MASTER REPORTING SERVICE

TRANSCRIPT OF PROCEEDINGS
AT WASHINGTON
MAY 17-20, 1943
ON DRAFT I

VOLUME IV

P R O C E E D I N G S

ADVISORY COMMITTEE ON RULES

FOR CIVIL PROCEDURE

VOLUME IV

May 20, 1943
Supreme Court of the United States Building
Washington, D. C.

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

NEW YORK
51 MADISON AVENUE
AShland 4-1827

WASHINGTON
NATIONAL PRESS BUILDING
National 8558

CLEVELAND
STANDARD BUILDING
Main 0894

CHICAGO
540 NORTH MICHIGAN AVENUE
Superior 3255

TABLE OF CONTENTS

TABLE OF CONTENTS

JD
1
fl

THURSDAY MORNING SESSION

May 20, 1943

The meeting reconvened at 9:40 a. m., Chairman Mitchell presiding.

THE CHAIRMAN: Gentlemen, the Reporter has brought back a suggestion to add at the end of Rule 54(b). That was that matter of separate judgments, and the proposal is, "A determination of or order concerning" --

DEAN MORGAN: Better let him read it.

THE CHAIRMAN: I think I will. I am not sure whether it is part of the same sentence or a separate one.

JUDGE CLARK: This is a suggestion to add at the end of 54(b), leaving the present 54(b) just as it is. It will be this sentence: "A determination of or order concerning some but not all of the issues material to a particular claim, and all counterclaims arising out of the transaction or occurrence which is the subject matter of the claim, is provisional and subject to revision by the court until all of such issues are adjudicated."

MR. LEMANN: Would you read that again?

... Judge Clark reread the sentence ...

MR. LEMANN: How about the word "or" in line 3 as an added emphasis after "determination of," in addition to this suggestion?

JUDGE CLARK: What was it?

MR. LEMANN: In addition to your suggestion, insert in line 3 of the section as it now stands, the paragraph as it now stands, the word "or".

JUDGE CLARK: Yes, I think that would be good.

MR. LEMANN: After "determination of". That would then contrast with your word "some" in your addition.

JUDGE CLARK: Yes, I think that would be a good idea, too.

SENATOR PEPPER: And, Mr. Reporter, oughtn't there to be an "of" after the "and" at the beginning--the order concerning or the determination of something, and of counterclaims?

JUDGE CLARK: "A determination of or order concerning some but not all of the issues material to a particular claim or counterclaim."

SENATOR PEPPER: "And of"? You don't mean a determination of.

JUDGE CLARK: No, it is of the issues material to a particular claim and material to a counterclaim.

SENATOR PEPPER: Then it ought to be "to" instead of "of," oughtn't it?

MR. DODGE: You have a judgment entered and it is provided that the basis of the judgment is provisional or conditional. How does that affect the judgment as a judgment?

THE CHAIRMAN: That is the question that struck me.

You say "order or determination," and there is a little ambiguity whether that carried through until he actually enters the judgment or order amplifying the judgment.

JUDGE CLARK: Order amplifying the judgment?

THE CHAIRMAN: But you use the word, you contrast the word "judgment" in the section. I had the same reaction that Mr. Dodge had. Why don't you call it "order or judgment" and be done with it?

JUDGE CLARK: I think that is all right.

THE CHAIRMAN: Not to confuse the bar. We know that orders are judgments under another definition.

JUDGE CLARK: Going back to that little suggestion you have, Senator Pepper, for "to."

THE CHAIRMAN: For what?

JUDGE CLARK: Senator Pepper suggested "to" in front of "or counterclaims." I am following the language already in sentence 1 and stating the converse.

SENATOR PEPPER: I see.

JUDGE CLARK: If you put in the "to" one place, you should in another.

THE CHAIRMAN: You can polish it up a little bit in wording when you come back. If it makes it clear, I think we are ready to vote on it.

JUDGE DOBIE: I move its adoption.

THE CHAIRMAN: All in favor say "aye." It is agreed

to.

Anything else under 54?

JUDGE CLARK: I think there is really nothing that needs consideration. As a matter of fact, we refer to two questions raised as to the cost provision, which is subdivision (d) on page 152. There has been a little criticism, but we think the rule does what it was intended to. The first criticism is that the rule permits the judge to deny cost to the prevailing party in his discretion.

DEAN MORGAN: It ought to.

JUDGE CLARK: Yes, I think so.

THE CHAIRMAN: That is the old equity practice, isn't it?

JUDGE CLARK: We are really carrying the equity practice over to law. That raises a doubt in some lawyers' minds, but that is what we wanted to do. So I think there is nothing more there.

THE CHAIRMAN: Now we will pass on to 55. What have you there?

JUDGE CLARK: I don't think there is anything in the first section except what we considered before in the first comment under (a), which is a question as to the two steps we have. The procedure now specified in subdivisions (a) and (b) provides means whereby defaults can be settled without recourse to the court itself. One of the deputy clerks has raised a

little question about it, but I don't think there is any real question there, myself.

JUDGE DOBIE: I think we can pass that.

JUDGE CLARK: Now as to (b), Section (b) in the comment there, the Department of Justice has proposed a new rule providing for summary eviction in actions by the United States to recover real property. The adoption of such a rule would necessarily entail an addition to Rule 55 with regard to defaults.

MR. HAMMOND: I think the solution to that is that the summary judgment rule really covers it, and I found in England you can get a summary eviction there. I don't think we will have to bother about this at all.

DEAN MORGAN: I think you are right, because we say any kind of an action.

MR. HAMMOND: Yes. I think they will be particularly satisfied if you provide for summary judgment at any time, you see. It seems to be likely that it will.

SENATOR PEPPER: That has the advantage of treating everybody alike. It doesn't give a special landlord's remedy to the United States and deny it to a citizen.

MR. HAMMOND: Sure.

THE CHAIRMAN: All right. What have we next?

JUDGE CLARK: We simply call attention at the end that certain provisions of the Soldiers' and Sailors' Relief

Act have a direct effect on the operation of this default rule. I suppose that that is an overriding thing and we don't need to call attention to it; that lawyers ought to know about it.

THE CHAIRMAN: Put a note in the new amendment calling attention to the fact that that modifies the rule but we didn't see occasion to do anything to the Rules.

JUDGE CLARK: Yes, I think that would be a good idea.

THE CHAIRMAN: I should think every lawyer would know it, anyway, but some don't.

JUDGE CLARK: That is all on that. We come to summary judgment.

MR. DODGE: I have a point I am obliged to raise. I have a deputy clerk here who wants more work to do, instead of less. One of the deputy clerks says that it would be desirable to have a provision that the clerk shall send notice of the default to the party defaulted if his address appears or can be ascertained; that we have had instances where the party knew nothing of the case or of the default until he received a copy of the judgment. One of the judges wrote to me that the power of the court to set aside a default for cause shown does not always meet the situation because, as he wrote me, the rule should provide the notice of default to be sent to defendant if the defendant who has not appeared can be located, because it is a waste of time for the court to

7

conduct a hearing for the purpose of taking an account or assessing damages on a motion for damages, and either be confronted with a motion to vacate the judgment under Rule 60, which must be passed upon favorably to the defendant if the judgment was entered through mistake or excusable neglect. The notice of default, with its subsequent removal, would prevent a waste of time and effort in many cases.

I saw no reason why we shouldn't provide for notice of the default if the address is available to the clerk. It would undoubtedly save trouble in some cases, and the failure to enter an appearance, of course, may have been due to some reasonable mistake or from the fact that service was made unusual and the defendant didn't know about it.

