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WEDNESDAY MORNING SESSION

May 2, 1945

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

THE CHAIRMAN: Let's go to Suggested Rule 60(b). That is not the one on page 50 of our staff's report, but the one that came in later, called Suggested Rule 60(b).

In order to bring into 60(b) now the right for a new trial on the ground of newly discovered evidence after the loss of the right under 59 has occurred because more than 10 days have gone by, we agreed to put it in 60(b) so that it wouldn't be a right but it would be up to the court to grant leave to make an application for a new trial on the ground of newly discovered evidence when there was no longer time to make it under 59(b).

I think you have before you the proposal of the Reporter. The first paragraph is the one the Reporter puts in to cover that. He says:

"On motion the court, upon such terms as are just, may relieve a party or his legal representative from a final judgment, order or proceeding on the following grounds: (1) mistake, inadvertence, surprise, or excusable neglect; (2) evidence discovered with due diligence but too late for presentation at the trial or to move for a new trial under Rule 59(b); or (3) fraud (whether heretofore denominated

intrinsic or extrinsic) misrepresentation or other misconduct of an adverse party."

Then it goes on: "The motion shall be made within a reasonable time, but in no case exceeding one year after the judgment, order, or proceeding was taken."

That brings into the rule the supposed operation of a bill of review, except that on the bill of review, according to what some people tell me, there is no time limit except laches, and I think Senator Pepper said that in his bailiwick there is a five-year limit on it. Now we have made it one year. What do we want in this draft? Would you want to make the one-year limit apply, as it did before, to mistake, surprise, and fraud, and say more than one year for newly discovered evidence, or would you leave them all in the same boat as to time limit?

SENATOR PEPPER: In answering that question, a good deal depends on what you do to 60(b).

THE CHAIRMAN: This is 60(b).

SENATOR PEPPER: If you entertain a plenary action to relieve a party from a judgment, there is no limit of time fixed in that.

THE CHAIRMAN: You brought a thought to my mind. I realized some months ago personally that I couldn't handle this problem intelligently as far as 60(b) was concerned and bring into the rules and provide the procedure for all the known methods of relief from judgment, unless I had a very clear

picture in my own mind as to what these old writs and bills could do and also (although I didn't ask for a memorandum on it then) what could be done by an original action. I am at sea about it. We have had a very long and thorough memorandum prepared by the Reporter's staff, and it is a good memorandum. It has a great deal of material in it. But there were some fuzzy margins in the decisions, and I think that Mr. Moore hesitated to do more than furnish the material. He hesitated to go ahead and make a decision and definitely state that you could or could not do a certain thing under a bill of review. While I appreciate his attitude about that, I think this Committee haven't the time to go through that memorandum and read those decisions and make that analysis.

So, here yesterday and this morning, all of us have a fuzzy idea about what these various bills and writs can do and the time limits on them, and we haven't a clear picture, if we say original action, of what upon the established authorities can be done under it.

I think the best thing we can do is to patch this rule up as best we can now and let it go to the bar, and then ask Mr. Moore if he won't take the responsibility of going through his memorandum as soon as he reasonably can and, casting aside the fuzzy edges where there is doubt and in which we are really not much interested, list for us definitely and express a conclusion that the writ, bill of review, can be used

for these functions, with time limits thus and so or none; coram nobis such and such. Then add to his memorandum a conclusion about what can be done by an independent new action.

If we have that before us, I myself am willing to trust his decision as to what the final weight of the authority is, and I am willing to trust him to cast aside the doubts that exist there, the fuzzy edges. If we have that by the time this thing comes back to us in the fall and we are getting our final report, then we can tackle this rule and deal with just such questions as the Senator has brought up, and do it intelligently, but I don't think any of us, as far as I can see, is really equipped to do a finished job on this rule as matters stand.

So, Senator, I see your point; it is a good one, but maybe we can put this in and let it go and let the bar chew it up. I don't think we can get any help from the bar, because it is too difficult a problem and there is not one lawyer in a hundred around the country at large who knows anything about these old writs and bills and one thing and another. We have to use our own judgment about it. I suggest that we forget these troubles that we can't settle and let it go out in the best shape the Reporter can get it in and just see what the bar say about it and then do our real job afterward.

MR. DODGE: Would you send it out with or without Judge Donworth's amendment?

THE CHAIRMAN: We haven't got to that yet. We are now dealing with this one. I raised a question about the time limit, and the Senator said he couldn't decide that as to newly discovered evidence, whether a year was all right or not, until he knew what you could do under an independent action. He is quite right about it. I can't decide it, either. I don't know. I have never looked up the law on it.

SENATOR PEPPER: All I meant was that if there was a reserved jurisdiction to relieve against the rigors of a definite time limit, then you would be more willing to impose the rigorous time limit, but if there is no way of getting relief from it, then it gives you pause. That is all. I haven't a fixed opinion about it.

THE CHAIRMAN: I agree with you. Why not leave it one year---

SENATOR PEPPER: Yes.

THE CHAIRMAN: ---with this reservation about original action. Then during the summer and fall, when we get this supplemental statement, we can decide whether the original action is going to do the business or whether we want to enlarge the one-year period for newly discovered proof.

JUDGE DOBIE: I would just like to suggest to Charlie on these two sentences, where it says, "evidence discovered with due diligence but too late for presentation at the trial or to move", that "or motion for new trial" would be better.

JUDGE CLARK: I think that is all right.

MR. DODGE: "too late for presentation or for a motion for a new trial".

JUDGE DOBIE: "for presentation at the trial or for motion for a new trial under 59(b)".

JUDGE CLARK: All right. Major Tolman thought we ought to start at the top by trying to get the verbs together. He says, "On motion and on such terms as are just, the court may relieve". We followed the form of the original rule. That is why we did it. I should think the Major's suggestion is probably all right, and it is probably a good thing generally to get the verb close to the subject, but that is a detail, I suppose.

"On motion and on such terms as are just, the court may".

THE CHAIRMAN: Yes. That is a transposition. That would be better style, wouldn't it?

JUDGE CLARK: I should think so.

THE CHAIRMAN: We are chewing it all up, so we may as well do that.

MR. DODGE: I was wondering about that phrase, "evidence discovered with due diligence". It is really evidence by one not charged with lack of due diligence before. He may have been very diligent after the trial.

THE CHAIRMAN: Why don't we use the stilted phrase,

"newly discovered evidence"?

MR. LEMANN: "newly discovered evidence which could not have been ascertained or discovered by the exercise of due diligence in time for presentation".

THE CHAIRMAN: "evidence newly discovered, but too late to move for new trial under 59(b)". We are not troubled with the failure to produce it at the trial, are we, because if it is newly discovered evidence, that phrase evidently means to most lawyers something that you discovered after the trial took place. Isn't that it?

JUDGE CLARK: I think that would do it.

THE CHAIRMAN: If it is too late to move, you certainly didn't get it before the trial.

JUDGE CLARK: If you let "newly discovered" be a term of art along with the decisions today.

MR. DODGE: It is uniformly held that you can't get relief if you could have discovered it.

THE CHAIRMAN: That is a matter of style, isn't it? We haven't got quite to the style phase of this rule yet.

JUDGE CLARK: As a matter of fact, we thought some of saying just "newly discovered". We thought the Committee wanted to get in the idea of due diligence. Of course, it isn't necessary if you use the words, "newly discovered", because that legally incorporates it.

THE CHAIRMAN: It may be newly discovered, but without

due diligence, and you can't get a new trial. So, I think the due diligence is a question of whether you can be allowed to use it or not, not whether it is newly discovered.

MR. DODGE: That is universally settled, isn't it?

THE CHAIRMAN: Why say "due diligence" in here?

MR. LEMANN: He just wants to show that you couldn't have gotten relief under 59(b). Why not say, "(2) newly discovered evidence which could not by due diligence have been presented as a ground for a motion for new trial under Rule 59(b)"?

JUDGE DOBIE: I think it is very desirable, in line with what Monte just said there, to use that term "newly discovered evidence", because it is a term of art; not that it isn't contained in here, for it is, and it is clear, but in every old book on the subject and in every old case--and I have read several hundred of them--they always use that term "newly discovered evidence". In other words, that is a term of art that all the lawyers know.

JUDGE CLARK: Then, if you are going to use that, why not make it simply "evidence newly discovered, but too late for a motion for new trial under Rule 59(b)"?

THE CHAIRMAN: That is it.

JUDGE DOBIE: That is all right.

JUDGE CLARK: You wouldn't need any more then.

SENATOR PEPPER: And I suppose that the court would

refuse a new trial if it appeared that the newly discovered evidence was newly discovered only because of a rank failure to prepare the case adequately and to look for evidence before. I don't know.

JUDGE DOBIE: It probably would be a good thing to spell it out. You have it right there, and it will call the attention of the bar to it. As General Mitchell said, some of the bar are probably not like those in Philadelphia, and for some of the rural sections of Virginia, where they know that better than the modern stuff, where they haven't read a law book published since 1870, I think it would be well to put that "due diligence" in there.

MR. DODGE: There are other qualifications on the right besides the lack of due diligence, such, for example, as the newly discovered evidence being merely cumulative. We can't define all the limitations upon its use.

JUDGE CLARK: Yes, I think that is so.

THE CHAIRMAN: When you say that a court may relieve a party and don't say that he shall, you leave it to his discretion, according to established principles, so that he may relieve a party on newly discovered evidence obtained too late to move for new trial under 59(b).

JUDGE DOBIE: That is all right.

THE CHAIRMAN: Then the "may" gives him discretion to say whether it is important material, cumulative, obtained by

diligence, or whatnot.

JUDGE DOBIE: I believe that is true. You can't put all the limitations in there. I believe it should be "evidence newly discovered---"

THE CHAIRMAN: "but too late".

JUDGE DOBIE: "---but too late for presentation at the trial or for motion for new trial under Rule 59(b)".

MR. LEMANN: It is poor use of English. "evidence newly discovered but too late". It means discovered too late. I think the English is poor. Let's leave it to the Reporter to wrestle a little bit on it. We will take another whack at the style. Personally, I would prefer to use "newly discovered evidence which by the exercise of due diligence could not have been presented in time for a motion for new trial under Rule 59(b)".

THE CHAIRMAN: All right.

MR. LEMANN: But let's let him struggle with it.

THE CHAIRMAN: I think I like that, too. If that is all on that, we will pass on to the second.

MR. LEMANN: I want to raise perhaps a voice in the wilderness against the Reporter's abolition of the saving clause about fraud. He served notice in his note that he was going to remove that clause, which permitted that limitation, but I should like to protest against the removal. You see, in the draft we had at the last meeting, in the case of fraud you

weren't barred until the lapse of a year, until after reasonable opportunity to discover the fraud. The Reporter said in his note that he didn't like that because it left the thing wide open. So, he took it out, and the limitation, as I now understand it, is absolute in the case of fraud, one year, even though it was covered in such a way that you couldn't have found out about it.

JUDGE DORIE: In other words, you don't want to encourage a man--

MR. LEMANN [Interposing]: If you can't find out by reasonable diligence, the statute of limitations ought not to be running against you.

JUDGE CLARK: There surely you can bring an original action under any view--that is, under either Professor Sunderland's or Judge Donworth's view--and it is only a question of the method. Should you be entitled to the same action by merely notice on counsel to raise a question of fraud whenever you discover it?

THE CHAIRMAN: Years after?

JUDGE CLARK: It seems to me a serious thing.

MR. LEMANN: Of course, if you have a right to get the relief by another suit, I suppose that is the answer.

THE CHAIRMAN: That brings you right back to my point that we will have to wait until we see what independent suits can be used for.

MR. LEMANN: I suppose it is pretty clear that an independent suit could be used for fraud.

THE CHAIRMAN: I would raise a minor point on this clause. I had a provision in my draft, in addition to this, that nothing in these rules will abrogate the power of the court at any time to set aside its own judgments for fraud upon the court. This isn't fraud upon the court that we are talking about. As I pointed out yesterday, the courts in occasional cases have set aside their own judgments years after they have been entered, as soon as they are convinced that fraud has been perpetrated on them. I cited the illustration of that article in a patent case.

The Reporter says that there is no need of mentioning fraud upon the court at all because (3) is fraud, misrepresentation or other misconduct of an adverse party, but the vice in that argument is that now the fraud clause with which he covers that other case has a one-year limit. I had a clause at the end that nothing in the rule should be construed to to abrogate the power of the court at any time to set aside its own judgments for fraud upon the court. The difference between his method and mine is just the question of time limit. That is all.

JUDGE DOBIE: I thought the sentence of Monte's superseded the first sentence only and that we left in the second sentence that it shall be made within a year or, in the

case of fraud, after reasonable opportunity to discover it. I thought the proposed first sentence was a substitute for the first sentence stopping in the middle of line 15, and that the second sentence, which gives you a year or, in the case of fraud, within one year after reasonable opportunity to discover it, still stayed in.

MR. LEMANN: In this redraft he has taken that out.

JUDGE DOBIE: Taken out the second sentence?

MR. LEMANN: Yes.

JUDGE CLARK: Of course, it must be said that that redraft has not been adopted. I just put it in.

MR. LEMANN: I understood that.

JUDGE DOBIE: Do you put any time limit on this motion?

THE CHAIRMAN: One year.

MR. LEMANN: One year. It comes back to the question, Armistead, of whether we can afford to accept that absolute limitation of one year because independent actions might give you relief over a longer period.

SENATOR PEPPER: Mr. Chairman, is there a difference in grade between fraud practiced on an unfortunate litigant and fraud practiced on the court? Why is there infinity such that there is no limit of time?

THE CHAIRMAN: Senator, if it is fraud upon the party, the time limit is only on the motion, you see.

SENATOR PEPPER: Yes.

THE CHAIRMAN: He has a right at any time, subject to the limitations of laches, to bring an independent suit to set aside the judgment by fraud.

SENATOR PEPPER: Yes.

THE CHAIRMAN: In the case where the party makes no move at all, and the judge can't bring an independent action to set aside his own judgment, I am leaving it that he takes summary proceeding.

SENATOR PEPPER: But without limit of time.

THE CHAIRMAN: Without limit.

SENATOR PEPPER: I am wondering just on the general proposition that it is to the interest of the public that there shall be an end to litigation. Suppose that twenty years after a case has been decided, it turns up through somebody's confession or through the turning up of an old document or something, that the most virulent fraud was practiced on the court, but for which the decision would have gone the other way. Is that open?

THE CHAIRMAN: Apparently it is under the decisions.

SENATOR PEPPER: All right.

THE CHAIRMAN: It is a rare thing, of course.

SENATOR PEPPER: Yes.

THE CHAIRMAN: But I just hesitated to concur in a rule that tied the hands of the court in the power that it now

exercises. The way I had it was to entertain an original action, and so on, for this or that, or to set aside at any time its own judgment for fraud upon the court.

JUDGE CLARK: Senator Pepper, I think you raise a real question. I don't know the answer to it. I had always been quite amazed at that Hartford Empire case, the Hazel Atlas case, where there was the use of a learned article that had been procured. What the difference is between fraud upon the court of that kind and general fraud, I don't see. I don't understand these great issues of fraud. It seems to me just a little odd to put in a definite limitation of one year and then a little later to say that this does not apply to the same thing in a different language.

THE CHAIRMAN: But I am afraid that isn't quite right, Charlie, because we place a definite limit of one year on a motion, and our whole theory is that the fraud action supplements that. It is the action taken by a party, and there is no one-year limit on an action by a party to set aside a judgment of the court for fraud upon the party. There may be a statute of limitations or a laches rule. So, by this we don't limit the party to one year and give the court an unlimited authority as to time. If we did, we wouldn't agree to the one-year clause for the parties.

PROFESSOR CHERRY: Whatever the basis is, isn't the point sound that procedural rules ought not to be interfering

with what the courts have done and are doing?

JUDGE CLARK: Of course, I don't know of any way that the court itself is ever going to act, practically. I mean by that that in all these cases that we have considered, even the Judge Mann cases, which I suppose are the most direct cases, it was only on the motion of a party. I suppose, theoretically, if the court knew of it, it would get excited, but take my court. After the Judge Mann cases, we didn't go pushing around in our clerk's office. We always waited until somebody had a grievance.

SENATOR PEPPER: In the Third Circuit, in connection with the scandals about Judge Davis, the court appointed a master of its own motion, Thomas Raeburn White, a reputable member of the bar, with instructions to go back and examine all the cases in which Judge Davis had sat, without limit of time, where his decision was the controlling factor. They reopened judgments on the basis of that which had been standing for I don't know how many years.

JUDGE CLARK: Without motion, Senator?

SENATOR PEPPER: I can't speak with positiveness, but my strong impression is that the judges themselves, to re-establish the dignity of the court, and so on, took this action of their own motion. That is my strong impression.

PROFESSOR CHERRY: Then there was one case there where they appointed counsel for the court, as a friend of the court,

and did upset it. Do you remember that?

SENATOR PEPPER: Yes.

PROFESSOR CHERRY: It is discussed in the opinion really on the question of their fee. That is the way it got into the books, you remember. The counsel was one who actually had been for one of the parties litigant in the case. They appeared here as friends of the court.

THE CHAIRMAN: Of course, these rules don't apply to the practice in the circuit court of appeals. They apply to the district judges. The only cases I have had called to my attention where a court set aside its own judgment summarily, without time limit, for fraud upon the court, or what was called that, have been circuit court of appeals cases. I couldn't reconcile the idea that the circuit court had the power to set aside its own judgment for fraud upon it when the district court was not permitted to do it. I should think they each ought to have the same right.

MR. TOLMAN: Mr. Chairman, I think in that Hartford case they did decide that very thing. They said, "It is a fraud on the district court and on our court, but since it is a fraud on our court, we will act without sending it back." I think that is in there.

THE CHAIRMAN: I think Roberts thought it was a district court job, didn't he, and that it ought to be remanded to the district court? Wasn't that the clash?

MR. TOLMAN: That may be, but that is my recollection.

THE CHAIRMAN: We are passing over the final decision as to the time limit in Rule 60(b), one year, until later when we find out how much can be done under an original action. I think we ought just to forget and dispose of this minor question that I raised of whether we ought to tie a court down against setting aside its own judgments.

MR. DODGE: Those words which you suggested would come in in line 15?

THE CHAIRMAN: Yes.

