the substitution rule said that there should be something so the Department of Justice would know when it was to take effect. I indicated to him in effect that we always did put in some provision, and this is the provision. I was not saying there was any connection with the substitution rule, except as a kind of example.

CHAIRMAN MITCHELL: Doesn't the statute say when they take effect?

JUDGE CLARK: No. We have always had this in. It says when they cannot take effect; that is, they shall not be effective before a certain time, until they have been laid before Congress, and so on.

JUDGE DOBIE: This is just like the old rule except that it leaves in there the date when they are adopted by the Supreme Court, the date they are transmitted to Congress, and

91 provides, as I understand it, that they take effect August 1, 1955.

JUDGE CLARK: That is what we have been able to do more lately under the new enabling act which allows the rules to be recommended at any time up until May 1, and have to remain before Congress for three months. So we get them in by May 1 and then we can make them effective August 1, which is about the first date we could make them effective. That seems to be a very good time to make them effective.

This provision, redrawn, is about the same as we had in subdivision (c) for the earlier rules.

When the Supreme Court came to adopt the condemnation rule, they did it somewhat simpler in effect by putting in their own order that this rule shall take effect August 1, and so on. That may have been simpler. This carries out what we have done before.

CHAIRMAN MITCHELL: That date has to be three months after it is submitted to Congress.

JUDGE CLARK: That is right.

CHAIRMAN MITCHELL: What do you want us to do?

JUDGE DOBIE: If it doesn't get through Congress, you may have to change that.

JUDGE CLARK: Yes. I should think tentatively there ought to be something here. Here are the effective dates once before (indicating). It is modeled particularly on the latest

92 one.

JUDGE DOBIE: I move its adoption.

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

JUDGE CLARK: The only thing left is the two suggested forms of judgment, and there is another form dealing with the third-party defendant. If you will look first at page 69 of my September draft, you will see a change made in the summoning of the third-party defendant. We are now changing the rule so that you don't have to go to the court first and get an order for something against the third party.

CHAIRMAN MITCHELL: What is your proposal?

JUDGE CLARK: That that form be corrected to conform with what we are proposing as an amendment, and the corrections made as indicated here.

CHAIRMAN MITCHELL: There can't be any objection to that.

JUDGE CLARK: It has gone a little out of my mind. Mr. Wright says there was discussion before and possibly some objection to the last sentence. What was that, Mr. Wright? I have forgotten.

PROFESSOR WRIGHT: The question was whether or not you should give free legal advice by having the form tell the third-party defendant that this extra paper that he is getting is a copy of the complaint of the plaintiff, which he can

93 answer if he wants to. The Committee did not adopt that last May. It said the Reporter should prepare an explicit draft and submit it to the Committee at this meeting. There has been no Committee action on that heretofore.

JUDGE CLARK: That last sentence is, "There is also served upon you herewith a copy of the complaint of the plaintiff which you may answer."

JUDGE DOBIE: He is not compelled to answer.

JUDGE CLARK: The basis for this is in the rule, which states that the third-party defendant must of course answer the complaint against himself, but it provides that he may also go on and make defenses against the plaintiff.

DEAN MORGAN: I think that ought to go in.

DEAN PIRSIG: You have taken out the copy of the defendant's answer.

CHAIRMAN MITCHELL: What is your pleasure with that?

JUDGE DOBIE: I move its adoption.

DEAN MORGAN: I second the motion.

CHAIRMAN MITCHELL: That is agreed to.

JUDGE CLARK: The suggestion was made that the Reporter should draw up forms of simple judgments and present them here. Let me say that it would seem to me that this ought to be very helpful. I think one reason for it is that Rule 58 has raised some question in different courts and they have not seen what to do. Some of them have prepared very formal

94 judgments with lots of whereases and recitals. We did have already a provision in the rule that the form of judgment should be simple. That is Rule 54(a). The Rules contemplate a simple judgment promptly entered. See Rule 54(a), providing that a judgment "shall not contain a recital of pleadings, the report of a master, or the record of prior proceedings."

This is to make it visual, so to speak. It seems to me that these forms ought to be helpful. I think they are simple and meet the point. If you haven't already, I wish you would take a look at them.