THE CHAIRMAN: The second notice of the default is the premium, so to speak. I feel that our experience with notices by the clerk hasn't been so good. We stuck this in here to put a lawyer wise to the fact that the judgment had been entered and that he had better look out for it as an errant clerk neglected to send it. At any time in the future the judgment might be set aside because the clerk's records didn't show that he mailed the notice, or something like that, or he got the address wrong. He had the address right on his books but wrong on his card, and you never know whether you have a judgment or not.

When you have a service of a summons, for instance, and a man doesn't appear, it strikes me as sort of taking some

risk. I think you would have a howl from all the clerks all over the country if you are going to do anything to require the party to serve a notice of default and file proof of service. If you don't file proof of service it leaves the judgment in the air, more or less. Don't you think the rest of the clerks would howl about it?

MR. DODGE: I shouldn't think so. I think there is an obvious possibility there of a waste of a substantial amount of time in going through an assessment of damages.

THE CHAIRMAN: If you serve a summons on a fellow and he doesn't appear, then the universal practice has been that the plaintiff files an affidavit of default and goes ahead. Now you want to serve another summons, which amounts to the same thing, before you can default him.

MR. DODGE: There are obvious cases where he has a legitimate ground for asking to have the judgment set aside.

THE CHAIRMAN: Why doesn't our section about relief and setting aside relief from judgment or order, cover it?

MR. DODGE: That comes up, as the Judge says, after considerable time has been spent on assessing damages and taking account.

THE CHAIRMAN: What is your pleasure with it?

JUDGE DOBIE: Suppose the notice isn't sent? I am a little like the Chairman. Does that in any way have an effect on the judgment or allow them to question it later?

THE CHAIRMAN: That is it.

MR. DODGE: What is that?

JUDGE DOBIE: Suppose the clerk does not put such a thing as you suggest in and the clerk fails to send the notice; would that be any ground for setting the judgment aside later? That is what I am afraid of later, that long after, some fellow is going to come in and dig into this mess and say, "The clerk didn't send the notice," and try to open the whole darned thing up again.

SENATOR PEPPER: If the thing were otherwise developed, it would be easy enough to take care of that point by providing, "but failure to receive the notice shall not constitute a ground for reopening the default," or something of that sort. It seems to me the real question is whether this is one of those things that tend to popularize the Rules without marring their integrity, or whether it has the reverse effect. I should have supposed that anything that disturbs the leisure of the clerks of the District Courts would be unwelcome.

THE CHAIRMAN: I would suggest that if you are going to do the safe thing, you would say that with failure to send it, failure to receive it, you had a defective judgment, and there are some courts--certainly not all of them--that feel they are wasting some of their effort by not giving the fellow a second caution. It is a very simple thing for the local

10

rule simply to direct the clerk in that district to mail such a notice before he enters the default, as a precaution, and that would save us from foisting this thing on a great many districts where they don't want it, where the clerks would howl about it and where that sort of thing has never been done.

JUDGE DOBIE: Would it not be very easy by local rule?

THE CHAIRMAN: That is my idea. If the court wants to save his court from waste of time, he doesn't need to make a rule; he can just make an order directing the clerk in each case of default to mail a notice.

JUDGE DOBIE: I believe that is the best way to handle it.

THE CHAIRMAN: You don't even need a rule on it.

MR. DODGE: They can make a local rule if they want it, but it is beneficial in the case where a fellow who has a ground for setting aside the default did not know of it for some reason.

THE CHAIRMAN: That is a practice that wouldn't be acceptable generally, and I think a local rule or even an order of the local judge to his own clerk, takes care of it.

MR. DODGE: I think that is a very good answer to it.

THE CHAIRMAN: You can satisfy him that way.

Is there anything more on Rule 55?

JUDGE CLARK: Nothing.

THE CHAIRMAN: We are up to 56, Summary Judgment.

JUDGE CLARK: 56, Summary Judgment. I think since we discussed a great deal of this in connection with Rule 12, there only remain two matters more for consideration. One of them is the suggestion I have made that seems to me rather unduly restrictive on the remedy and on the plaintiff's rights, to say that the plaintiff must await the defendant's pleasure in filing an answer before he moves. It seems to me that that is rather unnecessary. That, I suppose, may be considered a change of substance.

The other thing to consider is a thing where the wording of the rule has caused difficulty, particularly as to the use of the term "partial summary judgment."

THE CHAIRMAN: Let's take the first one up now.

JUDGE CLARK: Very well.

THE CHAIRMAN: That is in 56(a). The present rule says that the plaintiff can't get a summary judgment until the answer has been served. You remember my experience with the 60-day time to answer, our well-known case that I have been howling about.

JUDGE DOBIE: Is the suggestion that we just eliminate, "at any time after the pleading in answer thereto has been served"?

THE CHAIRMAN: I had thought about that a good deal, and I am opposed to going that far because the purpose of

allowing twenty days to answer--whatever it is--is to enable the defendant to hire a lawyer and get squared away and be able to defend himself. If you are going to allow him twenty days to do that and then we are going to say that at the moment complaint is filed, he can be hailed into court on a ten-day motion for summary judgment, it doesn't seem to me to be consistent. He has just as much need and even more need for getting a lawyer and getting squared away and raking up the facts and the witnesses and the affidavits on a summary judgment as he has the other. I think the main difficulty is that this time for answer gets extended a lot by various motions--motion to strike or to require a definite statement. It extends the time for answering. My thought was that you might, instead of waiting for the actual answer, make the rule that the plaintiff could apply for summary judgment within the time originally fixed for answer--something like that. Fix a date: a 10 or 20-day period, or something.

SENATOR PEPPER: I was just going to inquire whether you were right in assuming that it was only the plaintiff who could make this motion. Is it not either party, and might it not be possible for a defendant to ask for a summary judgment? It was indicated that that was the case when we were debating Rule 12.

JUDGE DOBIE: There is no limitation.

THE CHAIRMAN: This limitation is only on the

13

plaintiff.

SENATOR PEPPER: I was just wondering whether either we ought to say, "A plaintiff seeking to recover . . ." No, because then he might not be the plaintiff in the counter-claim, might he? I guess it is better to keep it "party."

THE CHAIRMAN: This is the fellow seeking to recover--

SENATOR PEPPER: Yes.

THE CHAIRMAN: -- under (a), and I think the Reporter is clearly right that we ought to do something to it, but it is a question of how to do it and I think it is rather drastic to say that you can have twenty days to answer but you don't have that much time to come in and resist the application for judgment.

MR. LEMANN: He has the word "appear" in this; he says he may do it "after the adverse party may appear," in this draft. That is the way he has it.

JUDGE CLARK: I thought that wasn't the way you wanted it. I did have a suggestion that "any time after he has appeared."

MR. LEMANN: Isn't that the way you are proposing it, page 156?

JUDGE CLARK: That is the way I proposed it.

MR. LEMANN: That would meet Mr. Mitchell's point.

THE CHAIRMAN: That meets my point entirely.

MR. LEMANN: I have just been thinking about it.

That would mean that if he did not come in, if he took his twenty days to answer, you couldn't rush him sooner. If he came in with a motion, he can now only make one motion, and he could take twenty days to make that motion. Then you could proceed by a motion for summary judgment; but by using the word "appear," you would guarantee him, in effect, at his option, a 20-day delay, which for the reasons the Chairman has stated I am inclined to think he ought to have, assuming that twenty days are reasonable to begin with. It might have been argued but it is settled. Wouldn't the use of the word "appear" now as the Reporter suggests give the defendant ample time to get organized?