MR. DODGE: After the word "notified." To bring it up, I will move that those words be inserted there.

PROFESSOR SUNDERLAND: Where is that, Mr. Dodge?

MR. DODGE: After the word "notified" in the fifteenth line of the suggested rule.

THE CHAIRMAN: It would read, adding a clause after "notified" in line 15: "or to set aside at any time its own judgments for fraud upon the court."

MR. DODGE: "or (3) to set aside".

THE CHAIRMAN: I had "for corruption of or fraud upon the court", but of course it is a horrible thing to talk about corruption of the court in these rules. The Reporter had some theory that he didn't need to put it in, in which I gladly acquiesced.

Is it agreed to set that in temporarily? Do you

think there is any great harm in it?

JUDGE CLARK: No, I don't think so, particularly the way the rule is going now. We were trying to make some limitation so that it would be clearer. I think the rule is going the other way. Therefore, there certainly is no reason.

SENATOR PEPPER: Could the Reporter give consideration at his leisure to the use of the word "original" as describing the action? It grated on me when I first read it. Major Tolman spoke of it to me last night and said that he thought the term ought to be "plenary." Am I right?

MR. TOLMAN: I thought that was a word that didn't mean anything.

SENATOR PEPPER: The word "plenary" was the one that you suggested.

THE CHAIRMAN: How about "new"?

SENATOR PEPPER: I noticed that everybody referring to it around the table referred to it as an independent action.

JUDGE CLARK: I should think "independent" would be better than the others. "Plenary" is in connection with bankruptcy, you know.

THE CHAIRMAN: The scope of the action.

JUDGE CLARK: Yes.

SENATOR PEPPER: All I mean is that while we are revamping the whole thing, the Reporter might--

JUDGE DOBIE [Interposing]: I believe that is better,

Senator, because quite generally in procedure the word "original" is used in contradistinction to "appellate". We speak of the original jurisdiction of the Supreme Court and say that the court of appeals has no original jurisdiction. I believe "independent" is better.

THE CHAIRMAN: We shall leave to the Reporter whether to use "original," "independent," "new," or "plenary."

JUDGE DOBIE: I think any of them is better than "plenary," because, as Charlie said, that is usually used in federal procedure in bankruptcy, where you want to get property away from an adverse claimant. If I go into bankruptcy and I have some property that you claim is yours, you have to bring a plenary suit there.

THE CHAIRMAN: Shall we go to Judge Donworth's suggestion, which is the second paragraph on this slip that has been handed to you, in which he suggests a change in line 15 of suggested Rule 60(b) to read as follows:

"Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished as methods of procedure, but this abolition shall not limit the power of the court to grant relief in any original action or to entertain and take appropriate action on any motion provided for in any of these rules."

JUDGE DOBIE: I will subscribe to that if you will cut out "as methods of procedure".

THE CHAIRMAN: I had the proposal: "Writs of coram nobis, coram vobis, audita querela, and bills of review," and so on,"are abolished, and the procedure for obtaining relief from judgments shall be by motion as prescribed in these rules or by original action."

I question the word "original". I tried to condense it a little bit, saying, "the procedure for obtaining relief from judgments shall be by motion as prescribed in these rules or by original action."

MR. DODGE: Do you think that means the same as this?

THE CHAIRMAN: I rather think it does.

JUDGE DOBIE: Judge Donworth's has a caution to the bar, and I think that is what he wants to put in there, that in abolishing those writs we haven't circumscribed the powers we have set forth in these rules.

SENATOR PEPPER: I think it is only fair to say that Judge Donworth's original motion did not have in it those words, "as methods of procedure". He accepted a suggestion of mine, and apparently that has complicated consideration of the main point, which is the one raised by his proposal. So, I will withdraw the suggestion, and probably Judge Donworth will, about the use of the term, "as methods of procedure", and let the question come clean-cut on his original proposition.

MR. DODGE: Which is this without those words.

SENATOR PEPPER: That is right.

JUDGE DONWORTH: I have no objection to withdrawing that additional clause, although on reflection I rather liked it. I will say while I am speaking that my thought in framing the language which is now under consideration was to parallel the idea expressed in the rules (I think it is Rule 81, but I don't remember) that the writs of scire facias and mandamus are abolished and that the relief formerly thus granted may be obtained by any appropriate action.

Judge Clark, have you in mind the rule that I am referring to?

JUDGE CLARK: Yes, I can find it in just a second.

MR. LEMANN: It is 81, I think. "The writs of scire facias and mandamus are abolished. Relief heretofore available by mandamus or scire facias may be obtained by appropriate action or by appropriate motion under the practice prescribed in these rules."

THE CHAIRMAN: I tried to do that here, and I was brushed aside, and I think properly so, by Eddie Morgan, because he said if we use that phraseology and say that the relief heretofore granted by coram nobis, audita querela, and so forth, shall be by motion or suit, we just dump the lawyers into a sea of uncertainty, which we ourselves are in because we don't know just what these old-fashioned things were. I think the point was well taken. So, I think that the Judge's approach is better for this purpose than the one we had on mandamus.

PROFESSOR SUNDERLAND: Furthermore, mandamus was a little different situation, because we had no rules which gave the procedural remedies which mandamus gave, but we do have some rules here which give the remedies which these various old common-law writs give.

THE CHAIRMAN: I have a great deal of deference for Judge Donworth's draft here, but I rather wonder if it can't be condensed and if we can't develop this procedural thought by the clause that I have suggested here. I would really like you to consider it.

JUDGE DOBIE: Read it again, will you?

THE CHAIRMAN: "Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure [that emphasizes that we are dealing with procedure] for obtaining relief from judgments shall be by motion as prescribed in these rules or by original action."

That develops the idea that we are abolishing the old practice and we can get relief by motion under the conditions stated in these rules, but otherwise the procedure would be by original action.

MR. DODGE: I don't see why that doesn't cover the idea, and I move the adoption of your language.

MR. LEMANN: It has the same idea as this has.

MR. DODGE: I make the motion that we adopt that.

THE CHAIRMAN: What do you think yourself, Judge? Is there anything that I omitted there that you think ought to go in?

JUDGE DONWORTH: I would like to have your suggestion read again, please.

THE CHAIRMAN: After the word "abolished", after saying that all these bills and writs are abolished, comma, "and the procedure for obtaining relief from judgments shall be by motion as prescribed in these rules or by original action."

JUDGE DONWORTH: I see no objection to that.

SENATOR PEPPER: I would be in favor of it, because in a left-handed way it says what I tried to say directly, that the other were procedural, that it was a procedural abolition. I think this is a more tactful way of doing it.

MR. DODGE: I make my motion again that that be adopted.

MR. TOLMAN: I second that motion.

THE CHAIRMAN: If nobody objects, we will agree to it.

JUDGE DOBIE: That is all right.

THE CHAIRMAN: Is there anything more on 60(b)?

JUDGE CLARK: I think there is just one thing more, and I will bring it up as quickly as I can. It is about suspending the judgment. In the original draft, lines 19 to 21, you will notice that you have that "A motion under this subdivision does not affect the finality of a judgment or suspend

its operation, unless served within the time provided in Rule 73(a) for taking an appeal." In my redraft I left out the "unless" clause, and I suggest, as I did in the notes there, that it seems to me it is desirable to leave it out altogether. The provision as it has existed seems not to have given trouble; it seems to have been satisfactory. Now the time for appeal is going to be still shorter, and if we didn't have the trouble before, I wonder if we need to have it now.

If you are going to have it stay in, ought it not to be somewhat limited, then, that it is only a motion accepted by the court on a showing of due diligence? Isn't it better to take it out?

Again the language I have in mind is, "unless served within the time provided in Rule 73(a) for taking an appeal."

JUDGE DOBIE: Haven't you got a general provision on that as to what effect a motion has?

JUDGE CLARK: Yes.

JUDGE DOBIE: Then, I should think it would be well to take it out.

JUDGE CLARK: Yes, but of course the general rule provides the contrary, unless it is specially provided. That is, if you take it out, you will leave it absolute.

MR. DODGE: The rules we sent out to the bar didn't contain the qualifying clause at the end.

JUDGE CLARK: No, and more than that, our original

rule since 1938 has been just this sentence without the "unless" clause.

SENATOR PEPPER: It is time for a motion by Mr. Lemann.

MR. LEMANN: I make the motion.

THE CHAIRMAN: Is there any objection to striking out the "unless" clause that was not in the original draft, "unless served within the time provided in Rule 73(a) for taking an appeal"? If there is no objection, we will strike it out.

JUDGE DOBIE: It is not likely to come up within that time, I think.

JUDGE CLARK: That covers everything that I know of. Doesn't that cover everything, Bill?

PROFESSOR MOORE: I think so.

THE CHAIRMAN: We are through with 60(b), thank the Lord, until next fall. We will go to Rule 65.

SENATOR PEPPER: Mr. Moore isn't through with it.

THE CHAIRMAN: No, I should say not. He has been appointed judge this time.

Rule 65. This is the appeal bond or the injunction bond? Which is it?

JUDGE CLARK: This is the injunction bond, which is now made like the appeal bond. We haven't made any change in it.

THE CHAIRMAN: I think we can pass 65 as it is.

JUDGE DOBIE: A very desirable addition, I think.

PROFESSOR SUNDERLAND: In line 14 we ought to have it plural instead of singular; "persons giving the security if their addresses are known."

JUDGE CLARK: Yes, all right.

MR. DODGE: Are you going to deprive the surety of a jury trial---

THE CHAIRMAN: Yes.

MR. DODGE: ---on some question of fact as to fraud in obtaining the bond?

THE CHAIRMAN: If he comes in and signs a bond, he consents to a summary disposition by the court. There is no constitutional right involved.

JUDGE DOBIE: I think that is the rule on criminal bonds.

MR. DODGE: I don't know.

THE CHAIRMAN: We have exactly the same thing. It was applied to another type of bond under the rule, and a good many courts have always brought a man in by summary proceedings as a surety. He consents when he signs as surety.

MR. LEMANN: To have an independent action is a long-winded way of enforcing relief against a surety on a judicial bond.

THE CHAIRMAN: Bob doesn't suggest an independent

action, but he raises the question whether in a summary proceeding in the same action, without a new suit, the surety can demand a jury trial. We don't settle that one way or the other by this rule.

MR. LEMANN: That raises the question whether you can get a jury trial on motion. This says by motion. Can you get a jury trial on a motion?

THE CHAIRMAN: I suppose if they are constitutionally entitled to it and the court so holds, he will say, "I will submit this to a jury."

MR. LEMANN: If it brought out issues of fact. Suppose this surety, when he is brought in by motion, comes in with an answer. He says, "I was procured to sign this bond by fraudulent misrepresentations of the adverse party, not the fellow for whom I signed the surety."

JUDGE CLARK: I wrote a decision a while ago which I was very proud of, in which I said that it didn't make any difference if you started a suit by motion, that the document by which you started the suit didn't count.

MR. LEMANN: You could start a suit by motion.

JUDGE CLARK: Yes.

THE CHAIRMAN: You could, if the rules provided for it.

JUDGE CLARK: This case was a little different, I must say. The suit actually had been started by somebody else,

and we held that the somebody who started it didn't have any right to start it, but the person who came in by motion was in there all right, and it didn't make any difference that she started by motion, the motion being inadequate--

MR. DODGE [Interposing]: We sent this out before to the bar. Was there any adverse comment?

JUDGE CLARK: Mr. Moore says it was favorable.

MR. LEMANN: Certainly. It would be.

THE CHAIRMAN: We have had the other provision for six years in a rule just like it on another type of bond.

JUDGE DOBIE: There were several suggestions, weren't there? One came from Judge Parker.

JUDGE CLARK: Yes.

THE CHAIRMAN: I imagine if there was a right to a jury trial, if the demand was made, the court would submit it.

JUDGE DOBIE: I think so.

THE CHAIRMAN: We go to Rule 66, Receivers Appointed by Federal Courts.

JUDGE CLARK: We have made very little change in this from what we had before. We did strike out "or by other similar officers", and there was a protest from the District of Columbia, and we put that back in.

PROFESSOR SUNDERLAND: If you struck out the words "the necessity for" in line 3, it would make it read, "without ancillary appointment", instead of, "without the necessity for

ancillary appointment".

JUDGE CLARK: I guess that is so.

THE CHAIRMAN: Why did we strike out the clause, "but all appeals in receivership proceedings are subject to these rules"?

PROFESSOR MOORE: That is covered in the last sentence which was brought in. It covers not only appeals but proceedings in general.

THE CHAIRMAN: Oh, yes. That is my point about brackets. I didn't catch at first that that sentence was out at all. If there had been a line drawn through it, I would have gotten it at once.

If there is no objection to 66 as it is on page 53, we go on to Rule 68, Offer of Judgment. Has anybody any objection to that as it stands?

PROFESSOR SUNDERLAND: Line 14 is a little awkwardly stated. "If the judgment finally obtained by the offeree is equal to or less than the offer". It seems to me that would be better stated this way: "Unless the judgment finally obtained by the offeree is greater than the offer".

JUDGE CLARK: What do you say, Bill?

THE CHAIRMAN: Yes. "Unless the judgment finally obtained by the offeree is greater than the offer, the offeree must pay and may not recover the costs".

JUDGE DOBIE: I think that is better.

THE CHAIRMAN: We will agree to that.

JUDGE DONWORTH: Does the word "greater" cover the whole subject? Really, the idea is "more favorable to," isn't it? Perhaps "greater" covers it.

MR. LEMANN: It may not be money.

JUDGE DONWORTH: That is the thought.

THE CHAIRMAN: That is a good point, too.

MR. LEMANN: More favorable than the offer?

THE CHAIRMAN: I should think "more favorable".

PROFESSOR SUNDERLAND: Yes, that would be all right.

MR. LEMANN: We had "more favorable" in the original draft.

THE CHAIRMAN: Did we?

MR. LEMANN: Yes.

PROFESSOR CHERRY: That is the way it ought to be.

THE CHAIRMAN: The original rule said: "If the adverse party fails to obtain a judgment more favorable than that offered, he shall not recover costs".

That is a style question. If there is no objection to 68--

MR. LEMANN [Interposing]: What improvement did we make by changing this sentence? Did we make any improvement by changing this sentence? Why not invoke the Lemann rule?

PROFESSOR CHERRY: We have.

JUDGE DOBIE: You are going to skip the Condemnation

Rule until the men come, or are you going to work on it now?

THE CHAIRMAN: "shall not recover costs incurred in the district court after making of the offer." Why don't we make that alteration and leave it as originally. It is just style.

Were you talking about 68, Judge?

MR. DODGE: Rule 71A.

THE CHAIRMAN: We are passing that temporarily, if agreeable, and we will go through the rest of them. Now, Rule 73, Appeal to a Circuit Court of Appeals.

JUDGE CLARK: This, of course, will be real fun. I should think it would be nice to send it out to the bar, at least, and see what they say. I think there certainly will be some approval. We know there will be some disapproval.

JUDGE DONWORTH: Who is the author of the idea that the United States should have more time than an individual?

THE CHAIRMAN: The Judicial Conference. We are putting this in on their recommendation.

JUDGE CLARK: I will give you a little background of that. The question of shorter time has been agitated quite a little at different places so much that one might say it is almost an old story, and I might say that three months seems a terribly long time to me. I think it is 20 days in my own state. The time is usually comparatively short. The Senior Circuit Conference had a committee on it, which recommended, as

I understand it, at first 30 days, without change. The Department of Justice in particular, the government agencies in particular, raised a strong protest, and I will have to say that my brother in the Tax Division has perhaps supported the protests as strongly as any, and he is quite worried at this limitation. The statement they make is that they can't get reports from all the people they have to consult the way the Government operates, particularly in the tax work. They have to talk with the attorney for the Bureau of Internal Revenue, and so on.

THE CHAIRMAN: They have to go all the way up to the Solicitor General.

JUDGE CLARK: Yes. They simply can't get the reports soon enough, and if the rule goes through, they will have no escape from doing the purely formal thing of docketing an appeal, only to dismiss it later. They think that the time serves a valuable purpose in that it screens out improper cases and that they try to be very fair under the precedent which Mr. Mitchell had much to do with establishing, that they don't want to take up a case unless they think there is merit in it. There may be a question how far they have always done it, but I guess on the whole the Tax Division perhaps has done it a good deal. At any rate, that is their idea, and they say that if they have an arbitrary time limit, a short one, instead of gaining, the people interested in tax disposition will actually lose because it will force them to take appeals that they would

not otherwise take.

THE CHAIRMAN: It harder to dismiss on government appeal than it is to prevent them to be taken. Once you take them, there is always a lot of kick-back if somebody dismisses it, that you are handing out something to somebody.

JUDGE CLARK: I was going to say that, on representations of this general nature, on consideration, the Conference of Senior Circuit Judges hit upon this solution, and this is their recommendation. I mean, these are minor details which I don't think they had thought through. I think we have had before us the exact terms of their recommendation. We have had to interpret the details of it because they hadn't worked out all the details, but the general idea was to make this very different, Judge Donworth, and that is the history of it.

MR. DODGE: Suppose the collector of internal revenue is the party.

MR. HAMMOND: He ought to have the same time as the United States.

JUDGE DONWORTH: You get into a lot of detail if you put in those things. It seems to me that the United States is the only party that should be favored.

MR. DODGE: A very considerable proportion of the tax cases have the collector as the party.

MR. LEMANN: That is right. You can always sue the collector if he is in office. If he is not in office, then you

have to sue the United States. If the collector whom you paid is in office, you may sue him for a hundred thousand dollars or any amount in the district court.

THE CHAIRMAN: If the claim is over ten thousand, you have to sue him or go outside of the District of Columbia.

MR. LEMANN: They have amended it now so that you can sue the United States in the district court if the collector is dead or out of office. If the same collector is in office, you have to sue the collector, as you always did, but they have extended your privilege now if he is out.

THE CHAIRMAN: It seems to me, in the face of this Judicial Conference action, taken unanimously and with the Chief Justice there, and presented to us by them, there is nothing for us to do but take it and weave it into the rules, putting in a note saying that the Judicial Conference's report send to us is thus and so, quoting it, and let the bar bust the Conference if they want to.

MR. LEMANN: Oughtn't we to take steps when we get the reaction of the bar and, perhaps independently of these other considerations of the Government, call that to the attention of the Conference when it meets in October?