JUDGE DRIVER: I think there is a genuine need for a form of judgment. The clerks have had trouble with the rule. It provides that they shall enter judgment. The lawyers prefer their own form of judgment, if you don't have an official form, and sometimes they submit to the clerk these long, drawn-out judgments that have long-winded recitals in them. If the clerk had his own form, he could say, "No, we have this form and I will enter it in this form."

DEAN MORGAN: I move the adoption.

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

JUDGE CLARK: Let me say that I have added a correction or two, which appear by reference to my March draft.

CHAIRMAN MITCHELL: We will take a look at your forms when the report comes back, and if anybody has any kick about it

95 we will take it up then.

JUDGE CLARK: We will add the corrections. For example, the numbers have to be changed because there have been inserted already some forms under the condemnation rule. These actually will be Forms 30 and 31.

MR. TOLMAN: I should think these forms of yours might be somewhat shortened. They have some recitals that I don't think you need.

JUDGE DRIVER: I have a suggestion on a minor point on your form of Judgment on Trial to the Court, on page 73. I notice there in the last part of the first paragraph, "recover of the defendant damages in the amount of $10,000" and then in brackets, "defendant", "as per opinion" or "memorandum of decision on file."

If you are going to put in a note of that sort, I would not limit it to an opinion or memorandum of decision of the court because in my practice -- and I think it is general -- in about four cases out of five I decide the case on an oral announcement from the bench and don't have any formal written opinion or memorandum of opinion. If I wrote an opinion in every case I would have to have two more judges out there to help me keep up. You can't do that in every case, and judges don't do it.

JUDGE DOBIE: It is tried before a jury, and it is handed down. You don't write an opinion unless there is a

96 motion.

JUDGE DRIVER: This is on trial before the court. In most cases what you do is to announce what you think about the facts and give your reasons and announce your decision from the bench while the matter is fresh in your mind, and that is that. You don't write any formal opinion.

MR. LEMANN: Why not take out those words? What is the purpose of saying "as per"? Why not take out "as per" and everything following that?

JUDGE DRIVER: Either take out "as per" or put in an alternate "or oral decision or announcement from the bench."

MR. LEMANN: What does it add?

CHAIRMAN MITCHELL: When you have an oral opinion from the bench, doesn't the reporter make a transcript of your opinion, and isn't it put in the files of the clerk?

JUDGE DRIVER: No, not unless somebody pays for it. If one of the parties wishes to get it, and they usually do, they have it transcribed by the reporter. If they do that, then a copy is put in the files. They started publishing my oral announcements from the bench with ungrammatical remarks and everything else in them as my opinions, and I had to stop that. I said, "I didn't prepare that as an opinion. When I prepare an opinion I like to have it at least in good English." I made them stop doing that.

CHAIRMAN MITCHELL: There is no objection to striking

97 out these words, "as per opinion or memorandum of decision on file."

JUDGE CLARK: I don't think so. I thought some judges would like to have some reference to that, but they can put that in very easily.

I would like to get Leland's ideas about shortening, if we can.

MR. TOLMAN: I think we can take out some of the recitals in it. It seems to me the judgment can be fairly brief. All you need to do is to say it was tried by a jury and there was a verdict in such-and-such amount. The other material all appears in the record.

JUDGE DOBIE: What would you strike out, Leland, to be precise?

MR. TOLMAN: For instance, in the judgment on page 71 I should certainly think it would be unnecessary to say "with all parties appearing by counsel." They might not all be appearing by counsel, in the first place; and, in the second place, what difference does it make in the judgment whether you say that or not? I don't think you need to recite all jurisdictional attacks.

JUDGE DOBIE: I think that could go out.

JUDGE CLARK: I am perfectly willing to cut it down. Take out "with all parties appearing by counsel." What else?

MR. TOLMAN: I don't see why you need the bracketed

98 material there. It seems to me that all you need to say is that the jury on June 2, having rendered a verdict for the plaintiff or defendant, or whatever it is, and so on. You don't need to say whether it was on interrogatories or a general verdict.

CHAIRMAN MITCHELL: Suppose the jury only returned answers, a special verdict, so to speak, and did not render a general verdict?

MR. TOLMAN: If they did, you would have to say that, of course.

CHAIRMAN MITCHELL: It seems to me there is an implication that if the form contains recitals that are not true in the particular case, you just draw a line through them.

MR. TOLMAN: I had the feeling that there was not really any necessity in a judgment to recite all the details of what preceded the judgment. I know some of the forms do not.