JUDGE CLARK: I should think this did it. It seems to me--well, I agree that you shouldn't rush him beyond the time he would normally have, but I think you can properly rush him beyond the time that he gets by favor, or what not. It seems to me that this probably covers it.

There is another thing, too. Suppose the defendant starts making motions. The way we are now making Rule 12\b), trying to get them all consolidated, it would be a rather nice thing if, while the defendant starts making motions, the plaintiff can start his, too, and have them come up together. I think that is really an additional reason for making it along this line.

I might say, in my suggestion here I went into

some simplification that may not be necessary. What I have done at the foot of page 156 is to combine the two, (a) and (b), together. I thought that was a little simpler if we were going to treat them much the same, to put them in one. Of course, that still isn't necessary.

THE CHAIRMAN: It shifts your designation of all the other subdivisions in the rule.

JUDGE CLARK: No. It didn't, as it turned out, because I found something to put in (b). It didn't, at least, as I do it there. I just call that to your attention so you will understand the reading of my rule. We can, of course, follow the same form of separate provision for the plaintiff and a separate provision for the defendant and make this change.

THE CHAIRMAN: Well, the proposal, as I understand it--what is the exact wording that you put in 56(a)?--is that instead of saying, "at any time after the pleading in answer thereto has been served," you would say, "at any time after" --

JUDGE CLARK (Interposing): -- "after an adverse party has appeared in the action."

MR. LEMANN: At the bottom of page 156, is that it?

THE CHAIRMAN: You wouldn't say "an adverse party," would you? You would say "the adverse party," because some one defendant might appear and you would be getting summary judgment against another who hadn't appeared.

MR. HAMMOND: What do you mean by (a) here? We don't provide for answer of appearance. I thought we were trying to cut out all references to appearance.

JUDGE CLARK: I don't think that is quite right. We don't require you to enter a formal appearance, but first you can do it, and the rule against default provides that. That stops the default. Second, you do do it if you file an answer. I think it is purely a technical phrase under our Rules.

PROFESSOR SUNDERLAND: You do do it if you file a motion.

JUDGE CLARK: Yes, that is correct. The only difference is that you don't have to sit down and right out an entry of appearance. You can do it if you want to. If you do do it, you have prevented a default. Instead of making that formality, you can just file an answer or file a motion.

MR. DODGE: I don't quite see that there is any sufficient reason for changing the existing rule. What great good is accomplished by allowing a motion for summary judgment to be filed a few days before it could be under the present rule? The delays are not there. The delays are caused in getting to a hearing before the court, and in a busy district, getting a decision from the court. I think this really is a very trivial matter.

JUDGE DOBIE: It won't come up very often, will it? Normally you won't have any move for summary judgment until

the other side has filed some kind of response pleading, will you?

JUDGE CLARK: It can come up. We have had it up, and in a particular case where it came up with us, it was just a necessity of having the case sent back for a trial and everybody knew how it was going to come out. It was a case where the defendant had held off filing his answer, and it was a clear case for summary judgment.

THE CHAIRMAN: As it stands today, the defendant, instead of filing an answer, comes in with a motion to make more definite and certain with a motion to do any one of those seven things under Rule 12(b), and the court taking it under advisement can hold the thing up for a month or two, and in the meanwhile it is a perfectly clear case for summary judgment if the plaintiff could only get at it. The purpose of this amendment is, where there is no real defense, it is all sham, to tie the whole thing up until the defendant has exhausted all the numerous means there are in the rules for avoiding the service.

DEAN MORGAN: Mr. Dodge's point is that the delay is in the hearing where you hold the whole thing up until the hearing, and if you could serve this motion for summary judgment it would all come on at the same time with the other motion so that if there is a long delay on account of the busy courts, there is all the more reason for allowing it.

MR. LEMANN: I like the general idea, but as a practical matter I can't think that it is going to be of much effect. In the case the Chairman suggested, where the judge has taken this under advisement on a motion to strike the service, quash the service, objection to the venue, he has held it up, I can hardly think that the ordinary judge would do that unless there was some serious question there. If there is, you couldn't eliminate the question by filing a motion for summary judgment.

DEAN MORGAN: You might very well.

MR. LEMANN: I am trying to think of cases in my own observation where there have been dilatory motions, whether I could have accomplished anything by a motion for summary judgment. It is rather hard for me to think that I could have. In other words, they were cases where there was no real controversy on the facts. If there was a real controversy, the trouble was the defendant was trying to put off the hearing of the controversy. It wouldn't have helped any to be able to make a motion for summary judgment.

I have some sympathy with Mr. Dodge's idea that maybe this is a case where we can say there has been no demand for improvement, and that improvement wouldn't be very far-reaching. Theoretically, it is O.K. It is just a question of whether it really accomplishes anything.

THE CHAIRMAN: I think it is practical and you can

accept my apologies for referring to my old Black Tom case again. I can tell you this. We wanted to file a motion for summary judgment against the Secretary of the Treasury and compel him to pay. The Government entered an appearance and made a motion to dismiss the original plaintiff's complaint on the ground that the court couldn't maintain an action to compel the Treasury to do anything. If we had had this rule amended, we wouldn't have had to wait sixty days for the Government to answer. We could have brought right in our motion for summary judgment against the Secretary of the Treasury at the same time that we heard our motion for summary judgment against the plaintiff.

There is a striking example. Here was the Government right in court and we had a plain ground under the decisions for a writ of mandamus against the Secretary and our hands were tied and we went into court and argued all the things we had there, including a motion for summary judgment against the original plaintiff, but we couldn't present our motion for affirmative relief against the Secretary by a summary judgment. There is a very practical example of just what occurred.

MR. LEMANN: What did the Secretary do after the sixty days had elapsed? Did he answer?

THE CHAIRMAN: Yes, but it was too late for our motion for summary judgment.

MR. LEMANN: What did he do, lay the issue in his

hands?

THE CHAIRMAN: Oh, yes, he didn't raise an issue against us. He had to defend against us. He thought we were right, but it was this untouchable business. "Oh, you mustn't mandamus the Secretary of the Treasury." He is sort of above and beyond the control of the court in things like that. It wasn't because our claim wasn't good and the Government didn't think we were right. In fact, they admitted we were, but they said, "Oh, we won't tolerate any mandamus against the Secretary. You are entitled to the money, we will pay you some day, but you mustn't mandamus."

That is the whole business. The point is that it does arise. There is a striking example of it. It wasn't a trivial thing, either.

JUDGE CLARK: It seems to me that this case where I call attention to it in my opinion was also a striking case. That was U. S. v. Adler Creamery. That was a case involving milk regulation in New York, and the defendant had made some minor motion and the plaintiff asked for a summary judgment, and the trial court granted it, and then it got to our court and there was no answer. The question had already been decided in the Hood case in the Supreme Court. It didn't seem possible to get away from the Hood case, but we had to go ahead in that case and reverse under this rule, and as I pointed out in my opinion, I said it probably would mean just

21

a six months' delay, and that happened almost to the day. The case was back in our court on a formal answer and then summary judgment, but essentially exactly the same record except for that formality just about six months to the day by way of delay. After my opinion, I had a great many comments of one kind or another, and not one of them but that thought it was a good idea to do away with this restriction.

MR. DODGE: Mr. Chairman, in your case you intervened as a defendant and also asserted a cross-claim against the other defendant.