THE CHAIRMAN: If we find that their scheme is objected to so seriously that we doubt that it ought to be adopted, we ought to go back to the Conference.

MR. LEMANN: In September.

JUDGE DOBIE: September.

MR. DODGE: Is this their exact language?

JUDGE CLARK: No, it isn't, because obviously they hadn't thought of certain things. We had a long memorandum on this before. I can't find just what happened. We raised the question as to the agencies, I remember. I say that they had not thought out details. I think it was clear that--

THE CHAIRMAN [Interposing]: This modification is ours that "upon a showing of excusable neglect based on a failure of a party to learn of the entry of the judgment the district court in any action may extend the time for appeal not exceeding 30 days". That is new. They didn't recommend that, but we thought of it.

JUDGE CLARK: There were several rather blind spots in their recommendation. For example, here is one. Is it only the United States or perhaps departments (that is another question there) that should have the 60 days, or should it be that in any action where the United States is a party, all parties should have the 60 days? There were several details of that kind which they hadn't worked through. If I can find our January comments, we had that all in when this was taken up. Have you the January comments?

MR. HAMMOND: I have a copy here.

SENATOR PEPPER: We have added some provisions which further analysis made desirable. There is nothing here that

isn't consonant with their recommendation, is there?

JUDGE CLARK: That is correct, yes.

SENATOR PEPPER: This is really their recommendation, we think, perfected.

JUDGE CLARK: That is it exactly.

SENATOR PEPPER: In that case, as long as we are going to send it up as a sort of trial balloon, wouldn't it be a waste of time to analyze it further here?

THE CHAIRMAN: Unless there is some error that somebody wants to raise.

JUDGE CLARK: Let me just read it. It is rather short. This appears in the minutes of their September meeting, September Session, 1944. The Conference approved the following recommendation of the Committee on Uniform Time for Appeals from District Courts to Circuit Courts of Appeals:

"That in all civil cases, except where a shorter period may be provided by law and except those wherein the United States is a party, appeals shall be within thirty days after judgment or order denying motions affecting the judgment; and that in cases wherein the United States is a party, the time shall be sixty days; and that this recommendation be addressed to the Committee on Rules of Civil Procedure appointed by the Supreme Court."

MR. DODGE: That answers my question, because they don't suggest governmental agencies.

THE CHAIRMAN: No. The only other clause in here that is new is this one about giving the lower court the right to dismiss an appeal on stipulation or motion before it is docketed.

MR. DODGE: In line 22 do you like those verbs after "directed at"?

JUDGE CLARK: I want to talk about that last part a little. I mean down in line 17 and on.

MR. LEMANN: Before you get to 21 and 22, are you going to talk about 17 and 18?

JUDGE CLARK: No, I don't think so.

MR. LEMANN: Is it plain what happens after the appeal has been docketed? We have put something in here now to take care of the situation if the appeal has not been docketed. I suppose it is quite plain that after it has been docketed, you can dismiss it by stipulation in the court of appeals. That would be covered by the rules of the court of appeals.

THE CHAIRMAN: The jurisdiction goes up there, and it depends on their rules.

MR. LEMANN: I guess so.

THE CHAIRMAN: What were you going to say, Charlie? Nobody has objected to this. There is no need of defending, unless you want to.

JUDGE CLARK: I don't want to defend it. I want to object to it.

MR. LEMANN: He has objected to it in the notes.

JUDGE CLARK: Yes. Mr. Moore and I have written a long note on 20 to 23, and we have made a substitute. You see, this is a different proposition from anything we have been considering.

MR. LEMANN: This is on page 66 of your notes; is that right?

JUDGE CLARK: Our comment and discussion of cases are on 61 and on, and on page 66 at the end--

MR. LEMANN [Interposing]: He has a bible, six pages.

JUDGE CLARK: Follow that down through page 66, and you get the final recommendation.

THE CHAIRMAN: This has reference to decisions that hold that certain motions destroy the finality of the judgment.

JUDGE CLARK: We want to make it exact, and we don't think that the motions go quite as far as was discussed before.

THE CHAIRMAN: How would you make it read? Would you strike it out entirely or put in a new clause?

JUDGE CLARK: Put in a new clause, which would read as follows--

JUDGE DONWORTH [Interposing]: Are you reading from your page 66?

JUDGE CLARK: Yes. If you look at the last paragraph on page 66, it is there.

MR. LEMANN: The main difference is that you are

restricting the operation in line 20 and following---

JUDGE CLARK: That is it.

MR. LEMANN: ---to certain special motions under certain special rules. That has at least the advantage of clarity and precision. As you have it now in line 21, it is the "pendency of certain motions".

MR. DODGE: In established rules.

MR. LEMANN: When you come to your substitute, you spell it out.

THE CHAIRMAN: I can find a hole in this right now. It says, "The time for appeal as provided in this subdivision (a) is arrested by a timely motion made pursuant to any of the rules hereinafter enumerated". If it is a timely motion, then the court entertains it, and it has the same effect. You cut out one type of motion, anyway.

JUDGE CLARK: May I say that of course that is what we disagree with, and we have disagreed with that in several pages.

MR. LEMANN: What did you mean, Mr. Chairman? I didn't follow you about untimely.

THE CHAIRMAN: I haven't read all the cases and the note, because I felt I knew what the law was on that thing. I know I have read innumerable opinions where the courts have said, if it is made within the time limited by the rules, it has that effect, but if it has been made after the time fixed

by the rules and the court doesn't enforce the rules and is willing to entertain it even though it wasn't made within the time prescribed in the rules, it still has that effect. The use of the word "timely" in this draft suggests that there is an untimely motion which the court allows by grace and hearing on it. It doesn't toll the running of the time for appeal. They have used that expression in dozens of cases: "A motion timely made or, if not so, which has been entertained ..." They use the word "entertain". "If we entertain it, even though it wasn't timely made ..."

JUDGE DONWORTH: I think, Mr. Chairman, that the rule is not so broad as you are stating it. Under the old rule about terms, the decisions are numerous to the effect that, although a court cannot grant a new trial after the term, nevertheless, if the motion is made during the term and there is something indicating that the court entertains it, then it goes over under the general continuance into another term. I don't think that there is a broad rule to the effect that a motion may be made any time and, if the court entertains it, that extends the right of appeal.

THE CHAIRMAN: I didn't state the rule that way. I said that the time limit was a mere rule limit, not a term limit, power limit, or jurisdiction limit. If it is a rule limit, and the court abrogates its rule or dispenses with the rule, as it has power to do, and entertains a motion that is

made after the time fixed in the rule has gone by, it has the same effect on the finality of the judgment as if it were made within the time fixed. For instance, we have all kinds of times fixed in our rules, and yet we have Rule 6 which says that the time can be extended, enlarged.

JUDGE CLARK: May I speak a little about the law, because we spent quite a little time on it, and we tried to set it forth here because it is an important point.

THE CHAIRMAN: Why do we have to define all these cases? Why can't we get rid of all our misapprehensions by just putting in a general statement that nothing in this rule should be intended to abrogate a rule as to the effect of certain motions on the finality of judgment? Why do we have to define all the cases?

JUDGE CLARK: I would say that I think the chief reason is that there seems to be some impression, just as you have stated, and we want to negative that impression because we think it is against the meaning of the rules and it is an unfortunate interpretation.

I might say that it also has been a matter of discussion. Chief Justice Groner down here in a case that we think should be the important one has followed this rule. That is, we are applying the view of the Safeways case which we discuss here.

You have to take a little background. Under the old

system of terms and the control that the court had during terms, all these questions of time had a different angle. They were governed by the term situation. When we abolished the terms in general, it would seem that we were stating absolute time limits rather than term time limits. The principle that considering the motion or entertaining the motion in itself will extend the time is a bankruptcy concept, and in the leading case that is often discussed on that, Wayne United Gas Co. v. Owens-Illinois Glass Co., which we have discussed at some length beginning on page 62, the court very carefully points out the difference of bankruptcy from civil actions where the term time rule then prevailed.

Building on the background, with the coming of the Rules and with the statement of time limits, Chief Justice Groner in the Safeways case, which we have also discussed here, held that the Rules state the time limits. The quotations from Groner's opinion is on page 64 and following. The case is Safeway Stores v. Coe, 136 F.(2d) 771, 774-775.

So, it seems to me that when, for example, the rule on new trial, Rule 59, says 10 days, it really should mean 10 days and shouldn't mean 50 days if the Judge has said, "I will take it." That is really the substance of what we are after.

MR. DODGE: I was interested in the Chairman's suggestion that an individual district judge might abrogate these rules at will. I hadn't supposed that he had the power to do

that.

MR. LEMANN: No.

THE CHAIRMAN: Of course, I didn't say that the district judge could abrogate these rules. These rules are just like statutes. But he is given power by our rules to abrogate a time limit.

MR. DODGE: By a motion timely made.

THE CHAIRMAN: Timely. That is the distinction I made about Judge Donworth's suggestion. I am not suggesting for a minute that any district judge can entertain a motion after the time limit within this rule, where he isn't given power under these rules to extend the time, and have any effect on the finality of the judgment, but the language of the draft is "a timely motion". The question is, when you say "timely", do you mean within the time fixed by the rule or within the time fixed by the rule which the court has extended under a rule permitting him to do so? I say that a motion made within the time fixed by the rule is a timely motion, and I think one that is made after that time is an untimely motion which the court, having power under these rules to extend the time, has the power to entertain.

Maybe I am wrong in interpreting "timely", but there are many cases where the Supreme Court of the United States has held, where there is a rule that may be abrogated or set aside by the court which has the case, his own rule, if there is a

rule which can be abrogated, then if a motion is made directed at the judgment, a timely motion is one made by the time fixed by that rule; but if it is untimely, if the court, having power to entertain it and set aside the rule or abrogate it, actually entertains the motion, then it has the same effect on the finality of the judgment. They have used that expression over and over again.

I don't claim for a minute that a time limit fixed by these rules by the Supreme Court can be set aside by the district court, unless the Supreme Court rules expressly authorize it to extend the time and grant relief from it.

MR. LEMANN: Mr. Mitchell, two thoughts occurred to me. First, in Rule 6(b) we have prohibited enlargements of time in certain cases.

THE CHAIRMAN: That is right.

MR. LEMANN: The judge couldn't enlarge the time---

THE CHAIRMAN: That is right.

MR. LEMANN: ---in those prohibitions, which include some of the rules, such as motion for new trial and findings, which would ordinarily be steps toward an appeal. That is observation No. 1.

Observation No. 2 is that it would seem to me that the word "timely" by necessary definition would mean within the time permitted by the rules, which in turn would mean that, in cases where the rules permitted an extension and if there had

been an extension, then the motion filed within that extension where it was permitted and had been granted would be a timely motion.

THE CHAIRMAN: I said it was a question of what you mean by "timely". I tell you, the word "timely" in connection with this subject has not been used that way in these cases. They have said it is timely if it is within the time limit, and it is untimely but effective if it is after the time limit but the limit is one which the court has power to disregard and does disregard and entertains it. It is a matter of the use of the word "timely".

MR. LEMANN: He has "timely" in his draft. He hasn't changed it. As I read his substitute on page 66, he retains "timely".

PROFESSOR CHERRY: He puts in "timely".

MR. LEMANN: That is it. Your objection is to the use of the word "timely" because you think it is an ambiguous term.

THE CHAIRMAN: It is under these circumstances, and our discussion shows it. If you read some of those decisions in the Supreme Court on this subject, they talk about "timely" and use the word "timely" as referring to a motion made within the time fixed by rule.

The other aspect of it, actually entertaining an untimely motion, refers to a case where the motion is made after

the time fixed by the rule, but because it is a mere rule and not a question of jurisdiction, the court has power to entertain it, and does. Really, that is a minor thing. I don't see why on earth we should start and read into these rules an essay on the effect of motions to attack judgments on the finality of judgments. There is a raft of decisions on it, and all we want is a caveat in here. We can put it by note or we can put it in the rule. The only thing we need, unless we want to write an essay on a subject on which it isn't our business to write one, is simply to caution them in the note or in the rule that nothing in these rules abrogates the established principle as to the effect of certain motions on the finality of judgment.

SENATOR PEPPER: If there is some ambiguity in "timely", why not adopt a substitute for it? "A motion made within the time fixed by the rules or as extended in accordance with their provisions".

JUDGE CLARK: Let me say on that, first, what we tried to do is just what Mr. Lemann has stated and what you are stating, Senator Pepper, and if "timely" is ambiguous, let's put it the other way around. As I listened to the Chairman, I thought we were using the exact definition he was using, but of course there is no magic in words.

I think it is clear, but I will say this: What we are trying to say is that the filing untimely of a motion, even

if entertained, will not extend. That is definitely what we are trying to do. I want to make it quite clear that that is what we think the law is and should be under the rules.

SENATOR PEPPER: I suppose some difficulty comes from the fact that the word "timely" in ordinary conversation means within a reasonable limit of time, and there might be some implication that it was something different from the time fixed by a rule. I hadn't seen it until the Chairman spoke of it, but if there is--and his views show that there is a difference--why not avoid the difficulty in the way suggested?

JUDGE CLARK: That is quite all right with me.

SENATOR PEPPER: I move that.

JUDGE CLARK: There are two questions here. Shall we say anything? And, if so, shall we make it explicit? The vote was that we put in something referring to"certain motions". What has troubled me about the"certain motions" is, first, that it is entirely indefinite and, second, I think it may be bringing back this old idea which now I think has gone out with the rules. Certainly it seemed to me not only ambiguous but very likely misleading. That is why I was disturbed by it and tried to spell it out definitely. Maybe you don't need anything in 20 to 23, but if we are going to put in anything, we want to look out that we don't make it misleading.

THE CHAIRMAN: I would suggest that this is a question of finality of judgments. When we say that an appeal may

be taken if permitted by law from the district court to the circuit court, that means, under the statute, a final judgment, and we go on to say when the time limit shall run on the final judgment. That is just the way the statute reads today. Yet, in the face of the statute, the courts say, "Well, it isn't a final judgment if there has been a motion made within a certain time." Why, then, do we have to put anything in the rule? We can deal with it just the way the statutes do. We can put a caveat in the note so that the lawyers will take note of the fact that many decisions hold that the judgment loses its finality if certain types of motions are made directed against it. That is all we need. Cite a few cases and let it go. What I don't like is an effort to lay down all the law and to define all the conditions under which the finality is lost by a motion. Why do we have to do that?

MR. LEMANN: You see, Mr. Mitchell, in our Rule 73 as it originally stood, we didn't run into the difficulty because there we simply said, "When an appeal is permitted by law from a district court to a circuit court of appeals and within the time prescribed, a party may appeal". So, we passed the buck and said to the lawyer, "You go and look it up," and the lawyer went and looked up the statutes and the rules and got out all the learning. Now we are undertaking in Rule 73 to establish a time limit ourselves, and we have to use some new language. We put that in line 3 and following, and we are using new

language. When we use new language---

THE CHAIRMAN: Final judgment.

MR. LEMANN: ---we don't use the language "final judgment". We say that the time limit within which an appeal shall be taken shall be 30 days from the entry of the judgment, and the entry of the judgment is a precise thing, as I understand it, under the rules. If you enter the judgment before the motion for new trial comes along, as we know, the lawyers are not all as educated as some of us hope we are, and if they read the words, "entry of the judgment", and you don't make it plain that it isn't always entry of the judgment, that a motion for new trial, for example, filed within 10 days and not disposed of would extend the time, then you are going to have this matter debated, I am afraid, in district court decisions and in the courts of appeals.

THE CHAIRMAN: I don't see it at all, Monte. The statutes left the lawyer precisely in that situation. Before this rule was passed, if he wanted to know when he could appeal, he went to the statutes, and there was a definite, unqualified statement in the statutes that the time for appeal is 90 days after it is entered; but that is a final judgment, and the courts have said that that statute was on appeals from a final judgment and that a judgment isn't final if you make a motion.

The lawyer is in no different position under this

rule, if you call the rule a statute and say it is 30 days, than he was under the federal act of Congress. You say, "When an appeal is permitted by law". Well, an appeal is permitted by law only from a final judgment. So, we start out with the assumption that there is a final judgment here, and we say 30 days instead of 90. So, it is no different from what it was under the statute.

If you could define in a word or two all the cases and all the motions which have an effect on the finality of the judgment, that would be good, but you can't do it. We have to go down and read all the decisions about the effect of motions and make up our minds as to what kinds of motions do and don't, specifying all the numbers of the rules and all that. I don't see any need for it.

MR. DODGE: Do you object to the simple language in the first draft, 20 to 23?

THE CHAIRMAN: The first draft?

JUDGE DONWORTH: Do you mean on page 59?

MR. DODGE: Page 59.

THE CHAIRMAN: The Reporter's first.

JUDGE DONWORTH: I make a motion, Mr. Chairman, that page 59 be adopted as the rule, with the following changes: In line 21, in place of the word "rules" put in the word "rulings", "established rulings", because they are not rules. Then, after the word "motions" insert "made within the time limited by

these rules". Then it would say: "The provisions of this subdivision (a) are not intended to alter the established rulings that the pendency of certain motions made within the time limited by these rules directed at vacating or modifying a judgment operates to deprive that judgment of finality for the purposes of appeal."

THE CHAIRMAN: I wouldn't object to that.

JUDGE CLARK: I don't think I would, but let me say how I think it should be interpreted and how it should be stated in the note. You say certain "established rulings that the pendency of certain motions made within the time limited by these rules". The only direct and specific ruling that we know of is that of Judge Groner. Isn't that so? There may be district courts.

THE CHAIRMAN: I see your point.

JUDGE CLARK: The "established ruling" is the way that I think it should be. It is Groner's ruling. I think that any note would have to say that the established cases are so-and-so, Safeway v. Coe.

MR. DODGE: Weren't there a lot of cases under the old statutes?

THE CHAIRMAN: I think the exact language that the Judge used may be open to question because it has limited it to rulings made under these rules.

PROFESSOR CHERRY: That is right.

THE CHAIRMAN: There are mighty few of them. Most of them were before these rules. With that qualification, I think his suggestion is all right.

JUDGE CLARK: If it is not made under these rules, I must say that I protest just as strongly as I can, because I think then, if we are not being just confusing to the bar, we are going against our own rules.