JUDGE CLARK: I think in general that is true, but it seems to me that it would be good to have the difference between jury and court to appear, and if you get that far you have practically to show the difference between the jury verdicts. That is about all I thought I was doing. If it can be made shorter than that, all right.

DEAN PIRSIG: What other fact is relevant in the rendition of the verdict? In whatever form it may be, special or with interrogatories or general alone, what other fact is

99 relevant to the entry of the judgment?

JUDGE CLARK: I would say the answer to your question is indicated by your question: There is none. I would say, What do you say when there is no verdict?

CHAIRMAN MITCHELL: No general verdict, you mean.

JUDGE CLARK: What are the answers to interrogatories?

DEAN PIRSIG: I think you should set them out.

JUDGE DOBIE: The case has to be disposed of.

DEAN PIRSIG: I agree with Leland that anything that recites facts not relevant to the entry of judgment should not be in, and to me only the verdict is relevant to that.

CHAIRMAN MITCHELL: Special findings of the jury on which the judgment is based are relevant. That is all this does. If there are not any, you just draw a line through it in the form.

DEAN PIRSIG: I was inclined to think you would need to set out the verdict itself in that case.

MR. LEMANN: Could you solve it by simply saying, "The jury rendered a verdict for the plaintiff" or "defendant"?

CHAIRMAN MITCHELL: Suppose they rendered a general verdict?

MR. LEMANN: They have to render something which would justify this judgment. It must be in accordance with the verdict.

CHAIRMAN MITCHELL: They have made special findings.

JUDGE DOBIE: The case does not end with the answers to special interrogatories. They are not judgments. The judge says, "I enter judgment for the defendant." You have to have a judgment.

CHAIRMAN MITCHELL: I know you have to have a judgment. You may have special findings by a jury on which the judgment is based, and is it not proper to say so?

JUDGE DOBIE: I don't think it makes any difference.

CHAIRMAN MITCHELL: I don't think so, either. Is there anything more, Charlie?

JUDGE CLARK: Let me perhaps perform a little obsequies for Mr. Hildebrand. Mr. Hildebrand had two other proposals. One of them is that he would do away with our Rule 41 that you can have only one dismissal without prejudice. I don't think we ought to change that, and I don't think we should do anything about it.

JUDGE DOBIE: I move that it be rejected.

CHAIRMAN MITCHELL: That is agreed to.

JUDGE CLARK: He has one other that I would like to state in brief form, but I am not sure that at this late hour I can do it. He has one good proposal, on Rule 4(a), to do away with service by the marshal and to have the service by the marshal or by any other person who is not a party and who is not less than eighteen years of age. Personally, I think that is swell.

101 DEAN PIRSIG: It worked well in Minnesota.

JUDGE DOBIE: Don't you permit that now, Charlie?

JUDGE CLARK: We debated it. I wish this had come in earlier. I might have carried the torch, the lamp, and one thing and another, for it. I really think it is a fine thing. We were not ready for it in 1935. Perhaps we have grown up, you know.

DEAN MORGAN: We may have grown up, but I don't know about the bar.

CHAIRMAN MITCHELL: How about the marshals?

DEAN MORGAN: The bar objected strenuously. There were lots of comments from the states saying that you are making a lawsuit too informal, and so forth. My suggestion was that that would be one feature of the adversary proceeding that worked very well and saved all kinds of expense, record, and so forth.

MR. LEMANN: Does the marshal depend on fees, Mr. Chairman?

MR. TOLMAN: No, he does not.

MR. LEMANN: So he wouldn't care.

MR. TOLMAN: His fees go in to the Treasury.

MR. LEMANN: I think the objection chiefly was the idea that the initiation of a lawsuit was a pretty serious matter and that it was desirable to have some formality about it.

CHAIRMAN MITCHELL: That you should have a responsible

102 person make the service.

MR. LEMANN: And have a formal record of the fact that the papers had been served by an officer of the court, because then it probably got more attention from the average defendant.

JUDGE DOBIE: I would like to observe that we have no marshal in Charlottesville, where I live, and several times I have designated a person to serve. In a very complicated proceeding sometimes it takes me as long as thirty seconds.

CHAIRMAN MITCHELL: You would have to make changes in other rules.

JUDGE DOBIE: I would leave it alone.

CHAIRMAN MITCHELL: A complaint has been filed, and there is the question of the statute of limitations and whether the complaint and summons had been delivered to the marshal for service.