THE CHAIRMAN: Against the Secretary.

MR. DODGE: You could have moved right off for summary judgment on the main case, couldn't you?

THE CHAIRMAN: We did. But don't you see, when we got a summary judgment against the plaintiff for dismissal and the plaintiff promptly took an appeal, he didn't have to give any supersedeas bond in that kind of case because we weren't getting any judgment for money against him. He carried the case through the Court of Appeals and the Supreme Court of the United States. If we had been allowed to have a summary judgment against the Secretary for affirmative payment, that judgment would have been entered, and then if these other award holders had wanted to take that case to the Supreme Court, they would have had to give us a bond for several hundred thousand dollars as a supersedeas to stay our

right to the money. But we didn't have any such judgment. They appealed without a supersedeas, and it took a whole year in the Court of Appeals and the Supreme Court, and our interest on the money we would have had, the value of the use of it, ran up close to $700,000, and it cost us a year's interest on something over $25,000,000 because we couldn't and didn't get a summary judgment right then against the Secretary.

MR. LEMANN: Couldn't the Secretary have appealed?

THE CHAIRMAN: He could, and without bond, but you see, he admitted we were right and the only reason he wasn't paying was because there was a controversy. If we had got a judgment against the Secretary, that would have fully protected him, wouldn't it, in paying?

MR. LEMANN: I am wondering if he wouldn't have appealed in the circumstances if you had gotten summary judgment against him.

THE CHAIRMAN: I am just saying he could, but he conceded we were right, and the only reason he was resisting anything was because he had a fund that two people were claiming. If one of them got affirmative judgment for payment against him and the other didn't supersede the other claimant, the Treasury could promptly have paid the money with perfect safety because it was a final judgment. That is what we wanted. We wanted to get that judgment against the

Secretary so as to protect him fully in the payment to us or compel the plaintiff to supersede it by a supersedeas bond. So there is something more to it than the mere juggling, you know. It really cost us, I figured out, between seven and eight hundred thousand dollars in the ordinary value of the use of that sum of money for the time, and it was a strike suit. That is a pretty strong statement to make about the case. It didn't have a leg to stand on and we swept them out of court both in the Court of Appeals and the Supreme Court of the United States.

SENATOR PEPPER: Mr. Chairman, may I inquire whether there is anything in this thought: If you put no limitation in (a) respecting the time when this motion was made, whether you would really be causing injustice in view of (c), which provides that the motion should be served at least ten days before the time specified for the hearing. If the plaintiff makes the motion, the defendant has been served and upon receipt of notice of the motion, the defendant has ten days in which to hire his lawyer and appear, and if it is the holder of a counterclaim who makes the motion, the plaintiff is already in court and he has his lawyer thirsting to go to bat.

THE CHAIRMAN: I would be satisfied with what amounts to a ten-day notice.

SENATOR PEPPER: That is really what it is. I don't see why we need this business, "at any time after the pleading

in answer thereto has been served."

JUDGE CLARK: Put in the provision, "at any time after defendant has appeared." What it means is that he gets thirty days anyway. He has twenty days in which to appear. He then gets an additional ten days. We know lawyers don't act with that precision, so it is really thirty days plus really --

THE CHAIRMAN (Interposing): I think the Senator is right about that. I think that is a reasonable time to get hold of a lawyer and do something about it.

JUDGE DOBIE: I think you can trust the courts to protect him. I would strike out the line, "after the pleading in answer thereto has been served." I move the Senator's motion.

JUDGE CLARK: All right. That is a little stronger than I put it.

SENATOR PEPPER: Yes, it is.

JUDGE CLARK: All right, I don't care.

MR. LEMANN: What is the motion?

SENATOR PEPPER: The motion was, Mr. Lemann, to allow the provision in (c) to assure the person against whom the motion is made at least ten days before the hearing in which to provide himself with counsel and prepare, which is enough in a summary judgment motion, and to strike out, therefore, in (a) any limitation upon the time within which

the motion for summary judgment may be made.

THE CHAIRMAN: It makes it ten days instead of thirty.--

SENATOR PEPPER: That is right.

THE CHAIRMAN: -- which is all right.

SENATOR PEPPER: I think it is all right.

THE CHAIRMAN: Thirty is too long.

SENATOR PEPPER: It speeds the thing up. It is perfectly fair to the person against whom the motion is made, and it meets the different criticisms that have been made here.

JUDGE DOBIE: I second that motion, then. That is what you want, isn't it, Senator, just strike out that line?

SENATOR PEPPER: I think so.

JUDGE DOBIE: Strike out the line, "after the pleading in answer thereto has been served," and then it reads, "may, at any time move with or without supporting affidavits."

SENATOR PEPPER: That will be very acceptable to the Government in these eviction cases.

MR. HAMMOND: Yes.

MR. LEMANN: It is agreeable to me because I was brought up in a practice that permits you to plead in ten days. I thought the twenty days was too long originally. I think the unanimous weight of other opinion was that the bar of the country was accustomed to twenty days. I am wondering whether

this isn't a pretty drastic reduction of time.

JUDGE DOBIE: I second the Senator's motion.

MR. LEMANN: Of course, it will be pointed out it applies only to sham cases, but there is a difference of opinion at times as to what is a sham case, you know. The plaintiff will say many cases are beyond controversy.

JUDGE DOBIE: If ten days isn't enough, a good judge will give him more.

THE CHAIRMAN: Ten days is enough to get a lawyer and let the lawyer go into court and say, "Your Honor, we can't be ready on this motion for another week."

JUDGE DOBIE: That is the minimum limitation.

MR. LEMANN: Probably you will be getting the courts to sign extensions in most districts in almost every case. I am just thinking aloud.

DEAN MORGAN: They do the same thing anyhow whenever they get a motion for summary judgment.

PROFESSOR SUNDERLAND: The extra twenty days doesn't make any difference.

MR. LEMANN: I have had one case of summary judgment--two, I think--and no extension was given there.

DEAN MORGAN: The judge gets started quicker, that is all.

THE CHAIRMAN: You see, if you made it twenty days you could make the motion--the plaintiff could make it any

time after appearance. Suppose he has a perfectly good case and no real defense at all; under that rule the fellow has twenty days in which to appear, and then only are you allowed to serve your motion, and that gives him ten days' more notice. So that in a perfectly sham case, you couldn't bring a motion on for summary judgment within thirty days.

SENATOR PEPPER: Then when you tack onto the thirty days the time which a District Judge usually will take before fixing the motion for hearing, the hearing on the motion, I mean, you have pretty nearly another month on there, usually. They will say, "We will take this up on the regular motion list. The motion list will be called the first Monday next month."

I honestly don't think that if we strike out this limitation that we are going to injure the rights of any person who has a meritorious case.

JUDGE DOBIE: I am satisfied.

JUDGE DONWORTH: This motion, the pending motion for amendment, makes it possible for the plaintiff to serve a motion for summary judgment with his summons.

DEAN MORGAN: That is right.

SENATOR PEPPER: That is right.

MR. LEMANN: I think in every case you will have an attempt by the plaintiff to get a judgment in ten days. I am used to that. I have no objection. I favored that to begin

with as a period for summons. I think the practical effect is that what you are going to be doing in two-thirds of the cases is that the lawyers will be running to the judges, I imagine in most districts, especially where the defendant is a foreign corporation, and saying, "We can't possibly answer and we need ten more days." It might be an accelerating influence. It is quite a change in the Federal setup, I should think, to which most lawyers are accustomed.