MR. DODGE: Hasn't it always been the law that the pendency of a motion for new trial extended the 90 days?

JUDGE CLARK: There have been bankruptcy cases; there have been various things. You see, it has been a different situation under the term. When we abolished the term, we brought up an entirely new line of authorities. We tried to establish the time limits within the rules. The bankruptcy court, of course, had no terms, and it had to develop its own rules.

MR. LEMANN: Personally, I would have thought we helped the bar by this enumeration. If we adopt this motion now proposed, we have to go and look up the rulings.

THE CHAIRMAN: As you always have had to do.

MR. LEMANN: Yes, but we are making things somewhat easier at times here by spelling it out.

THE CHAIRMAN: We are laying down the substantive law as to the effect of a motion on finality of a judgment. Maybe we have power to do it, and maybe it isn't substantive.

MR. LEMANN: I don't think it is substantive.

THE CHAIRMAN: I like to leave it to the courts; elastic.

MR. DODGE: It is a point that has troubled me under the rules as they stood before, and I think, therefore, that it may trouble other lawyers. I wondered myself what the effect of our rules was upon the time for appeal if there was a pending motion, and I hunted through the rules to find out what they said about that and was left rather in the dark. I think there should be something that would enlighten the bar, something to this effect specifying the rules or leaving it as it is, "established rulings".

THE CHAIRMAN: We didn't state any time before. We said within the time permitted by law, whatever the law was.

MR. DODGE: What was the rule in 1875 as to the effect of the pendency of a motion on the time for appeal?

THE CHAIRMAN: Eighteen-seventy-five?

MR. DODGE: Anytime long before these rules.

THE CHAIRMAN: As far as I know, way back, I can find decisions that if a motion is made which attacks the judgment, which seeks to have it modified or vacated, the pendency of that motion destroys the finality of the judgment. It doesn't just toll it or start it; it destroys it. The finality doesn't exist then until the motion is decided, denied. Then the time begins to run anew from that date. The only question is

whether the motion is one that is directed to altering the judgment and whether it is a timely motion in the sense that it is made within the time fixed by rules or, if the rules can be abrogated by the court, so that the court can extend the time, not timely made, not seasonably made.

I think maybe I am a little off about this. In the court decisions that I referred to, I am not sure that they used the word "timely". They used "seasonably made", "if not seasonably made, then unseasonably made but entertained". I think I was off the track about "timely". They say "seasonably". If it is seasonably made, it doesn't make any difference what the court does with it, while it is pending it destroys the finality of the judgment. If it is unseasonably made but is one the court has power to entertain by abrogating its own rule, then it has the same effect.

MR. DODGE: Why doesn't Judge Donworth's statement, then, say for the benefit of the bar exactly what has always been in effect the law?

JUDGE CLARK: I don't think that is the law. Before you go further, won't you please read the quotations from the opinion on page 64 and over on the top of page 65. Quotations from the Safeway case have been set out there.

THE CHAIRMAN: Commencing with "Since motions"?

JUDGE CLARK: That is right.

JUDGE DOBIE: Is that Groner?

THE CHAIRMAN: There is nothing new about that part of it.

JUDGE CLARK: Please keep reading.

MR. DODGE: That is of course perfectly in accordance with our rules and not inconsistent with Judge Donworth's amendment.

JUDGE DONWORTH: My amendment is faulty, as suggested by others here, in that the rulings that we want to give effect to were not under these rules that we are now making. The principle is the same, but my amendment is faulty in limiting it to rulings made by these rules.

JUDGE CLARK: Of course, I think that those old rulings don't apply now, and two circuit courts have so held. I see that we have put in the First Circuit. If we are going to make our notes mean anything, we have got to face it somewhere. We have to face it in the notes. Shall we criticize the Safeway case in the note? It seems to me that the Safeway case is the correct case.

MR. DODGE: Certainly. I don't think there is any question about it.

JUDGE CLARK: If that is so, then the idea that I can entertain a motion not filed within the time specified by the rule and thereby postpone the thing is not so.

THE CHAIRMAN: Nobody says anything of that sort.

JUDGE CLARK: I am sorry, then. I must be dumb,

because I thought that was the very point here.

THE CHAIRMAN: No, no.

MR. DODGE: Judge Donworth's suggestion covered that point.

JUDGE CLARK: All right, if it is clear, but I understood the suggestion that was made to be that if a motion made too late was entertained by the court--

MR. DODGE [Interposing]: No, that isn't it.

THE CHAIRMAN: No, sir. I have said nothing of the kind. If the motion is made after the time fixed by these rules, and the court was denied the power to extend the time under these rules, the court loses power to consider the motion, and it is not seasonably made nor properly entertained.

MR. DODGE: An appealable error.

THE CHAIRMAN: There is no question about that. But if it is made after the time originally fixed in these rules, and our rules give the court power to enlarge that time, although not seasonably made, by the grace of the court enlarging the time, it is actually entertained, and the court doesn't simply refuse to entertain it. It has the same effect. In a case where a fellow makes a motion after the time fixed by the rules where no extension is granted, if the court refuses to entertain it, it doesn't have any effect on the judgment.

JUDGE CLARK: Then I shall have to offer my humble apologies. I haven't understood anything that has been going on,

but that makes the stating of it all the more important, because if I can be confused, I think other people can be confused. Why don't we state, then, that these rules govern the time?

MR. LEMANN: How about saying this as a substitute for 20 to 30? "The pendency of certain motions filed within the time permitted by these rules and directed at vacating or modifying a judgment operates to deprive that judgment of finality for the purposes of appeal."

JUDGE CLARK: I think that is what I am getting at. It has to be only pursuant to these rules and not by any rulings made.

MR. DODGE: That is what I have been talking about. May we have Judge Donworth's suggestion again?

JUDGE DONWORTH: You recognize that I think it is faulty. I will repeat it as I made it.

"The provisions of this subdivision (a) are not intended to alter the established rulings that the pendency of certain motions made within the time limited by these rules directed at vacating or modifying the judgment operates to deprive the judgment of finality for the purposes of appeal."

MR. LEMANN: My suggestion merely takes out the first part of yours, which is repeating line 20.

JUDGE DOBIE: In other words, you state it positively, without stating that he doesn't change some rule.

THE CHAIRMAN: I should like to ask the Judge one question, the only thing I have about his suggestion. When you say it is "made within the time limited by these rules", a question of interpretation arises. Do you mean the time fixed by the rules, 20 days or 10 days, or the time to which the court may enlarge it? Isn't there a question there?

JUDGE DONWORTH: I mean the latter, of course.

MR. LEMANN: "the time permitted by these rules" is the language I use.

THE CHAIRMAN: The rules fix one time, and the judge fixes another.

JUDGE DOBIE: The rules give the judge power to change it.

THE CHAIRMAN: I know, but which does that clause mean?

JUDGE CLARK: I don't think there has ever been any suggestion that we would here take away the power given a judge under various rules to do certain things. Our draft on page 56 was intended to say, and I think it does say, that it must be taken under these provisions, and where these provisions permit enlargement, as in 6(b), under certain conditions, that is all incorporated.

Let me say again that I think Mr. Lemann's suggestion covers it admirably, if we can put in a footnote, as I now understand we can, that the correct rule was stated in the

Safeway case and in Magruder's decision in the Morales case.

MR. DODGE: They are right in line with this.

JUDGE CLARK: That jurisdiction is lost to consider it after the time, so that it doesn't affect the judgment. It must be done within the time stated in the rules, and any enlargement made pursuant to these rules--but beyond that, nothing.

MR. LEMANN: "the time permitted by these rules" would cover the Chairman's point, I think.

THE CHAIRMAN: I think maybe it does. The question on Judge Donworth's term, "fixed by these rules", was that I was afraid that might be interpreted to mean the time limits originally fixed and not as being broad enough to include enlargment.

JUDGE DOBIE: I would like to have Mr. Lemann read his suggestion again, if he will.

MR. LEMANN: I was just going to omit line 20 and the first four words of line 21, and then start: "The pendency of certain motions directed at vacating or modifying a judgment and filed within the time permitted by these rules operates to deprive that judgment of finality for the purposes of appeal."

JUDGE DOBIE: I move that we adopt that.

MR. LEMANN: Perhaps you could improve it by changing the order a little bit to read like this: "The pendency of certain motions filed within the time permitted by these rules

and directed at vacating or modifying a judgment operates to deprive that judgment of finality for the purposes of appeal."

MR. DODGE: "directed at vacation or modification of the judgment".

MR. LEMANN: That is better.

MR. DODGE: A little better English.

PROFESSOR MOORE: You mean "served" instead of "filed", don't you?

MR. LEMANN: I think that is good.

MR. DODGE: I second Judge Dobie's motion.

MR. LEMANN: Mr. Cherry suggests that, instead of saying "permitted by these rules", we say "permitted under these rules". I think that might be an improvement.

PROFESSOR CHERRY: That covers the judge's action a little better.

JUDGE CLARK: Monte, just one minor thing. Under 60(b) we have a provision that that doesn't suspend. Do you think that is covered by your language?

MR. LEMANN: Yes. If we say "permitted under these rules", if we have a rule that doesn't permit it, then it is not permitted.

JUDGE CLARK: No. The motion is permitted under 60(b). It is just whether your language covers that or whether we should say, "except as provided in 60(b)."

MR. LEMANN: I should think it reasonably clear, but

I wouldn't have any objection to put it in parenthetically, but "certain motions" excludes 60(b), I think, because 60(b) contains a prohibition.

JUDGE CLARK: I guess so. At least, we can look this over and make sure. I think that the idea is clear, as long as we have the idea.

THE CHAIRMAN: You are not going to have it say, "Nothing in these rules abrogates the principle that certain motions directed at altering judgments may deprive the judgment of finality"?

MR. LEMANN: I prefer the more positive statement. Instead of "may deprive", say "deprive".

THE CHAIRMAN: You say certain motions do it, and you don't say what they are.

MR. LEMANN: Personally, I was willing to accept, with some little change, the Reporter's spelling out, because I rather liked the idea that I could pull down the rule and see just exactly what rules interfered with the finality of the judgment. Personally, I would have somewhat preferred that. I offered this substitute only in deference to the objections made. I like the idea that I don't have to go chasing around to find out which are the motions that are permitted that may suspend finality. I like the idea of seeing them right there, Mr. Dodge, and of being industrious enough right now in this Committee to see that we have got them all. We could do it as

well as any lawyer could.

THE CHAIRMAN: What was your purpose and intent, Charlie, about this, having reference particularly to your statement in the first paragraph at the top of page 67 of your note? Do you have that? You talk about relief by the court. Suppose a motion for new trial is made after the 10-day period, and no relief of any kind has been applied for. He goes right ahead and violates the rules. The court can do one of two things. He can refuse to consider it or entertain it as long as it comes within the time which he has authority to extend. He may not have any on that particular motion, but I am trying to illustrate the idea. If a motion is made after the time originally fixed by the rules, but within the time in which the court under the rulee has power to extend it by leave, and he filee after that time without leave and the court actually entertains the motion by passing on its merits, should the pendency of that motion extend the time and destroy the finality of the judgment, according to your theory?

JUDGE CLARK: I would like to put it this way: First, if I were deciding the question, I would first decide whether what the court has done could properly be considered an order of enlargement under 6(b). I think I would be inclined to rule that the court's action was in effect really an enlargement, but I will put it in terms of defining that rule. As a matter of fact, you may remember that case from the Third

Circuit that raised all the question about a pleading filed too late. The Third Circuit didn't go that way, and I have always thought that decision was a little strong. That is the Rayherst case. In that case the court actually considered the motion filed later, and yet the appellate court held that that wasn't filed pursuant to an enlargement of time. I was wondering if that might not be a little sticking in the grass. I would do it all in terms of defining what was taken under 6(b), the enlargement of time provision. If I, as a court, came to the conclusion that the court had intended to enlarge and had enlarged the time, that of course would settle it.

THE CHAIRMAN: He hasn't done anything else if he entertains the motion, hears arguments on it, and decides it. You can't back me off of it because I have had so many cases that involved it. If the motion is made after the time fixed by the rule but within the time in which the court has power by abrogating the rule to hear it, if the motion is actually made after that time, and there is no application for relief or no application for extension, the Supreme Court has said over and over that if it is actually entertained on the merits and not cast aside, it has the same effect on the judgment as if it were filed seasonably.

I gather from your note that you don't quite agree to that and that that is why you object to my statement about entertained. You say that it ought not to have any effect on

the finality of the judgment if it is made after the time, unless the party goes in in advance and makes a formal motion for leave and has leave granted. I say, no, it doesn't make any difference. If the court has power to hear it, he can go ahead and hear on the merits and entertain it, and not force the fellow to go back and make a motion for leave.

MR. DODGE: What was it under the old law? Could the court entertain a motion in the new term?

THE CHAIRMAN: That was a question of jurisdiction. I am not arguing that the court by entertaining the motion after he lost jurisdiction affects the finality.

MR. DODGE: Haven't we in effect simply changed the period from the term to the number of days? Hasn't the court lost power unless our rules are followed as to time?

THE CHAIRMAN: Bob, I am talking all along about the cases where under the rules the court has power to extend the time up to the point where the motion was actually filed. I am not attacking your idea at all.

MR. DODGE: The rule gives only a contingent power to the court, if a motion is made before the time has expired.

THE CHAIRMAN: All right, if it is made before the time has expired, there is no argument about it. Suppose it is made after the time fixed in the rule has expired, but under Rule 6(c) or some other rule the court has power, if an application has been made to him, to enlarge the time. When this

motion comes in, he says, "The time has gone by. I will enlarge it." There is no need to make the man go through the rigmarole of asking for relief. "I will entertain it."

SENATOR PEPPER: That brings us down to a question of fact. Is there any rule under which the court has power to entertain if the motion has not been made before the expiration of the time?

JUDGE CLARK: Oh, yes, of course.

SENATOR PEPPER: Then, all that the Chairman is saying, as I understand it, is that if the situation is such that an application to extend the time was one of which the court might take cognizance, he doesn't have to do it in the form of extending the time. He does the same thing if he entertains the motion.

THE CHAIRMAN: That is it exactly.

JUDGE CLARK: I don't see why our rule doesn't cover it explicitly. It covers anything permitted by the rules generally.

THE CHAIRMAN: I asked you the question point-blank whether, under paragraph one on page 67, in a situation such as the Senator has described, a motion if so entertained affected the judgment, and you weren't willing to say "Yes" on it. I don't believe your are quite in accord with what I understand to be the established law, and I am afraid of any enumeration here that doesn't agree with the established law.

I would like to see a general caveat put in that nothing herein abrogates the established principle that certain motions may abrogate the finality of the judgment.

JUDGE CLARK: I want to clear this up now. Page 67 of course is not in the rule. We tried to put in an explanatory note. I think if you went back and looked at the cases as they developed, there wouldn't be any difficulty. On page 66 we tried to make it pursuant to what the rules provided, and I don't think I have hedged in answering the Chairman's question. I think the question should turn on the very thing I said, which is really whether what the judge has done comes within 6(b) or not. I think that is the real issue.

MR. LEMANN: Let me ask you this to straighten me out. What kind of motions could come in after a judgment to suspend its finality? Wouldn't they be a motion for a new trial or a motion to amend the findings? What else?

JUDGE CLARK: That is all, isn't it?

MR. LEMANN: I would like to ask that question first.

THE CHAIRMAN: Motion for judgment notwithstanding.

MR. LEMANN: Motion for judgment notwithstanding.

JUDGE CLARK: Rules 50(b), 52(b), and 59(e). That is all.

MR. LEMANN: All right, if you turn back to Rule 6, we have a prohibition against extending time under Rules 50(b), 52(b), and 59(b) and (e). Now I should like to ask--

THE CHAIRMAN [Interposing]: Except as those rules themselves prescribe.

MR. LEMANN: Permit; that is right. Now I should like to ask just how much we are worrying here. To what extent do those rules themselves permit extensions? My impression is that these particular rules (I haven't thumbed them through, but you can put your fingers on them and then we will narrow the discussion) don't permit any enlargment. Am I right about that?

PROFESSOR MOORE: That is my understanding.

MR. LEMANN: If I am right about that, I think we are talking about something that can't happen. If we are talking about something that can't happen, we are wasting our time to that extent.

JUDGE CLARK: I think that is right.

SENATOR PEPPER: That is what I meant when I said it was a question of fact whether there is a case.

JUDGE CLARK: I think I am properly corrected. I said 6(b) provided for further enlargement. It does provide it in certain cases, but in none of these. I think I will have to change what I said.

MR. LEMANN: That is why I thought all along that the Chairman was conjuring up difficulties that really couldn't present themselves under our rules, and that is why I liked the enumeration that the Reporter put in his proposed substitute.

JUDGE CLARK: I might say that Mr. Morgan has written in favoring this. He says he agrees with the change.

"The rules should make clear to practitioners just what motions operate to extend the time for appeal by preventing the judgment from being 'final.' I also agree with the Reporter that the rules should specify the definite time limits. I think the revised Rule 6(b) adopts the proper practice. I, therefore, favor the suggestion of the proposed provision at the bottom of page 66, without the final clause."

SENATOR PEPPER: We have debated this a good deal. I think we see the issue. Why isn't it wise, Mr. Chairman, to take a vote on Mr. Lemann's proposal now and let the Committee put itself on record?

THE CHAIRMAN: As I understand it, it is to adopt the provision at the bottom of page 66.

MR. LEMANN: That would be my first preference. My second preference would be the general language that I dictated a while ago.

THE CHAIRMAN: I don't object to it. I will take another look at it between now and next fall and, if I find some holes in it, I will come back and say so.

SENATOR PEPPER: Surely.

THE CHAIRMAN: Everybody in favor of putting in the paragraph at the bottom of page 66 in the Reporter's draft of Rule 73, it being the last paragraph on that page, say "aye."

MR. DODGE: That includes the substitute for the word "timely" which we have been discussing?

JUDGE CLARK: Whichever you want.

THE CHAIRMAN: Just as you have it.

MR. LEMANN: You see, there we enumerate the rules, and in answer to my last question, Mr. Dodge, he said you can't extend them. So, I don't think we need get into that debate.

THE CHAIRMAN: Hold on a minute. In Rule 59, about motions for new trial, haven't we a clause there that the time may be extended by the court on a showing?