DEAN MORGAN: You have a lot of things you ought to change if you did that.

JUDGE DOBIE: I move that it be rejected, Mr. Chairman.

JUDGE CLARK: Why don't we just postpone it.

JUDGE DOBIE: I move that it be postponed.

JUDGE CLARK: It is a good idea, really. There is nothing but formalism in the other things.

DEAN MORGAN: I suggest that we lay it on the table.

CHAIRMAN MITCHELL: It is laid.

103 MR. LEMANN: What is the probable procedure from now on? The transcript has to be written up.

CHAIRMAN MITCHELL: The Reporter is supposed to get up a final draft of everything that we have done in form to be printed. That will be mimeographed and sent to all of you for any suggestions by mail. If you find there is nothing serious that requires another meeting, we can dispose of it by mail and then it can be printed and distributed to the bar and bench.

MR. LEMANN: Have we already voted on to whom it is to be distributed?

CHAIRMAN MITCHELL: I don't think we need to vote on that. We have a practice about that. It will be sent to the bar associations, and so on, and anybody who asks for a copy can get it.

I have to report that the Chief Justice will not be back in Washington before Saturday night, so we are not able to call on him.

JUDGE DRIVER: Mr. Chairman, I hesitate to bring this up at this late time, but I think you mentioned it before here in connection with the pending bill in Congress on 71A(h) of the condemnation rule. From inquiries I have made here -- I talked to one of the Senators from my state and talked to Mr. Tolman -- there is very strong backing for this bill and great pressure is being brought, I think Mr. Tolman will agree, on the Judiciary Committee of the House. It is my opinion that, unless

something very affirmatively is done to stop it, the bill will go through. Unless something is done to head it off, it will go through.

One of the arguments that is made by the Department of Justice, as indicated by the copy of the letter that we have here from Mr. Rogers, is that the district courts are resorting more and more extensively to the use of commissions in fixing compensation. Of course, the answer that we have made to that argument is that we contemplate that it should be used only in special cases comparable to TVA. Where there is a large government project and an extensive area of land is being taken by the government, for the sake of uniformity and for the other considerations urged by Judge Paul, it was thought wise to leave to the district court in his discretion the right to resort to the commission method of fixing compensation.

The difficulty with that answer of ours is that our rule doesn't so provide. As you pointed out, Mr. Chairman, that was done after we had gone up to see the Supreme Court. We had to do something, and it was rather hastily drafted. As a matter of fact, it places very little limitation on the discretion of the trial court. Rule 71A(h) provides that trial shall be by jury, if demanded, and so on.

JUDGE DOBIE: Do you want to restrict the discretion?

JUDGE DRIVER: ". . . unless the court in its discretion orders that, because of the character, location, or

quantity of the property to be condemned, or for other reasons in the interest of justice, the issue of compensation shall be determined by a commission of three persons appointed by it."

A court could very well determine -- and I think his determination would probably stand up on appeal -- that because of the character or location of a post office site for the construction of a new post office, it would be best to have a commission. We are not limiting it to these giant federal projects, as we intended to do.

I wonder if it would be worth while for the Committee to try to formulate some wording that would more clearly express our purpose. I think it would be very helpful in heading off this contemplated legislation.

CHAIRMAN MITCHELL: We thought we would produce that result by a note. The notes have always explained carefully that our real reason was for these big projects.

JUDGE DRIVER: It might be that a note would serve the purpose, but I believe the note should be formulated in time to be referred to in your letter and perhaps brought to the attention of the committee or the subcommittee before they committed themselves. If there is a recommendation for this bill by the subcommittee, it is going to be hard to head it off after that, because it is the type of legislation in which most Representatives will rely upon the committee finding, and the committee will likely adopt the subcommittee's finding.

JUDGE DOBIE: I would not object at all to a note, but I would object to any restriction on the discretion of the district judge being incorporated in the amendment.

JUDGE DRIVER: It would be difficult to word it.

MR. LEMANN: Didn't you say the other day that you thought the small fellow was often better off with a commission?

JUDGE DRIVER: The small land owner in the large project. If you are taking 100,000 acres of land, the fellow who has 10 acres over in the corner is in a bad way on your jury finding. Where single tracts are acquired for a post office or something or other, usually you have a businessman who owns it and he can protect himself.