SENATOR PEPPER: I will give a handsome dinner to any plaintiff who gets a summary judgment inside of sixty days from the time he moves, no matter what you put in your Rules. (Laughter)

MR. LEMANN: You are probably right. I don't think it will help much except in default cases where you might be able to get a judgment sooner than you could get it by default.

JUDGE DONWORTH: How long is that invitation good for, Senator?

SENATOR PEPPER: Any time provided in these Rules.

JUDGE CLARK: Subject to enlargement if request is made before the time expires.

JUDGE DOBIE: Question!

THE CHAIRMAN: The question is on the amendment which is Rule 56(a), strike out the phrase, "after the pleading in answer thereto has been served." All in favor say "aye." It is agreed to.

What is your other point, now?

JUDGE CLARK: The other point is on the interpretation in the rule, partial summary judgment or summary judgment for a part thereof.

THE CHAIRMAN: What subdivision are you referring to?

JUDGE CLARK: The main part is (d) of 56. I would add that if any changes were made, there might have to be some changes of wording in other places, but the matter comes up particularly with reference to (d). If you have in mind what is provided for by (d), you will see that a partial summary judgment there in effect is or may be what is substantially a pre-trial order, and the question is, that such an order when entered should be considered as a final judgment. I think we would agree that it should not be in that case.

Now, reading down in that first sentence, "the court at the hearing . . . . shall ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted," and so on, and shall make an order specifying those. The matter came up in a case in the Seventh Circuit as to whether such an order was really a judgment or not, and they held, following Moore, I believe--at least, Dr. Moore's book is the same way--that it was not. That is the Leonard case on page 156.

We had the same question before our court, and we held the same way and wrote no opinion, just dismissed an

appeal. At the time when we discussed it, we decided to follow the authorities here, but Judge Swan said that he thought the use of the word "judgment" here was rather misleading. That is the problem.

Now, our main suggestion is found on page 157, and if you look at (d), we suggest heading it, "Complete and Partial Adjudication," and we say: "Upon an adjudication a judgment may be entered subject to the provisions of Rule 54(b). If a judgment is not so entered"--that means the final judgment, you see, under 54(b), because there may be certain cases where you want what is really a final judgment--"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", and so forth, and shall "make an order specifying the facts."

To carry out that same idea, you will notice in the earlier sections, in the earlier provisions, instead of the word "judgment," we used the word "adjudication." In other words, what we think and hope we have done would be to provide that an actual judgment is only entered if the court decides to do it under (d) by reference back to 54(b); that other partial statements will be, really, in effect, pre-trial orders.

SENATOR PEPPER: May I inquire, Mr. Chairman, of the Reporter, what is there in subsection (b) to justify Judge Swan's reference to the use of the term "judgment"? As I

read it, the only time judgment is spoken of is in connection with the situation where there is no judgment. "If on motion under this rule judgment is not rendered upon the whole case", then under such and such circumstances the court may thereupon make an order specifying the facts.

JUDGE DOBIE: It may be rendered for part of the case.

SENATOR PEPPER: Yes.

JUDGE CLARK: Yes.

JUDGE DOBIE: The accent is on the word "whole." If judgment isn't rendered upon the whole case, it may be a judgment on part of the case.

SENATOR PEPPER: I don't think that is a necessary implication, is it, because we go on to say --

JUDGE CLARK (Interposing): You refer back to (a), you see. You will see at the last of (a), "a summary judgment in his favor upon all or any part thereof", and this picks up that same idea.

SENATOR PEPPER: I see.

JUDGE CLARK: I didn't think his conclusion was complete, and I was successful in talking him out of it.

SENATOR PEPPER: Yes.

JUDGE CLARK: I suppose it is amending the idea of a judgment for part. Here comes up something that on paper looks like a judgment for part, and yet when you look at it, it is, as I say, what in effect is a pre-trial order.

SENATOR PEPPER: I see; that satisfies me.

MR. LEMANN: That means where there is a complete adjudication, you have two documents to sign. You give him a document saying he has an adjudication, and then a judgment. Then does he sign the adjudication or doesn't he?

JUDGE CLARK: In effect, yes. This question is only going to arise when he isn't making the complete case.

MR. LEMANN: Would that be true under your language? Doesn't he have to make an adjudication even where he has disposed of the case entirely under (c) as you propose it, page 157? As I read it, he would always make an adjudication under (c). Then under (d), if the adjudication were complete, he would then get a judgment.

JUDGE CLARK: Yes, that is true.

MR. LEMANN: I just wondered about whether you couldn't get a better mechanical formula for doing what you want to do than this which in the normal case where you are getting a judgment disposing of the entire case, you would have to have under this setup two pieces of paper. You would draw one adjudication, and you would draw a judgment.

JUDGE CLARK: As a matter of fact, as you will see when we get to Rule 58, you really have that in every case now. I mean, in every matter that comes up, there are two steps. One of them is some action by the judge, which is usually written--maybe in open court a direction to the reporter which

3 is taken down and then becomes written in the record, followed by a very formal document written up presumably by the clerk, but I find in practice in New York it is written up by counsel because the clerk won't do it. I guess there doesn't seem to be any way of getting away from that.

Here you have the same thing. You would have some sort of action by the court, which very often is a memorandum in a summary judgment case. If the matter is important enough, they usually write a memorandum. In any event, it might be an endorsement on the motion paper granted. Then it goes in the clerk's office and ends up with this very formal "whereas" thing which is the judgment. I shouldn't think this would be any different.

JUDGE DONWORTH: Is there a motion pending?

THE CHAIRMAN: Well, no, there is not. The Reporter has stated his recommendation for amendment to subdivision (d).

JUDGE CLARK: Is there any question about the problem?

THE CHAIRMAN: I gather that the two courts that have passed on it, if their decisions have prevailed generally there wouldn't be any troublt about it, would there?

JUDGE CLARK: I suppose that is true, or I will put it this way: I think the two courts who passed upon it reached the correct conclusion.

JUDGE DOBIE: Is it important enough, you think, to make the change?

JUDGE CLARK: I think there is an element of ambiguity in the idea of something that seems to be called summary judgment for part, when it is only a summary judgment settling certain issues, perhaps.

MR. DODGE: Your suggested language doesn't make it plain that you are dealing primarily with a partial judgment. You say a judgment may be entered otherwise, without indicating that it is a partial judgment that you really have in mind.

DEAN MORGAN: If it is not rendered on the whole case, you say.

THE CHAIRMAN: It seems to me the rule already does exactly what your amendment provides for. It says if you don't do it on the whole case, which you obviously have a right to do, and which your amendment just simply reiterates the right to do, then the court shall make this order. It is either judgment on the whole case as one alternative or the order on the other. Isn't that the way the rule now reads?

JUDGE CLARK: Of course, this isn't intended to change the rule. This is a clarifying amendment.

THE CHAIRMAN: I know, but it seems to me that the rule is fairly clear already.

JUDGE DOBIE: I don't believe there will be any difficulty there, particularly in the light of those

35 decisions.

MR. LEMANN: With the changes you have made in 54, I can hardly see how anybody could reach any other result.

JUDGE DOBIE: I move that the section be left as it stands.

MR. DODGE: I second the motion.

THE CHAIRMAN: All in favor of leaving 56(d) stand as is, say "aye," opposed. Carried.

JUDGE CLARK: Here is a case I suppose we might make a note on.

THE CHAIRMAN: You mean on this same thing?

JUDGE CLARK: No, when we come to write it up.

THE CHAIRMAN: Oh, yes.