PROFESSOR MOORE: No, sir. Extension for affidavits, but the motion has to be made within the prescribed period.

THE CHAIRMAN: We have now out out the clause about newly discovered evidence enlarging the time for that.

JUDGE CLARK: That goes into 60(b).

THE CHAIRMAN: If you don't make it in 20 days, there is no extension under 59, and you have to go to 60(b). That is one of the things I was off the track on.

It is agreed, then, that we stick in the paragraph at the bottom of page 66.

JUDGE CLARK: May I add this? You will see that the bracketed matter at the very end comes out, because a few minutes ago we took out that provision in 60(b), and we put this in brackets to cover that. Naturally, that bracket comes out.

THE CHAIRMAN: Yes. That is understood.

JUDGE CLARK: The figures, 1, 2, and so on, refer to footnotes. Those are just our explanation. Those are not part of the rule itself.

MR. LEMANN: Would the word "suspended" be better than "arrested" in line 1 of the paragraph at the bottom of page 66?

MR. DODGE: I think it would be.

JUDGE CLARK: What do you think, Bill?

THE CHAIRMAN: The word "arrested" isn't the right word at all. You didn't arrest. That leaves the idea that part of the time has already expired. What it does is to abrogate the finality of the judgment retroactively, and the thing starts to run anew from the date of the order denying the motion.

MR. LEMANN: Yes.

THE CHAIRMAN: That is a matter of style, I think. I wouldn't say that it is arrested.

MR. LEMANN: I suggested "suspended", but maybe you can get a better one.

THE CHAIRMAN: That is wrong, too.

MR. LEMANN: "interrupted"?

THE CHAIRMAN: No. The finality of the judgment is destroyed, and all the time for appeal that has already expired is wiped off the boards. That is hardly arresting it or suspending it.

MR. DODGE: We go on to describe the terms of the extension as an extension. The time for appeal is extended by the filing of a motion and starts running when the motion is acted upon.

THE CHAIRMAN: That is a mere matter of style. We can fix up the style of it.

JUDGE CLARK: Will you make a note on that? We have to consider the word "arrested".

THE CHAIRMAN: Is there anything else on that amendment?

JUDGE CLARK: I think that covers all of that.

THE CHAIRMAN: That covers all of Rule 73.

JUDGE CLARK: That covers the first paragraph. We say there has been no change in the amendment to 73(g). I guess there isn't anything there.

MR. LEMANN: In the first draft of this rule, you had a provision that the absence of notice of judgment made no difference, that your time was running even though you didn't know about the judgment. That was by way of emphasis.

JUDGE CLARK: Yes.

MR. LEMANN: You have taken that out.

JUDGE CLARK: Yes, because there is a provision on that, you notice here, that the judge can act, and so on, that "except" clause beginning in line 6. We don't want to say more, do we? We don't want to say, "except as hereinbefore said,

absence of notice doesn't".

MR. LEMANN: I raise the question whether you think it is implied sufficiently. I guess it is implied sufficiently by line 7.

MR. DODGE: I think that is covered. I was speaking of the language in 77(d) in this pamphlet. As it went out, you had: "Lack of notification of the entry by the clerk shall not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed by law." You have taken that out of 77.

JUDGE CLARK: You will remember, Monte, when we were considering 73(a), there was already a provision, which always has been there and which we continue, in line 12 and following, "Failure of the appellant to take any". That may not--

MR. LEMANN [Interposing]: That doesn't cover it. The only answer you can make to me--and perhaps it is an answer--is that lines 7 to 10 by implication are notice to the bar that they must not rely, except to the extent therein indicated, on the absence of notice.

JUDGE CLARK: I guess that was our theory, and I think that is why we took it out.

MR. LEMANN: That may be so.

JUDGE DONWORTH: I do not suppose there is any danger of this point. I would like the Reporter's view on this. We assume, I think, in the drafting of these clauses, that

appeals lie only from final judgment. Of course, we know that there are designated exceptions to that by statute. For instance, an interlocutory order granting an injunction may be appealed. I don't suppose there is any danger in that thought.

MR. LEMANN: We haven't limited this to final judgments particularly. It says, "When an appeal is permitted by law", in line 1 on page 59.

JUDGE CLARK: I should think that covers it. You notice that the title is, Appeals, When and How Taken. It isn't the substance. It is procedure.

JUDGE DONWORTH: In the original clause there about the finality of the judgment, and so forth, I didn't like that word "finality," because the appeal lies in the cases I mentioned where there is no finality.

JUDGE CLARK: Yes, that is correct.

JUDGE DONWORTH: Of course, on an interlocutory injunction, the court reserves the right, without saying so, to change the injunction at any time during the pendency of the case, but I do not see that we need to get into that detail.

MR. LEMANN: You no longer have the word "finality" now. You have taken out lines 17 to 23.

JUDGE CLARK: On your point, Monte, why don't you consider it a little and bring it up on 77(d), because that is where we have it.

MR. LEMANN: I think so, yes.

JUDGE CLARK: We did vote to leave it out there.

MR. LEMANN: Maybe it ought to stay out, but it was just another warning to the bar.

JUDGE CLARK: Let's consider it when we get to 77.

SENATOR PEPPER: Does that dispose of that rule?

JUDGE CLARK: I should think it did, yes.

THE CHAIRMAN: May I put this into the record just by way of suggestion to the Reporter. It is a matter of style on the amendment that we have added on page 66. It reads: "The time for appeal as provided in this subdivision (a) is arrested by a timely motion made pursuant to any rule hereinafter enumerated," and so on. I suggest something like this: "The finality of the judgment for purposes of appeal--"

MR. LEMANN [Interposing]: When you use "finality" you get to the difficulty Judge Donworth suggested, that he was afraid it might imply that you couldn't appeal from certain interlocutory orders.

SENATOR PEPPER: Mr. Dodge has given notice that he has to withdraw at twelve-thirty. I have to leave at one. Would it be consistent with the wishes of the Committee if we could take up the Condemnation Rule next, or do you think it undesirable?

THE CHAIRMAN: That is all right.

JUDGE DOBIE: They are coming at eleven-thirty?

THE CHAIRMAN: We asked them here at eleven-thirty,

and the time has now arrived. Are they here?

SENATOR PEPPER: We could begin our consideration of it even before they get here.

JUDGE CLARK: I take it that we are down to Rule 75 and that that is where we will start again.

THE CHAIRMAN: We are through with 73.

[The remainder of the session was devoted to a discussion of Rule 71A - Condemnation of Property For Public Use, and these proceedings are incorporated in a separate volume.]

WEDNESDAY AFTERNOON SESSION

May 2, 1945

The meeting reconvened at 1:45 p.m., Mr. William D. Mitchell, Chairman of the Committee, presiding.

THE CHAIRMAN: I suggest that we go back on our regular route and finish. We are commencing now with Rule 75.

JUDGE DONWORTH: Will you permit me to go back to a matter which I overlooked, Mr. Chairman?

THE CHAIRMAN: Yes, sir. What rule is it?

JUDGE DONWORTH: I am in the position of a member of the Legislature of the State of Washington who appealed to his colleagues to vote for a certain bill that he had because, he said, "I haven't done a single thing for my constituents, and I must take something home to them. Now, help me out."

The State Committee in California or some aggregation of lawyers in California suggest a change in Rule 56. We have redrawn here Rule 56(c), Motion and Proceedings Thereon. Have you the data there?

THE CHAIRMAN: Page 47.

JUDGE DONWORTH: Yes. Apropos of the difficulty of appeals from judgments, they want a change made in the final sentence, which is a new sentence on our part. "A summary judgment may be given on the issue of liability alone although there is a genuine issue as to the amount of damages." They are afraid that, if there is a summary judgment entered

definitely, the time for appeal will begin to run, there being no motion for new trial or the other things. So, they want it distinctly said that this is interlocutory in character, and they propose that after the words "a summary judgment", this or some equivalent language be inserted: "interlocutory in character". "A summary judgment interlocutory in character may be given on the issue of liability alone although there is a genuine issue as to the amount of damages."

They want no doubt that the thing they must appeal from doesn't take effect until the damages are ascertained and there is a definite judgment for a certain amount.

THE CHAIRMAN: Would it suit you if it read, "A summary judgment may be ordered on the issue of liability alone, although there is a genuine issue of fact so that the judgment may not be entered" or something like that?

JUDGE CLARK: I think the idea is certainly a good one.

THE CHAIRMAN: It is a good one.

JUDGE CLARK: It may be already covered by what we have done in 54(b). I mean, our formula may cover it, but, after all, it would be just as well to have it clear.

THE CHAIRMAN: Rule 54(b)?

JUDGE CLARK: That is that long section on split judgment.

THE CHAIRMAN: There is some other section in the

summary judgment rule that says, if you can't determine the whole thing, the court shall make an order fixing the things that are certain and go to trial on the rest.

JUDGE CLARK: Yes, that is true.

THE CHAIRMAN: Isn't that really the nub of it?

JUDGE CLARK: That is (d), I think.

THE CHAIRMAN: Yes.

"(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established".

That, of course, isn't a determination of a question of law. I raised the point before, I think, under this amendment to 56, whether it really ought not to be dealt with under 56(d).

JUDGE DONWORTH: While I don't think that the court

would hold that an appellee must appeal before the damages are ascertained, I can see that perhaps these lawyers have some ground for their point.

THE CHAIRMAN: I think they have.

JUDGE DOBIE: I don't think that is final judgment, do you, Judge, if something still remains to be done?

JUDGE DONWORTH: That would be my impression.

JUDGE DOBIE: It would be mine.

JUDGE DONWORTH: But they think it is in doubt.

JUDGE DOBIE: I don't mean it is a good thing to put it in, but I think they would hold it not a final judgment because something remains to be done.

THE CHAIRMAN: Why do we say anything about it?

JUDGE CLARK: About which? Why is the sentence in at all?

THE CHAIRMAN: We added before in (c), the original rule, "except as to the amount of damages, there is no genuine issue".

JUDGE CLARK: Just that Mr. Justice Jackson went to a considerable extent in ruining the thing under the Bartor case.

THE CHAIRMAN: He raised a doubt as to whether the summary judgment rule motion, under the terms of the rule, delayed at all if there was a dispute as to damages.

JUDGE CLARK: That is it.

JUDGE DONWORTH: So, this sentence was put in.

MR. LEMANN: He has a note, you see.

THE CHAIRMAN: To conform to the Judge's suggestion, why don't say under (c), instead of ordering a summary judgment, which raises the question of appeal--

JUDGE DONWORTH [Interposing]: Perhaps you might say in a note: "Obviously, an appeal would not lie until the amount is ascertained." Something of that kind.

THE CHAIRMAN: Take a patent case, for instance. Of course, there is an appeal from that judgment as to liability by virtue of a special statute, as I understand it.

JUDGE CLARK: That is so.

THE CHAIRMAN: Why don't we say in (c) as we have it here, "If the only genuine issue disclosed is as to the amount of damages, the court shall, pursuant to subdivision (b) [or (d); I am not sure] order for trial only the issue of damages and make an order on the rest of it." That doesn't call for a judgment. Why do we want a judgment there, I wonder. Are there types of cases where--

JUDGE CLARK [Interposing]: I think that is just a form of expression to do what you have in mind. I don't think there is any particular difference in it. That is correct, isn't it?

PROFESSOR MOORE: Yes.

MR. LEMANN: You see, of course this is judgment on an

issue of law, I guess, and (d) seems to be findings of fact, doesn't it? This would be primarily a ruling on a point of law.

JUDGE DOBIE: There wouldn't be any damages until you found the facts.

MR. LEMANN: I think that perhaps the simplest way to do it is by Judge Donworth's suggestion. "A summary judgment interlocutory in character may be rendered". I think "given" is not a good word in line 15, anyhow.

THE CHAIRMAN: The trouble is that in patent cases it isn't interlocutory.

JUDGE DOBIE: It is interlocutory, General, but special statute gives you the right to appeal.

THE CHAIRMAN: I guess that is right.

JUDGE DOBIE: The same thing is true of injunctions.

THE CHAIRMAN: Yes.

JUDGE DOBIE: Those statutes don't attempt to change the nature of them, but just give you a special appeal under that particular statute.

THE CHAIRMAN: Is that your suggestion, "interlocutory in character" after "A summary judgment"?

JUDGE DONWORTH: I used the word "character". I don't object to "nature". I think, for sending out to the bar, that would be all right.

JUDGE CLARK: It could be done, of course, as Mr. Mitchell suggests. It could be a forward reference to (d).

MR. LEMANN: As I said, (d) chiefly deals with findings of fact. You could put it in there, but as it stands, it seems to relate chiefly to findings of fact.

THE CHAIRMAN: (d) would permit the court to make an order.

MR. LEMANN: Specifying the facts that appear without substantial controversy.

THE CHAIRMAN: Oh, I see. You are right.

MR. LEMANN: You will get into more debate than you will by this little change.

JUDGE DONWORTH: I think, as a direction to enter a judgment when the court decides there is no real issue except for the amount of damages, this language is appropriate that a summary judgment may be entered. I think, however, that it should be qualified by those words.

JUDGE CLARK: That is all right.

JUDGE DONWORTH: I make a motion at this stage that it be so worded. "A summary judgment interlocutory in character may be given".

MR. LEMANN: Change "given" to "rendered"?

JUDGE DONWORTH: I have no objection to "rendered".

THE CHAIRMAN: Is there is no objection, that is agreed to. Is that all, Judge?

JUDGE DONWORTH: That is all, thank you.

THE CHAIRMAN: We will proceed to Rule 75.

JUDGE CLARK: On Rule 75 there is very little change from the way it was approved before. Perhaps the chief change is pursuant to direction of the Committee. What was formerly a single subdivision (m) is now made (m) and (n).

THE CHAIRMAN: That is to separate forma pauperis cases as one class from the cases where there is no stenographic record.

JUDGE CLARK: That is it, yes. Then, what was formerly (n) now becomes (o), and in (o) we made a difference of time. You may remember that we discussed that. Subdivision (o) is that special rule for transmission of original papers, and the chief thing we discussed there was the time in which the clerk should transmit the papers. We settled on the rule stated in lines 83 to 85. In general it is the time required for the ordinary record, except that the district court by order might fix a shorter time.

I think that states the most important things. The other things were quite minor, as I remember.

JUDGE DONWORTH: I would like to submit a memorandum given to me by Clerk O'Brien of the Ninth Circuit, who has written a number of works on appellate procedure. I won't read all of this. I will point out what seems to be germane. "Mr. O'Brien strongly favors a rule that would require only one original of the reporter's transcript to be filed in the district court for appeal purposes. The parties may examine the

reporter's transcript in the district court office. No copy should be made but, instead of copies, the original reporter's transcript should be sent up to the appellate court the same as exhibits. See Rule 75(b)."

I think I will read all of these (there are not many of them) so you can have them all together.

"Rule 75(m), (n), (o). Mr. O'Brien spoke of preparation of records in forma pauperis. He says in case of an appeal, the original papers should not go up, but there should be three typewritten copies, each certified, so that the three appellate judges hearing the case would each have one original certified copy without borrowing one from another."

That is only in case of forma pauperis.

"Rule 75, in general. Mr. O'Brien does not favor the rule formulated by the Fourth Circuit. He says the Fourth Circuit rule provides that each party shall print in his brief so much of the record as he wishes the court to consider, and then there is no general printed record. This is not convenient for the court because there is no continuity in what the parties print in their briefs. It would be much better if there were a general printed record with continuity. Mr. O'Brien thinks the best method is that prescribed by the Ninth Circuit Court of Appeals in its rules, by which each party designates what part of the record he wishes to be printed. Then, under the supervision of the clerk, the original record

in the appellate clerk's office is turned over to the printer with instructions to print the designated parts of that record as requested by either party. Such printed parts will follow in continuity, omitting only those parts of the record which neither party has designated for printing.

"The district court clerk should make a transcript of the pleadings, court orders, judgments, and so forth, but not including the reporter's transcript."

That is about all.

THE CHAIRMAN: There are several suggestions there. Let's take them up separately. The first point is that he thinks only one copy of the transcript ought to be filed.

JUDGE DONWORTH: Of the reporter's notes.

THE CHAIRMAN: The transcript.

JUDGE DONWORTH: One copy of the reporter's notes should be filed in the district court.

THE CHAIRMAN: The stenographic transcript of the proceedings at the trial.

JUDGE DONWORTH: Right.

THE CHAIRMAN: As we have it, (b) calls for only one copy.

JUDGE DONWORTH: We formerly required more.

JUDGE CLARK: No. It calls for only one, unless the circuit court of appeals rules require more. You may recall that I was asked to write all the clerks, and I had a nice

letter from Mr. O'Brien, among others, in which he stated his preference this way. A majority of the clerks voted for one copy, but there was a certain number who voted for more and, in order to take care of them and not to arouse animosity, we allowed the circuit court to order differently.

JUDGE DONWORTH: That settles it.

THE CHAIRMAN: Then we have also, Judge, in (g) a provision that the one single copy which has been filed as provided in (b) shall be used by the clerk for certifying the record on appeal. So, what he wants about that is already provided for.

JUDGE DONWORTH: Are you quite sure about that? What he wants is that there should be no copy made at all of the reporter's transcript. He files it like an exhibit in the case, and it goes up originally.

THE CHAIRMAN: All right, the rule so states in line 48.

JUDGE DOBIE: That is what we do.

THE CHAIRMAN: Line 48 of subdivision (g) says, "The copy of the transcript filed [a single copy of the reporter's transcribed notes is placed in the clerk's office; not two or three, but just one] as provided in subdivision (b) of this rule shall be used by the clerk for certifying the record on appeal". So, the rule expressly calls for the original transcript, one transcript, filed to be handed up to the circuit

court of appeals.

MR. LEMANN: It even says in the next line, "the clerk may not require an additional copy as a requisite to certification."

JUDGE DONWORTH: I was under the impression that you thought that the original transcript, speaking now of the stenographer's notes, remained in the district court's office and that the district court had to make a copy.

THE CHAIRMAN: The rules say otherwise on that. They used to provide that way, but the draft that the Reporter has out here says that only one copy has to be filed with the clerk.

JUDGE DONWORTH: I know, but that isn't the whole proposition. What does the clerk do with that?

THE CHAIRMAN: That is covered by the next rule, which says, "The copy of the transcript filed as provided in subdivision (b) of this rule shall be used by the clerk for certifying the record on appeal".