MR. DODGE: Would you limit it to very large takings where trial by jury is utterly impracticable and might last ten years?

JUDGE DRIVER: Yes, I would. I think that is the idea we had in mind. I don't think it should be used as a common procedure in ordinary cases. I think it is peculiarly adapted to projects such as I have out there, where the land is all unimproved, is all of the same character, and where it has the same problem with reference to water rights under a new irrigation project. The court of appeals has clarified the rules that should be used in determining compensation. There we have an ideal situation, I think, for commissioners to go in. The standard has already been set up for them. It is uniform.

107 There they can operate more efficiently than a jury.

MR. LEMANN: How would you word it to cover a case such as the TVA, which I presume is not within our rule anyhow, but a case in a similar project where you had condemned to begin with 100,000 acres, or 10,000 or 20,000 acres, but afterwards you wanted to condemn a small piece of 10 acres that you needed for a power house or something as an adjunct? For that you would then have to go to a jury if you limited this in the way that you are tentatively suggesting.

JUDGE DRIVER: I think that is a very sound argument in favor of what Judge Dobie has said, that it is better to do it by note than by limiting language. I certainly would not want the task of undertaking to reword this so as to limit discretion, because it would be very difficult to do.

CHAIRMAN MITCHELL: That is why it was left as it is. It would be so difficult to draw up a formula and express words that defined the kind of project in which it could be used, it is almost impossible.

JUDGE DRIVER: It is almost impossible.

CHAIRMAN MITCHELL: That is why we threw in that extra clause.

JUDGE DOBIE: You just cannot envision every situation that is going to come up in which a commission will be unquestionably the best way to handle the problem. While I think it would be entirely all right in a note, I think it would

be very difficult and very dangerous and very bad to try to incorporate in the rule any standard or rule that would absolutely fetter the discretion of the district judge.

MR. LEMANN: Mr. Tolman, did you get the statistics that we were talking about the other day?

MR. TOLMAN: I found that we did not have any record on the number of commission cases in our office. We called the Lands Division, and they said they did not have the exact figures. They gave us a memorandum which said that the use of commissioners had been greatly increased, and they thought that probably commissioners were being used in almost half the cases. Of course, if we really want to know, we can find out. We can make inquiry of the clerks of the courts and find out.

JUDGE DRIVER: Commissioners are being used in half the cases? They haven't been used at all on the West Coast.

JUDGE CLARK: I think that is entirely argumentive.

MR. TOLMAN: Do you have the memorandum, Mr. Mitchell?

JUDGE DOBIE: I know he said something in there about Judge Bryan and the Virginia judges using it extensively. They may have used it more than other judges. I know Judge Bryan is an excellent judge, and if he used it he had good reason.

JUDGE CLARK: That was not a report, but an argument.

JUDGE DOBIE: Do you want to vote on that?

MR. TOLMAN: I think the report we got from the Lands Division was exaggerated. We have on the agenda for the next

meeting of the Judicial Conference a request from the Department of Justice that the appropriation for payment of lands commissioners and other fact-finding agencies of the district courts be taken over by the Judiciary, to be paid for by the appropriation of the Judiciary rather than from the Department of Justice appropriation. They are very strong about that. They have been ever since this rule went into effect.

JUDGE DOBIE: There is a project, and they don't want their budget to be saddled with the cost of the commission. I don't object to that at all.

MR. TOLMAN: I think the Judicial Conference may be sympathetic to that suggestion, and I think we may take them over. If that happens, I gather there won't be nearly so much objection from the Department of Justice because, as you just said, it is a budget proposition.

JUDGE DRIVER: It seems to me logical. I was amazed when I found out that the Department of Justice paid for these commissioners. If the Administrative Office pays the jurors, it should pay the commissioners.

MR. TOLMAN: We pay the jurors. I have a feeling that a lot of the agitation of the Department will die if that is done.

JUDGE DRIVER: I think so.

MR. DODGE: How did the authority arise for charging that to the Department of Justice? It is not a question of

statute?

MR. TOLMAN: No. In the old days the courts had no money with which to pay commissioners, and I guess the Department did have and they paid them. We never took them over. It is just historical. I think there is a very good chance we will take them over.