JUDGE CLARK: Make a note and say --

THE CHAIRMAN: Any question of that kind has been settled by decision so-and-so.

JUDGE CLARK: Has been settled by decision and by the leading text writer.

JUDGE DONWORTH: I would like to ask the Reporter if he has given consideration to a point which was brought out by Mr. Sunderland as to a former hearing which seemed to me to have some merit. Mr. Sunderland compares this subsection (d) with the corresponding section in Rule 16 relation to pre-trial procedure. Down in Rule 16 there is a clause similar to one of the clauses here, that this order made at the

56

preliminary hearing shall stand for use at the trial. But in the pre-trial section, 16, there is this language: "Such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice." There is no such "unless" clause in this sub-section (d) and the statement is that the order made at the former hearing shall stand at the trial. If it weren't in either case the question wouldn't arise, but being in one case and not in the other, is there anything in that, Mr. Reporter?

JUDGE CLARK: I think both these rules are especially Mr. Sunderland's babies. I think maybe he had better take charge of them on this aspect.

PROFESSOR SUNDERLAND: I don't believe there is any difficulty there.

JUDGE DONWORTH: I made a note (I think it was at our last session three or four years ago) that you made that suggestion and I wrote it down.

THE CHAIRMAN: It has made no impression on my mind since.

JUDGE CLARK: Mr. Sunderland was the original draftsman of the summary judgment rule.

JUDGE DONWORTH: You understand the point I am making?

JUDGE CLARK: Yes, I understand the point.

37

JUDGE DOBIE: I move we allow it to stay.

THE CHAIRMAN: Without objection, it will be so ordered, Judge.

Is there anything more under Rule 56?

JUDGE CLARK: I think that covers everything I have.

JUDGE DOBIE: Judge Parker asked me to make this suggestion which I do because he asked it. We had some little trouble in forfeiture of bail bond in Maryland, and he wondered if something could be done in this rule which would permit summary judgment on bail bond after scire facias and return. I doubt very much whether we ought to phrase these rules so as to take care of a specific instance of this kind. What do you think about that, Charlie?

THE CHAIRMAN: I think that would be a matter for the Committee on Rules for Criminal Procedure.

JUDGE DOBIE: That is a civil proceeding.

JUDGE CLARK: If it is a civil proceeding, why isn't it under this, anyway?

DEAN MORGAN: It must be a claim of some kind.

JUDGE DOBIE: I think probably it is, but if it doesn't come under it I think it would be a mistake to reach out and try to make special provision for a particular instance of that kind. Under Maryland practice you can do it like that on a scire facias. The man doesn't show up and the bonds-man makes no defense at all, and you just enter judgment like

that. It took Coleman nineteen seconds, I think.

DEAN MORGAN: Do you remember, Judge Dobie, that scire facias is abolished?

JUDGE DOBIE: Yes, I know it is.

DEAN MORGAN: You don't have this question.

THE CHAIRMAN: We did put in a provision in these Rules that it doesn't relate to bail bonds but to supersedeas cost bonds, which provides that when they are filed, it is done with the assumption and understanding that the judgment can be entered on them in the same case by a mere motion, which was in lieu of scire facias.

JUDGE DOBIE: I just bring it up.

THE CHAIRMAN: It may not be broad enough to cover bail bond.

SENATOR PEPPER: Isn't a claim under a bail bond like a claim under any other bond? It is a claim of money against a surety, and I don't see, scire facias having been abolished, the summons having been substituted, why the case is not ripe for a summary judgment just because it is a claim.

JUDGE DOBIE: I think it is.

THE CHAIRMAN: That is true, but you have to bring a suit under these rules.

SENATOR PEPPER: Oh, yes.

THE CHAIRMAN: An independent suit.

DEAN MORGAN: Absolutely.

THE CHAIRMAN: Whereas, we did more than that in cases of supersedeas cost bond. The Government doesn't have to bring an independent suit. The bond is filed with an implied agreement on the part of surety and otherwise that you can get a judgment on your original suit on a mere motion.

SENATOR PEPPER: But there is no possible question of doubt as to the liability of the surety.

THE CHAIRMAN: That is true.

SENATOR PEPPER: I mean, the thing has been adjudicated. It is a mere mechanical collection. In this case, it isn't unfair where you are forfeiting a bond for lack of appearance or something of that sort.

THE CHAIRMAN: To require a suit and motion for summary judgment.

SENATOR PEPPER: An immediate summary judgment.

MR. HOLTZOFF: Mr. Chairman, may I make a suggestion about this point? It is a matter that has confronted the Department. We have had a little difficulty arising out of the abolition of the writ of scire facias, because the writ of scire facias did not have to be served personally on the surety, and we used to collect bail bond, as you will recall, by a writ of scire facias. Now we have to bring an independent action or make a motion, and the question arises whether we have to serve the motion on the surety in the same

manner as we would a summons. We didn't have to do that with the writ of scire facias.

SENATOR PEPPER: Isn't the surety entitled to service? Poor fellow, he is going to get stuck. He misplaced his confidence in the fellow who was admitted to bail. He is going to be held up for that fellow's default. I think he is entitled to be served and a summary judgment made against him. I don't see why that is any hardship on the Government.

THE CHAIRMAN: I am referring to Rule 73(f): "By entering into an appeal or supersedeas bond given pursuant to subdivisions (c) and (d), the surety submits himself to the jurisdiction of the court and irrevocably appoints the clerk of the court as his agent upon whom any papers affecting his liability on the bond may be served. His liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of the court who shall forthwith mail copies to the surety if his address is known."

Now, my point was that that rule provides not for an independent suit and new service, but for a mere motion of scire facias, but it is limited to supersedeas and cost bonds, and maybe we could put a clause in here. I doubt it, though maybe.

DEAN MORGAN: I doubt it, too.

THE CHAIRMAN: I should think that is a matter for

41

the Criminal Rules to provide for.

MR. HOLTZOFF: The Criminal Rules Committee has adopted that provision in its preliminary draft for bail bonds.

THE CHAIRMAN: Then let's let them handle it.

JUDGE DOBIE: That is my opinion. It is a civil proceeding, though, just as habeas corpus is.

THE CHAIRMAN: You are right, but we satisfied the difficulties resulting from abolition of scire facias by this thing here as far as supersedeas and cost bonds were concerned.

JUDGE CLARK: May I say on that, that I don't quite understand why there should be any difficulty. We just abolished the form. We didn't abolish the substance. 81(b) is the scire facias one. The writs are abolished. Relief, heretofore available, may be obtained by appropriate action or by appropriate motion. I should suppose whatever they did before, they can still do. They don't need to call it a writ. Just call it a motion.

JUDGE DOBIE: Having brought it up, I now move that we pass it by.

JUDGE DONWORTH: The matter was treated in extenso at the Institute held in the District of Columbia and I think some light may be thrown on the matter by reading the remarks of Mr. G. Donworth made at that Institute.

JUDGE DOBIE: Read them.

42

JUDGE DONWORTH: I haven't got them here.

THE CHAIRMAN: I think we will pass that up, then.

JUDGE DOBIE: I think the criminal cases take care of it.

THE CHAIRMAN: We have nothing more on summary judgments?

MR. HAMMOND: I want to make a suggestion of amendment. Shouldn't we include answers to interrogatories among the things that can be considered in deciding whether there is to be a judgment or not? We say pleadings, depositions and admissions on file. You think the admissions on file cover the admissions in the answers to interrogatories? I just thought maybe that ought to go in there, too.