JUDGE DONWORTH: That seems to me to be ambiguous.

MR. LEMANN: Look at line 11, Judge Donworth, under (b). "If there be designated for inclusion any evidence or proceedings at a trial or hearing which was stenographically reported, the appellant shall file with his designation--" We have taken out "two copies" and put in the words, "a copy of the reporter's transcript".

JUDGE DONWORTH: Yes.

MR. LEMANN: Don't you think the change is clear?

JUDGE DONWORTH: I am not sure about that.

THE CHAIRMAN: Aren't you assuming, Judge, that before anybody files anything, somehow or other there has been filed by the reporter or by somebody a transcript in the clerk's office and that this thing that is filed is an extra copy of that? Isn't that what you are assuming?

JUDGE DONWORTH: No. What I am assuming is that "shall be used in certifying the record" is ambiguous.

JUDGE CLARK: How can it be? There are further provisions in (b), too, that help to make it clear. For example, in line 20, "The copy so filed by the appellant shall be available for the use of the other parties. In the event that a copy of the reporter's transcript or the necessary portions thereof is already on file, the appellant shall not be required to file an additional copy."

Then, down in (g) is a provision that the copy so filed shall be the one certified, and the clerk may not require an additional copy.

THE CHAIRMAN: That is just where the judge says it is ambiguous, and I think he is right. It says, "shall be used by the clerk for certifying". It may mean it is to be used as the basis for getting up the copy.

JUDGE DONWORTH: That is it.

THE CHAIRMAN: Why don't we say, "The copy shall be certified as part of the record"? That meets your point.

JUDGE DONWORTH: That is the point.

JUDGE CLARK: I guess that is all right.

THE CHAIRMAN: This is in lines 48 and on in subdivision (g) of Rule 75. "The copy of the transcript filed as provided in subdivision (b) of this rule shall be certified by the clerk as a part of the record on appeal".

JUDGE DONWORTH: That is right.

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

JUDGE DOBIE: "shall be certified as the record".

JUDGE DONWORTH: "as a part of the record".

THE CHAIRMAN: You can say "included" instead of "certified", if you want to.

Is there anything more on that, Judge? What other points does he have?

JUDGE DONWORTH: His other point--and I don't know that we need to take up any time about it--is, as he tells me, that the rule in the Fourth Circuit, which is thought well of in a number of other circuits, it seems, provides that instead of having a printed copy of the reporter's notes, his transcript, each party may print in his brief such parts of that as he wishes the appellate court to consider. Mr. O'Brien's point is that, as the two parties file separate briefs, there is no

continuity in the excerpts from the record that get into the briefs, making it hard for the judges to study what really was said or done.

THE CHAIRMAN: That is a good point.

JUDGE CLARK: Why should he force the rule on us? It is a matter of choice.

JUDGE DONWORTH: He thinks there should be one printed copy of the report in the appellate court.

THE CHAIRMAN: Of course, we don't attempt by these rules to say what the court of appeals shall do. That is fixed by their own rule on printing, so we couldn't do anything about that.

MR. LEMANN: No other circuit has to change that.

JUDGE DOBIE: Judge Donworth, there is no duplication there, if that is what he thinks. The appellant tells the printer what he wants, and after that, the appellee does; and not infrequently the two will get together and you have one printing for both of them. As for the lack of continuity, I think that is all hooey.

PROFESSOR SUNDERLAND: There isn't any continuity, anyway.

JUDGE DOBIE: Of course there isn't. There wouldn't be any continuity when you have breaks. There are times when there is only one point in the case, and five pages of the transcript are all that we need, and there may be a thousand.

So, the rule has worked very badly in one way--for the printers. Since we have had that rule in effect, for five years, it has lost the printers considerably over $200,000.

JUDGE DONWORTH: Without prolonging the discussion, you recognize, don't you, that Mr. O'Brien would print only so much of the record as either party requested to be printed?

JUDGE DOBIE: But he would print it consecutively.

JUDGE DONWORTH: But print it consecutively as far as it goes.

THE CHAIRMAN: The point is, he has nothing to do with the printing. That is the circuit court of appeals. He is arguing against the Fourth Circuit practice and asking us to do something about it, when it is a matter that is handled under the rules of the circuit courts and we can't tell the Fourth Circuit to get off the road.

JUDGE CLARK: He is arguing for the Ninth Circuit rule. He loves his own rule, and of course that often happens.

MR. LEMANN: We are not interfering with his rule.

PROFESSOR CHERRY: I was going to refer him to Mr. Dean. I think he could get an argument the other way.

JUDGE CLARK: Oh, yes.

PROFESSOR CHERRY: He is quite ready to put up a brief.

MR. LEMANN: We are not interfering with the Ninth Circuit rule, nor are we trying to impose the Fourth Circuit

rule on the Ninth Circuit. Am I right?

THE CHAIRMAN: Right. Neither is the Fourth Circuit interfering with the Ninth Circuit.

JUDGE DONWORTH: I withdraw.

THE CHAIRMAN: Is there anything else on Rule 75? Has anybody else any suggestion to make as to any further provision in Rule 75? I have one suggestion to make. There is nothing to it. It is mere form. In (m) on page 71, line 66, it says, "Upon leave to proceed in forma pauperis". I guess that is all right, and I think I used that phrase myself when I suggested that, but somebody would come back and say, "There is no leave in the federal court to sue in forma pauperis. It is simply a permission to proceed with the appeal without paying the costs as provided in section so-and-so." Is there anything in that?

MR. LEMANN: No.

JUDGE DOBIE: We always called it in forma pauperis.

PROFESSOR CHERRY: Certiorari denials come down from the Supreme Court that way all the time.

JUDGE CLARK: What he asks for is a waiver of the charges, and that is what he gets, but this is what we always call it.

THE CHAIRMAN: I think so.

PROFESSOR CHERRY: That is what the Supreme Court calls it.

JUDGE DOBIE: That is the only phrase we ever used. That is the only phrase the Supreme Court ever used. "Permission to proceed in forma pauperis granted. Certiorari denied."

PROFESSOR CHERRY: That is right.

THE CHAIRMAN: I am vindicated, then, because I made this suggestion.

JUDGE DOBIE: I wouldn't say you are vindicated. I would say that is what the Supreme Court does.

THE CHAIRMAN: I don't know of anything else to suggest. Unless somebody else has something, we will pass on.

MR. HAMMOND: For some time I have thought that some of these subdivisions on page 72, line 97, wouldn't be applicable in the case of the transmission of original papers. All I suggest is that the Reporter's staff, Mr. Moore, look at those and see if they definitely are. Maybe you have already. I thought maybe you might have overlooked it. Just see that they are all applicable.

JUDGE CLARK: I know we have discussed it together. Maybe we should discuss it again.

MR. HAMMOND: No, I don't want you to go into any discussion of it. If you have decided it, it is all right with me. I know my letter to you came in just before--

THE CHAIRMAN [Interposing]: Do you think they are not applicable to some of them?

MR. HAMMOND: I have really forgotten now. I haven't

had a chance to go over it. I couldn't find my letter on it. I thought there might be some that weren't, but as I understand it, the Reporter has considered the matter and thinks that they all are.

JUDGE CLARK: It is obvious that some of them will be only very rarely applicable, I will certainly say that, but we thought that there might be an occasion where each of them might come in, and it wouldn't be misleading to put it in.

THE CHAIRMAN: Let's pass on to Rule 77.

JUDGE CLARK: We have only (d) here. We have provided for the notice of the filing of findings, too, and that fits in with this. Maybe it isn't so necessary now in view of the change.

THE CHAIRMAN: Did we agree that the clerk had to "serve a notice of the entry or filing by mail in the manner provided for in Rule 5 upon every party affected"?

MR. LEMANN: Yes. That was in the original rule. The original rule, Mr. Mitchell, said that the clerk should serve a notice of the entry by mail, and then we debated this and decided that in view of Hill v. Hawes, we had better put in a special statement that his failure to give you notice didn't give you any more time. Wouldn't you put your clause in at the end of that sentence?

THE CHAIRMAN: Oughtn't we to say that the failure to receive that notice shall not affect the time for appeal except as provided in Rule so-and-so?

MR. LEMANN: We had that in our draft to the bar.

"Lack of notification of the entry by the clerk shall not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed by law."

Now Judge Clark has taken that out here. I raised the question when we were looking at 73(a), and he said we took it out because in 73(a) we gave the limited right of relief and that would give any person reading the rule carefully reason to know that, except within that limited provision, there was no relief, but he suggested that we might bring it up again for consideration.

THE CHAIRMAN: I would suggest that we restore the phrase in this form: "Lack of notification of the entry by the clerk shall not affect the time for appeal except to the extent provided in Rule so-and-so, which gives the court power to extend the time for appeal."

MR. LEMANN: Wouldn't it come at the end of the sentence there? Look at the language on page 107 of the pamphlet that we sent to the bar.

THE CHAIRMAN: Yes, I have that.

MR. LEMANN: Wouldn't you put your clause in at the end of that sentence? "Lack of notification of the entry by the clerk shall not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal

within the time allowed by law, except as provided or to the extent provided in Rule 73(a)."

THE CHAIRMAN: That is what I would do. I would add it again.

MR. LEMANN: I would, too.

JUDGE CLARK: That is all right. I think we voted it was unnecessary, but it certainly would do no harm, and maybe it is desirable.

MR. LEMANN: It is a reminder to the court and to the bar.

THE CHAIRMAN: I think when we voted it was unnecessary. We didn't have any provision authorizing the court to extend the time. We were going on a 90-day rule then. We weren't putting in a suggestion to cut it to 30. Let's add, then, to subdivision (d) of Rule 77 a sentence--I am not so sure that it ought to go at the end, because now we have run in something about service by a party, and that may be by mail.

MR. LEMANN: No.

JUDGE CLARK: That was in before.

THE CHAIRMAN: If was there before, but, Monte, if we say that such mailing is sufficient, lack of notification--yes, I see. We will add to (d), according to Mr. Lemann's suggestion, the following sentence: "Lack of notification of the entry by the clerk shall not affect the time to appeal or authorize the court to relieve a party for failure to appeal

within the time allowed by law, except as provided in Rule 73(a)."

MR. LEMANN: "except to the extent permitted by Rule 73(a)", because we make it permissive there.

THE CHAIRMAN: Yes, all right. "except as permitted by Rule 73(a)." Is it 73(a)?

JUDGE CLARK: Yes.

THE CHAIRMAN: Is there any objection to that?

JUDGE CLARK: If that is settled, I want to raise another question.

THE CHAIRMAN: That is agreed to. All right, go ahead.

JUDGE CLARK: I want to say that the reason for adding this provision in 2 and 3 and also in 8 and 9 is not as strong now. You will recall that in 52(a) you restored the provision that you can move for a change of findings of facts now, as before, after entry of judgment. We had changed it to filing of the findings. So, as I say, that makes this less necessary. I should think in one sense it was still desirable to have notice, except that of course the clerks kick about it anyway and, even though desirable, we may not want to require it now that it has not become as necessary.

MR. LEMANN: Why do you say it is not as necessary? Because originally the time for taking appeal was as provided by law, and that was entry of judgment, you might argue that there was no necessity under that provision for a clerk's

notice. I don't quite follow your suggestion that it is not as necessary as it previously might have been.

JUDGE CLARK: Because nothing happens then. The way we were going to put it, he lost his chance of moving to amend the findings unless he did it within 10 days after they were filed. Now nothing happens.

THE CHAIRMAN: Hold on. Didn't we strike out the notice business in the findings?

MR. LEMANN: Yes, we did.

THE CHAIRMAN: Yes.

MR. LEMANN: I don't know just what you are speaking of, Charlie. What rule are you talking about?

JUDGE CLARK: Rule 52(b). Maybe it was (c); 52(b), I think. We restored that to its original form.

JUDGE DOBIE: Entry of the judgment.

MR. LEMANN: That is right.

JUDGE CLARK: So, I say that this became less necessary.

THE CHAIRMAN: I see.

MR. LEMANN: But that was only in connection with changing findings, and the importance of this is in connection with appeal.

JUDGE CLARK: Oh, no.

THE CHAIRMAN: He is not striking out the provision that on entry of judgment the clerk shall send the notice, but

it is only the underlined clause about giving a similar notice as to findings.

JUDGE CLARK: That is it.

THE CHAIRMAN: The point is that, since you can make your motion to amend the findings within 10 days after entry of the judgment, you don't lose anything by not knowing that the findings have been filed, because you will receive a notice of the judgment, and that gives you 10 days from there on to move to amend the findings.

MR. LEMANN: He is referring now only to a part of line 2 of 77(d), as I understand.

THE CHAIRMAN: The underlined part.

JUDGE CLARK: The new part. That is all I said. I said, now that the amendment of this part of the rule (that is, the entire amendment except what we added just two or three minutes ago) is not as necessary as before, I would put it now that I should still think it desirable for the clerk to give such notice and I would like to do it, except that the clerks howl so at any additional burden, we may not want to face that.

MR. LEMANN: It seems to me that the appeal and the correction of findings stand on the same basis. As we now have the rules, notice isn't necessary to start your time running in either case.

JUDGE CLARK: It depends on the judgment, and not on the filing of the findings.

MR. LEMANN: That is right, and the same is true about appeal. The notice is of no importance in either, but you say you are going to tell the clerk to give notice in both cases because you think it is desirable that he should do so. Then, you want to make it plain that, if he doesn't do it, it isn't going to help out the party who hasn't gotten the notice. Isn't that a correct statement?

THE CHAIRMAN: Charlie, this new stuff that you have here now, which is no longer vital because the time for moving to amend the findings doesn't run from the date of the filing of them, is not in the equity rule, and this stuff was founded on the old equity rule which required the clerk to send due notice of an order of judgment. So, why shouldn't we drop it here? Why should we impose that additional duty on the clerk?

PROFESSOR SUNDERLAND: I think it is useless. It seems to me that we might relieve the clerk of that. It is a kind of duplication of notice.

JUDGE CLARK: I wanted to bring it up. I announced before that you could do whatever you wanted. I think the clerks will still send notice of a memorandum of decision. Don't the clerks do it practically, even if they are not required to?

THE CHAIRMAN: Usually it is an order. It might be in the form of an order. The findings will wind up with an order for judgment, maybe, and if he sends a postal saying that

an order for judgment has been entered, that ought to advise the fellow that findings have been filed. I should think we could drop out that underlined material now.

JUDGE DONWORTH: Of what page are you speaking?

THE CHAIRMAN: This is page 74 of the Reporter's draft, having to do with subdivision (d) of Rule 77.

MR. LEMANN: Am I right that notice is not important for appeal? Am I right about that?

THE CHAIRMAN: Yes.

MR. LEMANN: Equally, notice isn't important for findings.

THE CHAIRMAN: That is right.

MR. LEMANN: Therefore, my argument is that appeal and findings are on the same basis. Notice is unimportant for both of them. Yet, you tell the clerk he must give notice of the judgment.

THE CHAIRMAN: Of an order of judgment.

MR. LEMANN: Yes; even though it isn't necessary.

JUDGE CLARK: I don't think that is correct, Monte. I think there are degrees of unimportance or of importance, if you will. That is, the party in effect must be charged from the time of the entry of order of judgment. He must know that this provision that the clerk must send him notice comes from the equity rule and is an additional way of giving him warning and is the old way of doing it, and so on. As we have left it,

the filing of the findings as such is quite unimportant anyhow. So, I say that if you say that it is unimportant to know of an order of judgment, it is much more unimportant, if you will, that they should know anything about this. That is what I mean.

MR. LEMANN: I see.

THE CHAIRMAN: You were favoring knocking out the clerk's notice entirely, were you?

MR. LEMANN: No. I was in favor of leaving it in for both. That is the only point.

THE CHAIRMAN: For both?

MR. LEMANN: That is right.

THE CHAIRMAN: As he proposes to put it.

MR. LEMANN: That is right. I say it is unimportant on both of them, and he says that it is less important in one.

THE CHAIRMAN: I suppose some of the clerks send a postal notice of findings filed or opinion filed, but some of them are awfully busy and have never been accustomed to sending anything except notice of an order of judgment. Now we come along with a rule that requires those exceptionally busy clerks in the busy districts to have some more labor imposed on them. We can defend ourselves on the requirement that he give a mail notice of an order of judgment, because that has been the law for twenty-five years or more, but we can't defend the other against an attack. We may defend it, but we would have a row

on our hands.

MR. LEMANN: I am content.

THE CHAIRMAN: There hasn't been any decision. Shall we strike out the underlined provisions in the Reporter's draft and leave it merely that the clerk shall send the notice of an order of judgment? What is your pleasure?

PROFESSOR SUNDERLAND: I move that.

THE CHAIRMAN: Is there any objection to that? That is so ordered, then.

JUDGE DONWORTH: I desire to present another question with reference to the underlined matter in lines 2 and 3.

PROFESSOR CHERRY: That is out.

THE CHAIRMAN: We have taken that out.

JUDGE DONWORTH: All right.

MR. LEMANN: Unless you want to move to put them back.

THE CHAIRMAN: I beat you to it, Judge.

Is there anything on 79?

JUDGE CLARK: I guess not, no.

THE CHAIRMAN: We just tinkered those up to fit the Administrative Office. Has anybody any objection to Rule 79 as it now appears in the Reporter's draft? If not, we will pass on to Rule 80.

JUDGE CLARK: As to 80, Mr. Chandler has sent us word that the appropriation bill has been passed and, as I understand it, it is in the form indicated at the foot of 78.

THE CHAIRMAN: It has been approved by the President?

JUDGE CLARK: I don't know.

THE CHAIRMAN: He means passed as a law.

JUDGE CLARK: No, that isn't the way the notification came to us. He first wrote about the report of the committee, and then that the House had concurred in making a certain change. This is the latest I have. He says that the Senate has passed it today.

THE CHAIRMAN: April 25. Let's assume that the President signs it, then what?

JUDGE CLARK: I don't know that that necessarily makes any difference except that that does provide for the operation of the court reporter system. They have appropriated not the full amount requested, but $700,000 to get it started.

THE CHAIRMAN: Is there anything wrong with our last four lines on page 78, then? What is your point? I don't get it.