JUDGE DRIVER: Here is what I had in mind, frankly, gentlemen. I am going to see the Congressman from my district, whom I know very well. I have known him personally for a good many years. If he sees fit to do so and will introduce me to the chairman of the subcommittee, I will talk to the chairman of the subcommittee. I will not intrude myself or do any lobbying, but if I get an opportunity I will talk to him. It would be helpful if I could say what we had in mind about this. We had in mind using it only in special cases in the big projects, and we had in mind making a note to clarify our understanding of the rule and to state what we intended to do. If I can say that and not be saying something that is not accurate, I think that would be helpful. Is what we have in mind here to make an explanatory note of that kind?

CHAIRMAN MITCHELL: I have been pondering the question of whether we might amend this rather loose language and do something that way, but I don't know how to define accurately the type of case we would want. I certainly would not want to leave it in such shape that we were suggesting in any way that

the Congress by statute draw a definition for it, because we are just inviting legislative interference with these rules, a thing that we have always been opposed to. In the absence of a proposal by the Committee to amend the rule, all we can do is put a note in there.

MR. TOLMAN: I think Judge Driver might get some help from those opinions of the Tenth Circuit which were referred to the other day. They were restrictive. In fact, in one case they set aside a reference to commissioner as being improper under the rules. They said the case was not one where reference to commissioners was intended.

JUDGE DOBIE: That the district judge abused his discretion?

MR. TOLMAN: Yes.

CHAIRMAN MITCHELL: Do I have a reference to those cases?

MR. TOLMAN: I don't know whether you have or not. I will give them to you.

CHAIRMAN MITCHELL: Not this minute, but if I am going to draw up a report I will need those cases.

JUDGE DRIVER: You gave me those in a letter which I have in my file here.

MR. LEMANN: Mr. Mitchell, you might also note that it might be appropriate to say to Congress that we have the impression that perhaps the Department of Justice is taking this

112 position because of the fact that they are burdened with the cost of the commissioners.

CHAIRMAN MITCHELL: I propose to mention that in my report, because for a while that was the only expense item that the Department objected to, the salaries of commissioners. I met them right in our Supreme Court hearing with the suggestion that that was a simple thing to take care of by the appropriation bill, just the way it is done in the TVA Act. I propose to test his assertion in the last letter that the expense of commissions is greater than jury trial. They have never given us any figures to justify that. When you consider that the whole venire of jurors is sitting around the court house waiting for some other case to be reached, and one jury is sitting in a condemnation case and keeping all these other jurors idle if you have only one judge, when you consider the expense of paying for the venire as well as for the panel and all the court officers, the time of the judge and everything else, I think the allegation that the commission is more expensive than the jury is absurd.

JUDGE DRIVER: Here is what is involved in the jury trial: Almost always you have the jury view the land.

CHAIRMAN MITCHELL: That is one of Paul's ideas. You can't have a jury examine a watershed which is sixty miles away.

JUDGE DRIVER: In this condemnation by the Atomic

113 Energy Commission some of the land is eighty miles from the nearest place where court is held. It is out in a sagebrush area. There are no toilet facilities. If you have women on the jury it is very difficult. I have the jury take one or two days to go out and look at the land before I can even start taking testimony. As you say, you have to have a big panel from which to select the jury, and then these cases are protracted. Sometimes they take two weeks or more.

MR. DODGE: In opposing this bill don't you think great stress should be laid on the utter impracticability of trying all the cases in a taking like that by jury, the hardship it imposes particularly on small land owners, and all that sort of thing?

JUDGE DRIVER: Yes, I think so, definitely.

CHAIRMAN MITCHELL: There is another thing the Department of Justice has never taken any account of at all. What would happen in the district court in an area where a big project is being put through? How many tracts of land would you get in one jury trial? How much time of the court is going to be taken up in condemnation cases, and how much business will they be able to do in other types of cases?

JUDGE DRIVER: I believe that at one time Judge Hall suggested that we could achieve uniformity in these condemnation cases by having all the cases set for trial before the same jury panel. Perhaps I could set 300 or 400 cases before the same

jury panel, but the complaint on consolidation for trial comes from the land owners. They don't want to be put in with a lot of other land owners, and I don't blame them. If you have ten tracts in one case, the individual owner is not going to get the same consideration for his case as if he were in alone. All of them want to cut down as much as they can the number of cases that are tried before one jury. That is from the land owners' standpoint.

CHAIRMAN MITCHELL: You get the most erratic results, of course. The memorandum that we got in the beginning from the counsel for the TVA proves that. It is very spotty with the jury, and the commission system soon produces a standard that people are satisfied with.