SENATOR PEPPER: Where is that?

DEAN MORGAN: Which section?

MR. HAMMOND: It is in section (c).

PROFESSOR SUNDERLAND: Affidavits would include that, wouldn't they?

THE CHAIRMAN: No.

PROFESSOR SUNDERLAND: Interrogatories to parties are nothing but affidavits.

THE CHAIRMAN: Well, it is an admission on file, and you can't grant a summary judgment except on facts really admitted anyway. Why does that phrase, "admissions on file," cover it?

3

MR. HAMMOND: That is the question. I noticed in a motion under Rule 12 (b) that they said that you could consider them. I didn't find any under the summary judgment rule.

THE CHAIRMAN: I should think the court would instantly say if there is anything in the answers to the interrogatories that can be taken as an admission of fact, it shall and can become undisputed. That is an admission on file within the meaning of the rule.

MR. HAMMOND: Yes, I guess that is the reason we left it out before.

SENATOR PEPPER: You can't really imagine the judge entering a summary judgment if the way was clear as far as pleadings, depositions, admissions on file and affidavits were concerned, but here was a solid stone wall in answer to interrogatories. I can't imagine his saying, "Well, I will enter the judgment because answers to interrogatories are not specified in the rule."

THE CHAIRMAN: That is the converse of his statement.

SENATOR PEPPER: Yes.

THE CHAIRMAN: I think that is so.

MR. HAMMOND: Do we need the motion for judgment on pleadings if we have this rule?

JUDGE CLARK: My answer is no.

DEAN MORGAN: I don't think we need it.

THE CHAIRMAN: It is there, and it is upsetting every numbered rule from there on unless we can find something to put in its place to strike it out.

JUDGE CLARK: Are we to take that as authority if we can find something to put in its place in 12(c), because we will go hunting?

THE CHAIRMAN: It is a motion that the lawyers are familiar with. It raises a question of law on the basis of pleadings.

SENATOR PEPPER: But, Mr. Chairman, it doesn't require changing the number of the rules. It is merely one of many lettered subsections of 12, and it really does seem to me that it is a particular case of the motion for judgment limited by its terms to a situation where the pleadings have been closed, but necessarily included in the general provisions for a motion for judgment both before and after the pleadings are closed.

THE CHAIRMAN: Where is our rule?

SENATOR PEPPER: Subsection (c), sir, of Rule 12.

MR. HAMMOND: Pardon me. We are completely redrafting Rule 12 anyway.

SENATOR PEPPER: Yes, and it does seem to me that it does clarify our whole theory of procedure if we do not specify both the general and the particular that comes

within it.

DEAN MORGAN: Don't look so pleased, Charlie.

JUDGE CLARK: I guess maybe that is a mistake. (Laughter)

SENATOR PEPPER: I thought he was ridiculing me.

DEAN MORGAN: No, indeed.

THE CHAIRMAN: It is perfectly plain, I guess, that you are right. I think we put it in because the summary judgment rule was a sort of novel thing and the lawyers are all familiar with the motion for judgment on the pleadings.

SENATOR PEPPER: That is right.

THE CHAIRMAN: I should doubt whether it is advisable.

SENATOR PEPPER: Just to bring the matter up, I move that in any revision of Rule 12, the present subsection (c) be omitted.

DEAN MORGAN: I second the motion.

JUDGE DONWORTH: You would abolish, then, the idea of a motion for judgment on the pleadings?

SENATOR PEPPER: Not at all, sir. It seems to me that a motion for judgment on the pleadings is nothing more than a motion for a summary judgment made at a particular time, whereas under Rule 56 you may make the same motion at any time on the pleadings if the pleadings are closed, and on some other ground if the pleadings are not closed.

MR. LEMANN: Of course, you have to wait ten days

under 56(c), and under 12(c) I suppose theoretically, at least, you might move with less delay. Is that correct?

THE CHAIRMAN: No, because the pleadings have to be closed before you can make the motion for judgment on the pleadings.

MR. LEMANN: I mean after they are closed. As I understood it, the thought was that after the pleadings were closed, if you took out 12 (c), you would move for summary judgment.

THE CHAIRMAN: Yes, and you would have the pleadings there.

MR. LEMANN: You would have to wait ten days. I am just trying to figure --

DEAN MORGAN (Interposing): Ten days' notice is all.

MR. LEMANN: That is what I mean, whereas, theoretically, I suppose, if you left 12(c) in, the pleadings were closed, you could file a motion and bring it on for hearing in two or three or five days. Five days is the limit, I believe, and is not very important.

JUDGE CLARK: I think probably Pepper would make his same offer, if you can get a motion for judgment on the pleadings inside of sixty days.

SENATOR PEPPER: My offer holds good.

JUDGE DOBIE: I don't see why, in a clear case. Suppose you have a tort suit and the answer sets up infancy,

47

which is obviously no defense whatever to a tort; do you think any judge would mess with that for a long time?

JUDGE CLARK: He wouldn't mess with it under any rule.

THE CHAIRMAN: There is another advantage under the Senator's suggestion that occurs to me. Suppose the pleadings are closed and the plaintiff's pleadings are insufficient; he has filed to put in something that he ought to; then you make a motion for judgment on the pleadings; then it arises that he wants to come back with some affidavits to show that he has matter outside of his pleadings. That converts it, under our rigmarole, under a motion for summary judgment, or we are in this mess as to whether he oughtn't immediately to move to amend, which we have been talking about. Certainly if we strike out the subsection (c) about motions for judgment on the pleading, we would obliterate that kind of thing, and we aren't in this trouble as to whether it shall be treated as a motion for summary judgment and affidavits allowed by the plaintiff, for instance, to supplement his pleading, with this question that he ought immediately to move to amend instead of putting in an affidavit. So for that further reason, I should favor striking out.

SENATOR PEPPER: Really, my suggestion came from Mr. Hammond and I thought it was perfectly sound. I am glad to make the motion.

MR. LEMANN: You would still have the right to move to amend, as far as pleadings are concerned.

JUDGE DOBIE: Certainly, in that case.

MR. LEMANN: The point would be in your motion for summary judgment that there was no real controversy that the pleadings on file showed.

SENATOR PEPPER: That is it.

MR. LEMANN: You couldn't amend very well and change the facts.

MR. DODGE: The motion for judgment on the pleadings raises only a question of law. The whole section on summary judgment is supposed to deal with cases where the pleader is making an apparent issue of fact.

JUDGE DONWORTH: I was under the impression that there was still room for a motion for judgment on the pleadings where it is sort of an agreed statement of facts and raises, as Mr. Dodge says, the question of law, the validity of the statute, and things of that kind. The court might grant a judgment on the pleadings so as to allow an appeal, and all that, to dispose of the case. I am not quite clear that the function of the motion for judgment on the pleadings is no longer distinctly valuable.

SENATOR PEPPER: As I read 56, I might paraphrase it this way: A party seeking to recover upon a claim, counter-claim or cross-claim, in order to obtain a declaratory judgment,

may at any time move for judgment on the pleadings without affidavit. That is what it says.

THE CHAIRMAN: It is no doubt true that the motion for summary judgment under those circumstances where there is a mere question of law on closed pleadings, can perform all the functions of a motion for judgment on the pleadings. There is no doubt about that. The only question in my mind is whether, this being a standard motion for judgment on the pleadings with which all lawyers are familiar, it may not confuse them a little bit if we strike it out. It certainly isn't necessary, but it might be just as well to leave it and not confuse them about it, and not have to write a lot of explanatory notes in our report explaining that the reason we struck it out was that you can make a motion for summary judgment based on the pleadings alone and if there are no affidavits or depositions put in, you have what is equivalent to a motion for judgment on the pleadings.