JUDGE CLARK: I am not making any point at all. I just wanted, first, to give you the information that the reporter system is presumably going into effect. Second, our subdivision (a) really may be unnecessary, but we considered that before and decided to have it in in case of any unusual need. For example, Judge Sibley raised some question that there might be parts of the court reporter system that might not be fully effective.

THE CHAIRMAN: The reporter might die and in the meantime there would be none until the Administrative Office got busy, and that fills the gap, doesn't it?

JUDGE CLARK: Yes. So, I think this is all right but I just wanted you to have in mind that we are still continuing (a) even though presumably there will be an official reporter, and almost always then (a) would be useless. I mean it would be functus officio. Is that the word?

THE CHAIRMAN: I suggest that we leave it as it is and ask the Reporter to submit a copy of this draft to Mr. Chandler now and ask him if he has any suggestions in view of the fact that this bill has become law. Let him check against us on that.

JUDGE CLARK: I think that is probably correct.

THE CHAIRMAN: If there are any holes in it, he will find it quicker than we will.

MR. LEMANN: Didn't Sibley assume that this court reporter bill would be passed and still think that you would need this?

JUDGE CLARK: Yes, he thought there would be some gap even if it went into effect.

MR. LEMANN: I can't see that it will do any harm, and (b) will go out automatically by the last sentence in it.

THE CHAIRMAN: Even under the law, a reporter may not be appointed right away in a district. There may be a gap in

his selection, between the date of the passage of the law and his appointment in a particular district where this thing fills the gap--and he might die.

MR. LEMANN: Or get sick.

THE CHAIRMAN: It provides for the place where it is vacant. Let's put it up to him.

JUDGE CLARK: I will see that that is done.

THE CHAIRMAN: Rule 81.

JUDGE CLARK: No change was made since the earlier drafts of this in this rule.

MR. LEMANN: How about the effective date of these amendments? I raised that point in discussion with Mr. Hammond of Rule 71A's effective date. I said, "I guess we will have to have an effective date for the amendments generally."

He said, "Yes. We had better have a separate one for 71A."

What would be the effective date of these amendments? Ought we to make a provision for that?

THE CHAIRMAN: I suppose that when we agree on the final draft of the report, we will add a clause to the report that the effective date will be--

MR. LEMANN [Interposing]: Would it be well, so that we don't forget it, to have the Reporter draft the language and leave the date blank? How did we have it here?

THE CHAIRMAN: The same as in the original rules.

MR. LEMANN: Yes, as we had it at the end of the original rules. Rule 86, Effective Date.

JUDGE CLARK: It would have to be a new rule, or an addition to 86, if you will.

MR. LEMANN: But wouldn't it be well to put it in while you are thinking about it and leave the date blank, and then we won't forget it. I guess we wouldn't forget it, but we might.

THE CHAIRMAN: It would appear in the rule then. Wouldn't it be an order of the court, really?

JUDGE CLARK: The Chairman suggested that it might appear as a part of the court order rather than in a separate rule.

MR. LEMANN: I should think it might be helpful to the bar for it to be embodied in the rule, because they might forget to look at the order. It seems to me it would be just as proper to put this in a rule as it was to put the original effective date in the rules.

THE CHAIRMAN: We might add to Rule 86 a provision that "The amendments promulgated on such-and-such a date take effect subsequent to the adjournment of the _____ Congress." It is a little awkward.

MR. LEMANN: Yes.

THE CHAIRMAN: Let's let that go until we see what that looks like when we get our report ready.

As far as the notes are concerned, we don't want to take the Committee's time to go over them now. They have been distributed, and I would suggest that, if anybody has any suggestions to make as to the notes that are to go out in this draft, he send his suggestions in to the Reporter. I have one or two things in mind that I am going to write to him and suggest. If anybody else has any, I think that is the best way to handle it.

MR. LEMANN: I would suggest that he not print them. I don't know. These notes are not to be printed.

JUDGE CLARK: Oh, no. Those are not the notes at all. Those are to drop out.

MR. LEMANN: You were thinking of these [indicating]?

JUDGE CLARK: Yes.

THE CHAIRMAN: If anyone has an alteration to suggest, I would suggest that he send it to the Reporter instead of our taking an hour or so here to go over them.

MR. LEMANN: I have the impression that these notes are much longer than the notes to the original rules.

JUDGE CLARK: Of course, at least certain notes got longer in this draft. The notes that we have now drawn are practically the notes of this draft, except where changes have become necessary as, for example, where we now have settled on one instead of several alternatives, and we have dropped out some of the discussion with reference to that. So, they aren't

longer. Indeed, they will be a little shorter than the others.

MR. LEMANN: For instance, I was looking at your note to Rule 73. It is true it doesn't run to the six pages that you gave the Committee, but it still runs to two and one-half pages of single-spaced matter.

JUDGE CLARK: Let me raise the question how far we want to go, anyway. Part of that, if you look through it, is in answer to Judge Sibley, not by name, but--

MR. LEMANN [Interposing]: Rule 73? I don't think so. I am talking about 73 and Judge Groner and company, bankruptcy rule differentiation, and so on.

JUDGE CLARK: Aren't you now still going back to the comment that will drop out?

MR. LEMANN: I don't think we ought to stop too long on it, but I have before me the provisions of the rules and your comment on Rule 73, which is eight pages. I understand that will drop out.

JUDGE CLARK: That was for the Committee.

MR. LEMANN: I turn to what I presume is for the bar. When I come to Rule 73, I find two and a half pages, and that also seems to me quite long. It is not as long as eight pages.

JUDGE CLARK: It depends on how long we should make it. Part of that is on the new appeal time, which of course is an important thing. Shall we go into much explanation or shall we not?

MR. LEMANN: I think if you would cite the cases on which you rely--Judge Groner and the case of Magruder's of which you spoke--

JUDGE CLARK [Interposing]: Now you have gone back to the part that we have to do over anyway. That was my argument to the Committee, and what you are looking at about Judge Groner and Judge Magruder has to be done over. Most of that will go out. I think we would have only the citation of cases there. I agree with you.

THE CHAIRMAN: Clear me up. What are we talking about? This [indicating]?

JUDGE CLARK: That is what we should be talking about, yes.

MR. LEMANN: I am looking at page 31 of that last thing there.

THE CHAIRMAN: Rule 73.

MR. LEMANN: I look at it and see two and a half pages, which I imagine in print would be six or seven pages, perhaps.

JUDGE CLARK: Of course, we would like your suggestions. This isn't at all final, but the Criminal Rules notes were voluminous, you know, much more than we had, and it would be a good idea to know what you would like. Do you want these notes very restricted, or do you want them argumentative, or do you want something in between? I am frank to say that, as it

now stands, I think they are not wholly uniform, but, of course, the questions are not wholly uniform, for that matter. Some notes have more explanation than others.

MR. LEMANN: Of course, I realize, too, as I am talking, that it might be useful to have them somewhat longer for the purpose of the next distribution to the bar than they would be when finally adopted.

JUDGE CLARK: Yes.

MR. LEMANN: Don't you think so, Mr. Chairman?

THE CHAIRMAN: I think the bar ought to have a full explanation. If it costs the Government a few dollars more for printing, it will save in the end to explain things fully. In fact, I criticize the note that you just criticized because it doesn't set forth verbatim the resolution of the Judicial Conference which says that they recommend this and address it to us to consider. Judge Sibley refers to that.

MR. LEMANN: I think it is set out in this, but perhaps it ought to be repeated.

THE CHAIRMAN: I don't think there ought to be any reference back to the first preliminary draft. A lawyer ought not to have to have both of them before him. I think I have already made that point.

JUDGE CLARK: I think so. Monte, you won't find that back there because it wasn't passed until the September Session.

MR. LEMANN: I guess you are correct. It isn't in

this pamphlet that went to the bar. The Chairman is undoubtedly right that it ought to be in. I withdraw my suggestion that these notes be generally condensed for the present purpose, although I think I might renew it when the time comes to make the final official notes.

THE CHAIRMAN: That is right. The trouble is that if we don't explain these things fully, the lawyers misunderstand the drafts and don't know why, and they bellow and are never satisfied. If you give them a full story, they are placated. A lot of them have sent in objections to some of these rules, and these notes are drafted by the Reporter in the light of certain kicks that have come in already, to satisfy the fellow who has made the objection. He reads the rule and sees that his point has been considered, and it saves my writing him a letter and telling him that we thought it all over and couldn't agree with him.

MR. LEMANN: I think you are right.

THE CHAIRMAN: I have had an awful mass of correspondence that way. I have been trying to placate the fellows and get them in the right mood about the rules, and it works. There is no harm in arguing them off the boards in the notes.

MR. HAMMOND: In that connection, in some cases where we have dropped matter entirely from this new draft, I was wondering whether we ought not to explain why. I will give an example of that. That is Rule 12(b). We had a provision in

the preliminary draft which said, "When the court grants a motion hereunder, it shall not enter an order of dismissal without first affording reasonable opportunity for amendment." Now we have dropped that out in the next draft. I think an explanation of that ought to be given. The explanation, as I understand it, was that the general provisions for amendment would allow him to do that anyway.

THE CHAIRMAN: And that in many cases he wouldn't want the privilege.

MR. HAMMOND: Yes.

THE CHAIRMAN: It would be staying the order for 25 days to give the right to amend where he didn't want to. The point is, Who is going to go through these kicks and complaints and pick out the complaints that we haven't dealt with in the rules and that apparently we haven't done anything about and give me a list or somebody a list so that we can write to all these fellows and tell them why or at least put something in the notes about it?

JUDGE CLARK: I would like to ask about the question that Mr. Hammond raises. It is an interesting and rather important thing. That would of course in itself clarify it a little. I think we could do a good deal of that. I think probably there would still be some question of judgment when the things we left out were very small. Do you want us to go through now and add to what we have already given you, comments

on what is omitted from this draft of last year? I don't believe we can agree to add everything that is omitted. That would be too much, because some of the omissions are very small. We would have to exercise some degree of discretion.

MR. LEMANN: I should think that you had better not. It seems to me it would be pretty complicated to send to the bar a statement about everything that was changed from this preliminary draft.

THE CHAIRMAN: I think maybe we can let it go as it is, and then if they come back and ask, "What became of my suggestion?" we can respond to the particular individuals.

MR. LEMANN: Wouldn't you just send that to the Reporter's staff and ask them to give you the answer?

THE CHAIRMAN: They always write to the Advisory Committee, and send the Chairman a copy, and a civil answer is required from somebody in authority. I have no objection. I sit down and write them: "Your letter has been received and given careful consideration. The reason we didn't put this in is that in many cases the court would be granting leave to amend when nobody wanted it and it couldn't change the results, and under our other rules about amendments being freely granted, there can't be any doubt that as a matter of judicial discretion he would be bound to give it if it is needed."

MR. LEMANN: And whenever it was a complicated matter and your memory needed refreshing, I assume you would just pass

it to the staff and ask them to give you a memorandum that would enable you to answer the letter.

JUDGE CLARK: Of course, I get a lot of correspondence, too. Probably all members of the Committee do, but I get quite a large correspondence. I think perhaps some of them may even duplicate Mr. Mitchell's. I don't always know. I got a long letter the other day from the clerk of the court at Baltimore, and he wanted a requirement in the summons and in the rules that the answer must be filed in court because, he said, he didn't know when to enter default otherwise. He objected to the forms that Mr. Chandler sent him. I wrote to him and said that I considered that he was all wrong on the rule. I referred to the "hip pocket" rule, and so on, and said that we had settled that the best we could and that now it was up to him to conform. I mean that is the type of thing that I get.

Could I ask, Mr. Mitchell, about the time schedule? Are we to get copies to the Court by, say, May 15?

THE CHAIRMAN: I think so. I wrote the Chief Justice a while ago and told him that we were going as fast as we could, and I asked him if it would be all right if we got our work at this meeting, our proposed issue to the bar, in to the Court by May 15. I said that I appreciated the fact that they were going to adjourn shortly afterward, but I said the draft will be headed by a very careful statement that the Court hasn't had a thing to do with it and isn't responsible for it, that it is

just sent out for the bar. I said that I hoped that if we did that, maybe the Court would authorize him to look it over and, with that caveat on it, consent to its going out. He wrote back, and he was a little bit hanged in his reply because he hadn't consulted the judges and didn't want to say that somebody wouldn't rare up on the Court.

I think, as the thing stands, what we will do is to get the thing to the Court in typed or mimeographed form just as it is going out to the bar, with this foreword on it warning the bar that the Court is completely innocent, and get it into his hands, with one copy for each justice. We will file it with the Clerk. We won't send it to him.

JUDGE DONWORTH: By what date?

THE CHAIRMAN: Then give the Court from May 15 to May 28, when they are going to adjourn, to say whether they will permit us to print it and distribute it. If they say, no, that they want to take the summer to look it over before even the bar takes a squint at it, that is their baby. It isn't our business. I imagine that when they haven't any responsibility for it and that is so stated, the Justice will glance through the thing in an hour. He won't find anything very dreadful that he wouldn't even let us ask the bar about.

JUDGE CLARK: Of course, that isn't so very much time. I shall be in New York holding court next week. Is it your idea that you and Mr. Moore and I get together next week? We

will have to hustle, perhaps.

THE CHAIRMAN: You don't have to get together with me. You have instructions from the Committee, and you just go right ahead and make such little changes as we have ordered. Within a couple of days, I shall send in a few suggestions that I have about the notes. You go right ahead. You don't have to consult me at all about it.

JUDGE CLARK: I guess we had better send you a draft before it actually goes to the Court.

THE CHAIRMAN: I will draw up a foreword for you and send that to you. Are you going to have it mimeographed for the Court?

MR. HAMMOND: We always have.

THE CHAIRMAN: When you send it to Washington to be mimeographed, you send me a typewritten copy, but don't hold back on the mimeographing. Go right ahead with the mimeographing and send me a carbon of it, and I shall try to look it over. If I catch anything that looks as if I ought to interfere, I will act promptly on it.

MR. HAMMOND: I don't know how the mimeographing people are, but of course they are under Mr. Chandler. With all the notes and everything, I think they can do it.

THE CHAIRMAN: They will certainly have to type it if they mimeograph it. The Reporter won't make a dozen copies. Will you?

JUDGE CLARK: We can't make a dozen at once. The only thing we could do would be to get it retyped.

THE CHAIRMAN: We will send it down for mimeographing, and if you find you can't mimeograph it, then it is up to the government outfit down here somehow to get some more typed copies of it.

MR. HAMMOND: Send it piecemeal as you did before.

JUDGE CLARK: We can do that.

MR. HAMMOND: That will help a great deal on the situation down here. Complete a certain number of rules with the notes.

JUDGE CLARK: Do you want the notes following right after?

THE CHAIRMAN: Yes, they ought to be under each rule. That is the trouble with the piecemeal business.

MR. HAMMOND: I meant that when you have finished a certain number of rules with their notes, send them down here.

THE CHAIRMAN: Yes, but the point is, they may not get their suggestions about notes right away. They may keep the notes up with the rules they have changed, and they may not. I don't know.

MR. HAMMOND: Will it be necessary for the Court to have the notes?

THE CHAIRMAN: Oh, yes.

JUDGE CLARK: Did they have them before?

THE CHAIRMAN: Yes. If they get rambunctious about anything, we would like to smooth them down.

JUDGE CLARK: The Committee, then, as I understand, will have to get their suggestions in very quickly, really.

MR. LEMANN: Instanter.

THE CHAIRMAN: Yes. If you have any in your mind, get them in right away. In other words, I think the staff ought to be instructed to fire away without regard to anything that they haven't got in at the time they are ready to do the work. If I don't get my suggestion in when you are making up the note to Rule 10, pay no attention to me. Go right ahead, and I am out.

MR. TOLMAN: Are you speaking now of only the notes or of certain things that ought to go into the rules?

THE CHAIRMAN: We are through suggesting about what is in the rules. We have done that today.

MR. TOLMAN: Yes.

THE CHAIRMAN: The Reporter isn't going to wait for any more suggestions about the rules.

MR. TOLMAN: Yes.

THE CHAIRMAN: If you don't get your suggestions to them in two or three days, you are just out of luck, because they won't wait for you, can't wait for you.

Now let's go back to Rule 71A.

MR. HAMMOND: Before we do that, in Rule 80 there was

something that I didn't bring up, one of the last rules. It is on page 77, the sentence in lines 21 to 25, about the Government and the use of a reporter employed by it. Mr. Holtzoff suggested that that also ought to cover subdivision (a). I think that is right. It ought to be applicable to subdivision (a).

THE CHAIRMAN: Why isn't it?

MR. HAMMOND: Because it is under (b).

THE CHAIRMAN: It says: "In a hearing or trial of an action where the United States or an officer or an agency thereof is a party the stenographer employed by such party under contract pursuant to statute shall be the official court stenographer for that hearing or trial."

That isn't limited to (b) or (c) or anything else.

MR. HAMMOND: The whole section goes out as soon as an official reporter is appointed. You see, the whole section goes out by the last sentence.

THE CHAIRMAN: Oh. What does that new bill provide? Doesn't the official court reporter system supersede the contract system?

JUDGE CLARK: It does, yes.

MR. HAMMOND: It does, but, don't you see, (a) is a provision for an additional stenographer. I say, if there is an official stenographer and the Government is a party, it has to use the official stenographer.

THE CHAIRMAN: Are we talking about official or contract?

MR. HAMMOND: Here is the point: Under (a) we have now provided that the court can appoint somebody other than the official stenographer, you see.

THE CHAIRMAN: When necessary.

MR. HAMMOND: Yes.

THE CHAIRMAN: "in addition to any official stenographer acting under rule or statute, may appoint a stenographer for that purpose. When a stenographer is so appointed, his fees shall be fixed by the court". They wouldn't be fixed by the court if they are contract reporters, to start with.

MR. HAMMOND: They have had that trouble, you know. Some courts haven't fixed them, and they had a case up--

THE CHAIRMAN [Interposing]: You would have to change (a).

MR. HAMMOND: I say, take what is now in 21 and put it up there at the end of (a).

THE CHAIRMAN: I see what you mean. You mean to take the underlined clause in subdivision (b) of Rule 80, which appears in lines 21, 22, 23, 24, and one word in 25, and transpose--

MR. HAMMOND [Interposing]: I don't mean it should be transposed. I mean there should be a similar sentence in (a).