DEAN MORGAN: You will remember, Mr. Mitchell, when the Department of Justice was urging here that you would have a big group of cases to try in one tract, and you could impanel one jury and then try Case No. 1 before that jury, then Case No. 2, and in two or three trials they would get the attitude of the jury as to the amount of damages. That is what they said. Then they would always get a settlement with the rest of the owners. The verdicts would be going a certain percentage above or a certain percentage below the amount that the government had offered. Whereas there seemed to be fifteen or twenty or fifty cases to try, as a matter of fact they would try only three or four and then settle all the rest of them.

115 If they had the commissioners, the commissioners would value every piece of land, and they would take longer than the jury. That was the argument they made the first time they appeared before us with reference to this matter. I think you have to answer that argument if you take the argument of the tremendous number of cases that are going to be tried and the diversity in the jury verdicts, because they say they don't work it that way. That was one reason that we at one time submitted a rule with trial by jury allowed in all these cases.

CHAIRMAN MITCHELL: I have a letter from George Pepper that makes me sort of gloomy. He feels that on account of his difficulty in hearing he is not qualified to sit any longer, and he has tendered his resignation as a member of the Committee. I will pass it on to the Court, of course.

I have asked you to submit to me names for suggestion to the Court for appointment to the Committee. I mentioned that when we were discussing vacancies on the Committee. There is no set rule as to the number. There are several of us who are getting pretty old, and my theory is that it wouldn't do any harm for the Court to appoint maybe three or four more members than we have ever had before.

JUDGE DOBIE: The statute does not prescribe the number?

CHAIRMAN MITCHELL: No. There is no act prescribing the Committee.

116 JUDGE DOBIE: I didn't think so.

CHAIRMAN MITCHELL: The Court has just called on us as members of the bar to help it, and we have been recognized by law only to the extent that Congress has made appropriations available to the Court to pay for our per diems, travel, and so on.

I am going to ask Mr. Tolman if he will get up a little memorandum giving the name of every man who has ever been appointed, where he came from, when he was appointed, whether he is dead or alive, so you can get a picture of what we have had before and what areas are not really represented on the Committee. Then, if I can get the names of a group of men that you recommend who are top-notch and who are well to work with, I will hand them to the Court and let them do what they like with it.

JUDGE DOBIE: May I ask a question? I certainly hate to lose Senator Pepper. I don't think there is any debate on the subject of what a magnificent man he is and how helpful he has been. Do you think it would do any good if we wrote him a letter or if some of us asked him if he would not consider withdrawing his resignation, or do you think we had just better accept it with regret?

CHAIRMAN MITCHELL: I don't know. He wasn't able to hear anything that was going on here, and for some reason or other he has never resorted to any hearing aid. How old is

117 George?

JUDGE DOBIE: About eighty-seven, I think.

CHAIRMAN MITCHELL: I don't know whether or not it would do any good to press him. I don't propose to hand this resignation in right away. I would like to see his name on our next report, anyway.

JUDGE DOBIE: Do you want us to send these names to you or to Mr. Tolman?

CHAIRMAN MITCHELL: Send them to me, because he would just have to forward them to me, and that would load him down with work. I will ask him to get up a tabulation of members of the Committee, who they were, whether they are dead or alive, and where they came from.

MR. TOLMAN: I will do that right away and send it to each member of the Committee.

CHAIRMAN MITCHELL: Then I will take it up with the Chief Justice. Hughes used always to consult the Committee before he appointed members; Vinson did not. I think Chief Justice Warren would appreciate suggestions as to the new members.

JUDGE DOBIE: I am sure he would.

CHAIRMAN MITCHELL: Once or twice the Court did not consult me when they named people. There is one over there on your right. We lost Cherry, and that is how Pirsig happened to get that appointment, I assume.

JUDGE DRIVER: I think we should have at least fifteen members.

CHAIRMAN MITCHELL: We are only one short of that now. I can see that in my own case and in other instances where some of us are getting pretty old, it would be a good thing to have some additional appointments made and break them in and accustom them to how we operate before we commence dropping off, when it would be necessary to appoint people out of a clear sky, who would have no experience, to go on with the work.

JUDGE DOBIE: I would like to move, if it is in order, that as far as humanly possible those who are on the Committee now not drop off.