THE CHAIRMAN: You don't have to have it twice. The

only reason to put it in (a) is that it becomes inoperative if (b) goes out, but it is broad enough in its terms to apply to any section.

MR. HAMMOND: Yes.

THE CHAIRMAN: So, the only reason you have given me for transposing it is that line 25 says, "This subdivision (b) shall become inoperative in any district in which an official reporter has been appointed". If it thereby becomes inoperative, all of it becomes inoperative, and the clause in lines 21, 22, and 23, is inoperative. Therefore, you want to transpose it to (a) so that it doesn't become inoperative if subdivision (b) falls by the wayside.

MR. HAMMOND: Yes, but you also have to leave it in (b).

THE CHAIRMAN: Why?

MR. HAMMOND: Because there might be a case where there hasn't been an appointment under the court reporter statute.

MR. LEMANN: Why wouldn't you be protected by its presence in (a) in that situation? It is in the rule.

THE CHAIRMAN: I see what he means. You could force a contract reporter in in place of the official court reporter, couldn't you?

MR. HAMMOND: Yes.

THE CHAIRMAN: Which you don't want to do.

MR. HAMMOND: Yes.

THE CHAIRMAN: I don't clearly understand the situation. Maybe we had better present it to the Reporter and his staff.

JUDGE CLARK: I think I get the point. I think if you were going to cover it completely, maybe it should be in both sections, although I am not so sure but that if we put it in the first one, it would be adequate. What do you say, Bill?

PROFESSOR MOORE: I believe it would be.

JUDGE CLARK: We rather think that, if we put it in (a), it would cover us in any hearing.

THE CHAIRMAN: If it is put in (a), the trouble is that it is so broad in its terms that, wherever it is put, it supplants the official court reporter appointed under the new statute. Is that the intention?

MR. HAMMOND: No, no, that isn't the intention.

THE CHAIRMAN: Then it is wrong wherever it is put. What you mean is, If there isn't any official court reporter under the statute, or if it becomes necessary to appoint an extra one---

MR. HAMMOND: That is exactly it.

THE CHAIRMAN: ---then in actions in which the United States is a party the contract reporter shall be used.

MR. LEMANN: Maybe you can make a new subdivision (c) to cover it.

JUDGE DONWORTH: I should like to make an observation. We have a rule that has recently occasioned some difficulty, Rule 23(b), the minority stockholders' suit business. I would like to call the Committee's attention to a decision bearing on that, and perhaps you would like to make a note of it.

THE CHAIRMAN: It ought to be added to the note, if it is a recent one.

JUDGE DONWORTH: It is the case of Black v. Mahogany Association, 129 F.(2d) 227, where the court used this expression quoting from another case: "We think this must be deemed to be an indication from the Supreme Court that in so far as equitable remedies are concerned, federal courts are? to grant them in accordance with their own rules which have been developed out of the English chancery practice," and so on

THE CHAIRMAN: He is reading Erie Railroad out of of the equity practice, is he?

JUDGE DONWORTH: I guess so. I think that we don't have the case well enough in mind to make a point of it, but we may have to consider it later on. That is all.

[At this point there was further discussion of Rule 71A - Condemnation of Property for Public Use, and these proceedings are incorporated in a separate volume.]

THE CHAIRMAN: Have we any further business?

JUDGE DOBIE: I move that we adjourn.

JUDGE DONWORTH: What is your thought, Mr. Chairman,

about the autumn meeting?

THE CHAIRMAN: My thought was that we would have a meeting in the early part of October, and give the bar from June 1 to October 1--July, August, and September. That isn't very good, is it? I am glad you brought that up, because we will have to state in this prelude when we want their comments in. My idea is that we have got to give the bar ample time. We can't afford to rush them and not get their support. If we carry it beyond January 1 on the promulgation of the amendments, maybe we can fix it up to get the rules submitted to Congress after the beginning of a session. We will talk about that. We might get a resolution through authorizing the Court to submit it after the session is commenced.

If we go as late as November 1 to get our comments in from the bar, and if then it takes us another month to make our plans and final report, I myself would not join in making a report December 1, with the idea that they were to take a rough glance at the report and hand it to Congress on the first of January.

MR. LEMANN: When did we hand it to the Court before?

THE CHAIRMAN: The original rules?

JUDGE CLARK: December 27, wasn't it?

PROFESSOR CHERRY: That is when they were promulgated.

THE CHAIRMAN: When did we hand the draft to them?

JUDGE CLARK: Oh.

THE CHAIRMAN: What is the date of our final report?

JUDGE CLARK: We didn't give them very much time. I think it was November 6, wasn't it?

THE CHAIRMAN: That was two months.

JUDGE CLARK: December 20 is the date of the Chief Justice's letter to the Attorney General.

MR. HAMMOND: November 4 was the date of our final report to the Court.

THE CHAIRMAN: That gave them November and December. That was short enough.

MR. LEMANN: Of course, they haven't as much to look at.

THE CHAIRMAN: Some of the new justices have been objecting to being dummy directors, and we can't invite their opposition again by giving two or three weeks to pass on these rules.

MR. LEMANN: On the other hand, they have less to look at this time, a good deal less than they had in the original draft.

THE CHAIRMAN: A very much smaller job.

MR. LEMANN: If we could get it to them by November 1, I should think that would be all right, but can we?

THE CHAIRMAN: We couldn't unless we met early in October, and that is an awfully short time for the bar. After this thing is printed, they won't get it until their summer

vacations have commenced. It wouldn't go out, I suppose, in printed form until toward the middle or the end of June, would it?

MR. HAMMOND: I will be lucky if I can get it out by the middle of June, as I did last year.

JUDGE DONWORTH: I suggest Monday, the 22nd day of October. That is three weeks after the Court meets.

THE CHAIRMAN: That is, for our meeting?

JUDGE DONWORTH: Yes.

THE CHAIRMAN: That means we have to order all the comments in by the first of October, and it means that the bar has July, August, and September to study this thing, and we are going to have the same kind of howl that we had last time. We had to extend it.

JUDGE DONWORTH: I don't think we would need three weeks after the comments come in. I don't think we need to say that they must be in by the first of October. I thought that if they came in by the 15th and if we met on the 22nd, that would be enough time.

THE CHAIRMAN: You have to have the comments digested and in shape for consideration. I think a good many of the members would like to have a digest of them before they meet and get some ideas. I don't know.

MR. LEMANN: We save time by reading the comments before we come to the meeting.

THE CHAIRMAN: Yes. We get a lot of ideas and then make notes about them.

MR. LEMANN: This summer period is what worries me.

MR. HAMMOND: That is the objection a lot of people made last year. They were on vacation and didn't have a chance to work on them.

MR. LEMANN: How long would you have to give them? All through October?

THE CHAIRMAN: You will have to give them, really, October and November. Those are the only working months that are going to be left to the bench and the bar after they get this thing. July and August and the first half of September are no good.

MR. LEMANN: If you come to December, we couldn't get them to the Court until the end of December at the earliest.

THE CHAIRMAN: As far as January 1 is concerned, unless you want to cut the bar down to July, August, and September, to study these things--and you know in advance they are not going to do it--you will never get it promulgated by the judges by January 1.

MR. LEMANN: The last time they were sent to the bar in May, weren't they?

THE CHAIRMAN: They didn't actually get out until the 15th of June.

MR. LEMANN: I mean the original draft of the rules.

THE CHAIRMAN: You mean this second preliminary draft?

MR. LEMANN: Yes, the first one that went out. May 1937?

THE CHAIRMAN: You mean the original rules, not this.

MR. LEMANN: Yes. I am talking about our time schedule there. I think that might be some guide to us.

THE CHAIRMAN: When did the second preliminary draft go out to the bar?

JUDGE CLARK: Mr. Hammond, aren't the dates that you are giving really the dates that they went to press? They are not necessarily the dates that they went out. That date of November 4, for example. I think that would be the date they went to press.

MR. HAMMOND: I don't think it was in that particular case. I don't recall exactly, but I think we sent the Court mimeographed copies.

JUDGE CLARK: I guess we did, yes, but of this spring draft that would be true. The date you are going to give us will not be quite the date the lawyers got it.

MR. HAMMOND: This coming draft?

JUDGE CLARK: Yes.

MR. HAMMOND: No, that is true.

THE CHAIRMAN: What was the date on the second preliminary draft of the original rules?

MR. HAMMOND: The second preliminary draft of the

original rules was dated April 1937. I can't tell from that exactly when it went out.

THE CHAIRMAN: We issued it in April and asked for comments before September 15.

MR. HAMMOND: I think it went out shortly after the first of May, because then we weren't having trouble getting things through the Government Printing Office, and I was able to get things printed very quickly then.

JUDGE DONWORTH: Mr. Chairman, wouldn't it be all right in our report which we give to the Supreme Court on the 15th of May to suggest that there should be a joint resolution of Congress changing the time on amendments to the rules? January 1 is a very awkward time, in view of everything. Wouldn't the Supreme Court be willing to recommend to the Attorney General that there be an amendment to that Act so that amendments might be filed, say, March 1, or something of that kind?

THE CHAIRMAN: They might be willing to do that next fall when they find that they are not going to be able to put the thing in January 1, but they might not want to bother with it now. My idea is to make up our minds, regardless of that, how much time the bar really has to have in order to get the results we want, and then guide everything by that. If that carries us over the first of January, we will fire ahead and get our final report in whenever we can after due consideration

by the bar. Then it will be in the lap of the Court, and at that time we can make the suggestion, informally or otherwise, that after they have reached a conclusion about the rules, if they want to get them in operation before January 1, 1947, they had better ask Congress for some modification. That is the way it would work out, I think. I doubt that they would want to cross bridges before they came to them as far as legislation.

What do you think, Charlie? You haven't said anything about this.

JUDGE CLARK: On the last part, I certainly hope that sooner or later we will ask the Court to do just that. That is, I agree with Judge Donworth in all that he has said. This is about the most awkward set of dates you could ever imagine for lawyers' habits and for court business, and so on. I don't see why April 1 isn't a more natural time than January 1, the way Congress is.

Next, as to dates, I wonder if we are not going to have some protests for delay, anyway. I am inclined to think, if I were doing it myself, I would put it either September 1 or September 15, rather expecting that we then would extend it to October 15. In that way we would get in a lot to deal with, and we would always take the late ones anyway and consider them up to the very date of our meeting. I am afraid, lawyers being what they are, there is always a tendency to put off things

until the end, and I wonder if we couldn't push it along a little by putting it at a somewhat earlier date and then just frankly extending it later. I wonder if nowadays lawyers won't be able to do something in September. I am a little surprised at the idea that September is no longer a working month.

THE CHAIRMAN: The first week or two isn't a working month. Vacationists stay away until after Labor Day, and business will have piled up on their desks.

JUDGE DOBIE: They will be putting their children in school.

THE CHAIRMAN: I had a good deal of trouble about that this last year. I found that two things occurred. We had too early a date, and they were away on vacation, and then we found we weren't getting any results. In some cases we did get half-baked reports in. They hustled around and didn't have much time to give it much thought and went off half-cocked. I also found a great number of cases in my correspondence from bar committees, and so on, who said that they understood the date was September 15, and it was utterly impossible to do anything, so they agreed not to hold any meetings or do anything about it. They never heard that the time had been extended. We got a very patchwork result. I think that fixing an early date is going to discourage a lot of them from doing anything or, if they do it, it will be half-baked, and then they won't go back and do a thorough job. That is the way things worked

as I saw them the last time.

JUDGE DONWORTH: How about Thursday, November 15? That is a good compromise, isn't it?

THE CHAIRMAN: Judge, if we met on the 15th and then if we got our final report out, mimeographed, and in the hands of the Court December 1, do you think that we ought to expect the Court to O.K. the thing and hand it up to the Congress the first of January? Aren't we going to run into this dummy director argument up there? I know there is trouble in the Court over this system. Some of the judges don't like it. Some of them are indifferent about it. Some of them are positively against it--the new personnel. If we hand this thing in December 1, then the dummy director group will say, "What did we tell you? They are handing this stuff up to us December 1, and we are supposed to study them over and reach a considered judgment on them and get them into the hands of the Congress the first week of January."

MR. LEMANN: We couldn't even get them to the Court by December 1 if we met on the 15th of November. I don't think it would be possible.

THE CHAIRMAN: I doubt it, but I am just figuring if we met for three or four days then and went through the printing business. I myself think that maybe we had better figure on the Court's not making an attempt to get the thing filed on January 1, but later in the year, coupled with a request for

congressional action that allowed the thing to be done, that permitted and ratified it. Then we have plenty of time for the bar and plenty of time for ourselves. We don't need so much, but plenty of time for the bar and a lot of time for the Court to sit down for a month or two at their convenience.

There is another thing about it. A lot of these lawyers spent some time on our alternatives and made a lot of objections to rules on certain grounds. We have wiped out the alternatives and met the objections. Now they have to concentrate on something else again. That takes time.

We have all expressed our ideas about it. What is your pleasure?

PROFESSOR SUNDERLAND: I think, if we try to get the bar to put in their suggestions for next fall so as to get the thing before Congress by the first of January, we will just hurry everybody so much that nobody will be satisfied. The bar won't be satisfied, the Court won't be satisfied, and nobody will be satisfied. It seems to me that we are really up against it. We might just as well satisfy the bar. They are our first problem. Satisfy them and then put up our rules and give them to the Court when we can, as soon as we can, trusting that the Court, if it sees fit, may ask for permission from Congress to file it later. If they don't, it simply goes over until next January. I think it would spoil everything if we tried to rush it so much.

JUDGE CLARK: I wonder if, in reporting to the Court on May 15, we shouldn't outline this program. I think probably we shouldn't suggest now that they make a joint resolution, because that would be crossing the bridge when they don't need to, but wouldn't it be desirable to put them on notice, so to speak, that the Committee thinks that this is the correct course and, unless there is some suggestion to the contrary, these are the dates that will be set? Otherwise, if the Judges really studied the statute, they might wonder what we are doing.

THE CHAIRMAN: I think maybe that would be better put in an informal letter to the Chief Justice.

JUDGE CLARK: Yes, I should think it well might be.

THE CHAIRMAN: He can stick it in his pocket and if any argument arises among the members of the Court about what we are doing, if they think we are trying to rush them next fall, he can pull that letter out and calm their minds; but if you pass the word around to all of them, it will be setting a sort of program, and maybe we can't live up to it.

JUDGE CLARK: I think that is all right any way so that next fall they may not be able to say, "What does this mean?"

MR. TOLMAN: Mr. Chairman, would you like to make a statement which would be published in the American Bar Association Journal, covering these matters you are talking about now?

THE CHAIRMAN: I wouldn't issue any statement, but you could put something in. I think the only thing we really ought to say now is that the second preliminary draft has gone out to the bar, that comments and suggestions are invited, and that the comments and suggestions ought to be sent in to the Advisory Committee, Supreme Court Building, Washington, not later than the date we agree on, whatever it is. I wouldn't go any farther than that. That gives the bar all the information they need now.

MR. LEMANN: You couldn't put that in until the Supreme Court has authorized it. You couldn't get it in the Bar Association Journal now before perhaps the first of July. I don't know when the June issue goes to press.

THE CHAIRMAN: Of course, we wouldn't put anything like that in until the Supreme Court authorized us to distribute the draft, but that ought to be within ten days or two weeks. It will have to be, because they adjourn on the 28th.

MR. LEMANN: If they do it by the 28th of May, I guess he can't get it in the Bar Association Journal before July, can he?

THE CHAIRMAN: That is early enough. That will be as early as the bar will get the copies.

MR. TOLMAN: There is one other thing I wanted to ask you. Suppose the subcommittee was able to get specific suggestions from Mr. Williams of the Lands Division, if it seems

to be worth while, can we submit it to the Committee?

THE CHAIRMAN: Of course. Anything you want. I can't vouch for the fact that the members will be able to study them, but that is up to them. I shall be glad to receive anything of that kind that you want to send me and, if I have any ideas, I shall be glad to respond.

MR. LEMANN: If the subcommittee get suggestions from the Department of Justice, they ought to try to see if they can get agreement between the Department of Justice and these title people before they go any further with the Committee.

THE CHAIRMAN: That is the feeling we had before, that until the Department and the people interested got together, we weren't interested.

MR. LEMANN: The question is, what is the time limit which we shall fix for the sending in of comments by the members of the bar, and the discussion indicates that it cannot safely be before November 1, and I am not sure but that you think it ought to be later than November 1. What is your suggestion, Mr. Chairman?

THE CHAIRMAN: What is the date we fixed here?

JUDGE CLARK: September 1.

MR. HAMMOND: To what date did we extend it, Mr. Chairman?

THE CHAIRMAN: December 1.

JUDGE DONWORTH: November comes in on a Thursday.

MR. LEMANN: What time would you suggest, Mr. Chairman?

THE CHAIRMAN: I have a feeling which may be a defeatist feeling, but it is a feeling that you are not going to get the Court able to promulgate the rules January 1. Once you admit that, if you want to admit it, I don't see any reason to make it November 1. I would just as soon make it January 1, hold our meeting in January, and give the bar the fall and early winter months to go through it, with no excuse at all. Give them plenty of time. Why do we want to meet in December instead of January if in either case we can't get the rules in force January 1? I don't think you will.

PROFESSOR SUNDERLAND: It would make a better impression on the Court if we didn't give those things to them at a time so that it looked as if we were trying to railroad the thing through in a very short time.

THE CHAIRMAN: That is what I was thinking about. If I were doing it, I would make it January 1 for the bar's comments to come in and give them the whole year.

MR. LEMANN: That would mean February or March to get it back to the Court, I fear.

JUDGE CLARK: Why don't we compromise on December 1? December is a month that they are not likely to do very much.

THE CHAIRMAN: I think that is the date we fixed the last time, after renewal of it. I agree to that. I think that

is a reasonable suggestion.

MR. LEMANN: Then, leave the date of the Committee meeting to be fixed after you see how many comments come in and how much work you have to do to get it shaped up. If there aren't a lot of them, maybe we could meet in the early part of December. Otherwise, it would have to go over until January.

THE CHAIRMAN: All right. Suppose we put in our foreword, then, that we ask for comments by December 1. I don't think we will have any squeal about that being too early. Is there any further business? If not, the meeting is adjourned.

[The meeting adjourned at 4:00 p.m.]