JUDGE CLARK: To whom would that motion go, if passed?

JUDGE DOBIE: To God, I guess.

CHAIRMAN MITCHELL: There are now some of us who are ten years beyond the age when one is supposed to be fit to sit on a court.

JUDGE DOBIE: How many are still left of those who were on the original Committee?

MR. DODGE: Eight. I have just looked at that list. Seven of the original fifteen have died.

JUDGE DOBIE: The mortality is pretty heavy, isn't it?

CHAIRMAN MITCHELL: I will be eighty in September. I think when a man gets to be over eighty he is a very exceptional man if he is active enough to be vigorous about his work.

MR. LEMANN: You are an exceptional man, Mr. Chairman, and we have a few others in your category.

CHAIRMAN MITCHELL: I am not proposing to resign right away. I might after a little while. It depends upon what the Chief Justice does with the proposal to put some other members on the Committee. I think we ought to have some.

JUDGE DRIVER: Do you have in mind a suggestion to the Chief Justice that he appoint additional ones, or would it be helpful if we passed a motion or resolution to that effect?

CHAIRMAN MITCHELL: I think it would be the sense of this Committee that there ought to be several new members.

JUDGE DOBIE: I don't think a formal motion is necessary.

CHAIRMAN MITCHELL: If you don't object, I will tell him that is our feeling about it, because of the advanced age of some of us, who may not be dead dogs yet but are pretty close to it.

MR. LEMANN: Judge Clark, I realize this is pretty difficult for you with your judicial duties, but if we could get this before the debate is too remote in our thinking, it would help us in looking it over, probably. I know that when I got this material in September or October, I had pretty well forgotten everything that happened in May. I don't know whether you can help that, because you have a heavy docket. It is now almost the first of April. You won't get this

material until the middle of April. We could hardly get it before June, could we, or July?

MR. TOLMAN: Mr. Chairman, several of the chief judges of the circuits have spoken to me about the work the Committee is doing now and have said that they would like to make these amendments a subject for discussion at their various circuit conferences. I told them that I thought they probably could, but I didn't know. Is it fair for them to plan to do that, do you think?

CHAIRMAN MITCHELL: How can we say when this report is going to be available? I don't think we ought to commit ourselves to any date at all now. The Reporter has to do his work, then we have to get it mimeographed and sent around to the members of the Committee, and we have to see whether we like it well enough to print it. I don't know how to fix a date.

PROFESSOR WRIGHT: I might say, Mr. Lemann, that actually we don't have to wait on getting the transcript. I think I have quite complete notes of everything that we have done and, assuming Dean Pirsig doesn't expect me to teach in the next two weeks, I think the chances are that I would have a draft out to Judge Clark by that time which would be pretty complete, and then he would have the transcript to check it against. At least the spade work of the revision would be done.

MR. LEMANN: It might very well be that if I got it by the first of June, I wouldn't read it before the first of July.

121 JUDGE CLARK: I should hope and think we can get something out by perhaps May 1, but by May 15 anyway, unless something hits us.

MR. LEMANN: As I understand it, after we have all gone over it and sent back our comments and suggestions, then you need time to put them in. Then it would have to be printed. Then it would have to go to all the bar committees. Then we would have to have at least one other meeting to consider what they had to say, which I suppose we will hardly be able to hold until late fall at best.

JUDGE DRIVER: I would like to have this material by July 7. That is the date of the Judicial Conference of the Ninth Circuit. Isn't Mr. Hildebrand from California?

JUDGE CLARK: Yes.

JUDGE DRIVER: If these California lawyers and judges start giving me a bad time again, I will ask them why they don't do something through their own members.

MR. LEMANN: Maybe we should be glad that he doesn't come around in view of the lack of favor that his suggestions have received.

MR. TOLMAN: We are working under a special appropriation which expires on June 30. I suppose I will have to make plans for additional funds if the work is to go on in the summer.

CHAIRMAN MITCHELL: I will try to get a train for

122 New York this afternoon. I had thought that we might take all afternoon and that I would go back tomorrow morning, but I think I would rather make a stab at going back this afternoon, so I would like to run along.

JUDGE CLARK: May I say that I think the discussion at this meeting has been excellent, and I thank you all for your contributions.

CHAIRMAN MITCHELL: The meeting is adjourned.

... The meeting adjourned at 1:00 o'clock ...