That is all a lot of explanation to set the bar right and they are all astonished at our striking out a conventional motion. From that standpoint, even though it isn't necessary, as Mr. Hammond says, it just causes a lot of discussion and a lot of questions by lawyers who don't understand summary judgment motions as well as we do.

SENATOR PEPPER: We can easily take care of that, if we are right in principle, by calling Rule 56, "Motion for

Summary Judgment on the Pleadings or Otherwise." I mean, it isn't a difficult matter, it seems to me, for the bar to realize the inclusiveness of the summary judgment rule if they will only read it.

PROFESSOR SUNDERLAND: A motion for judgment on the pleading is nothing but a postponed motion, under our subdivision (6) of 12(b), and with that the point was made the other day that we should abolish that and substitute the motion for summary judgment. We thought better to leave it as it is. If we leave our subdivision (6) in, we ought to leave our motion for judgment on the pleadings, because the same thing may be brought at a later stage.

SENATOR PEPPER: Except it is just one more case of simplification, easy steps for little feet.

THE CHAIRMAN: Our summary judgment rule is worded a little ineptly anyway, because it expressly says that you can move at any time. It is perfectly plain that a motion for judgment on the pleadings can't lie until all the pleadings are in, so you have to put some more rigmarole in your summary judgment motion to clear that up, haven't you?

SENATOR PEPPER: Doesn't that clear it up? Why say anything about "upon the pleadings"? You say "at any time," and if it is a motion on the pleadings, there will have to be the pleadings on which to make it, and if it isn't a motion on the pleadings, then whatever else is covered by the

summary judgment rule.

JUDGE CLARK: I think this discussion indicates that if 12(c) stays in, it must have the same rigmarole as 12(b). In my draft I sent around and which we are not going to consider here, 12 generally forgot that, but I think the whole idea is that if it does stay in, we have got to put in 12(c) "becomes convertible", and so forth.

May I add just one thought further as to the possibility of confusing the lawyers? I really think they are much more confused now when here is a thing that seems to be different and yet turns out not to be. I think that is a real confusion.

MR. HAMMOND: I was just going to ask you, Judge, if there had been any cases. I had a lawyer ask me whether you could use affidavits for motion for a judgment on pleadings.

THE CHAIRMAN: Judge Goodrich says you can; convert it into a speaking motion.

JUDGE CLARK: I said he could, too, in the District Court. I wrote a couple of District Court judgments when I said so.

THE CHAIRMAN: Isn't it a motion on the pleading, then? It is a summary judgment motion. That is my point all along about 12(b)(6), and also this means just exactly what it says. It is a motion for judgment on the pleadings and not one on affidavit. If you want to put in affidavits and get what you

2

call a speaking motion, you have to resort to summary judgment.

SENATOR PEPPER: If the courts are going to treat the motion on the pleadings in practice as if it was a motion for summary judgment, and if actually it is included within the general language of summary judgment, it is hard for me to see why we shouldn't have the courage of our convictions and deal with it that way.

THE CHAIRMAN: The Reporter has also pointed out, and we think he is right about that, that under 12(b)(6), a motion to dismiss on the ground that the complaint doesn't state a claim--we sort of tried to remove confusion there by putting in clauses that the motion shan't be granted without granting leave to the plaintiff to amend, or pleader to amend. To be logical, we would have to do the same thing if we left in the motion for judgment on the pleadings. We would have to put that rigmarole in there and say a judge can't grant a judgment on the pleadings without giving one pleader or the other a chance to amend. So you certainly couldn't let 12(c) stand unaltered now as it is without making the same changes in it we did in 12(b)(6).

DEAN MORGAN: Yes.

THE CHAIRMAN: The question is whether we should strike out the provision in 12(c), motion for judgment on the pleadings, on the theory that it is already covered by the summary judgment rule, and explain it to the lawyers in a

note that that is the reason we are striking it out.

All in favor of the motion say "aye," opposed, "no." The Chair thinks the "ayes" have it.

PROFESSOR SUNDERLAND: I would like a show of hands.

THE CHAIRMAN: We will have a show of hands. All in favor of striking out the motion for judgment on the pleadings of subdivision (c) of Rule 12 raise their hands.

... Four hands raised ...

THE CHAIRMAN: Opposed.

... Four hands raised...

THE CHAIRMAN: I guess the section stands, all right.

JUDGE CLARK: I take it, it is a tie vote, and I think, therefore, we should bring it up again.

THE CHAIRMAN: Did we have a tie vote? All in favor of striking it out, raise their hands.

MR. LEMANN: I did not vote. I don't think it is very important, myself, one way or the other. If it were alone, I would vote against it because I don't believe in changing things that are not very important. The only reason I hesitated is because we are changing 12 anyhow, and we can throw this in.

SENATOR PEPPER: I think that is it.

MR. LEMANN: I said to myself, "It doesn't make much difference. Leave it to the other fellows."

SENATOR PEPPER: The motion I put was that in the revision or rewriting of Rule 12, that the provision in subsection (c) be omitted. I wanted to do it so as to emphasize that this wasn't one of those cases where the rule was being changed only on this ground.

Can we take a vote on it again, because there is some dispute?

JUDGE CLARK: This has raised all the questions we have talked about.

MR. LEMANN: This judgment on the pleadings was just thrown in by Mr. Hammond here and you never said a word about it until he brought it up, and it has given a lot of trouble.

JUDGE CLARK: You will find it all stated under 12(b). The same sort of confusion arose.

MR. LEMANN: I didn't realize it. I thought it was a new point contributed by Mr. Hammond, but it seems we had it all the time.

THE CHAIRMAN: In the courts.

MR. LEMANN: We talked about it and decided not to change it.

JUDGE CLARK: It is the question whether you use affidavits or not. I had two cases where I ruled that you should use affidavits, and I think Goodrich has ruled that you should use affidavits.

PROFESSOR SUNDERLAND: On a motion for judgment on the pleadings?

JUDGE CLARK: Exactly.

THE CHAIRMAN: In other words, the motion doesn't mean what it says.

SENATOR PEPPER: That is the point.

THE CHAIRMAN: That is what Judge Goodrich held.

SENATOR PEPPER: It isn't vital, and we are pressed for time. I suggest we just take that vote again and see where we do stand.

THE CHAIRMAN: All in favor of striking out subdivision (c) of Rule 12 raise their hands.

... Five hands raised ...

THE CHAIRMAN: All opposed.

... Five hands raised ...

DEAN MORGAN: The Chairman decides it, then.

THE CHAIRMAN: I will raise it in opposition. My principle objection is that every decision that refers to subdivisions (e), (f), (g) and (h) will now mean something else.

SENATOR PEPPER: That has to be changed anyway.

THE CHAIRMAN: No, not the letters.

JUDGE CLARK: I don't see why we would have to change the letters anyway. The easiest thing to do on that is to say, "(c) omitted. See footnote." I don't see that there

is any reason for changing the letters.

THE CHAIRMAN: We have had our vote and will let 'er ride. I was just a little facetious about that.

MR. HAMMOND: I am sorry I took so much time.

JUDGE CLARK: When the two are put together, they look very foolish. It is more of this "deemed" stuff, really. If we get it repeated twice and you see how badly it looks, maybe you will want to say directly what we are doing. Here are two cases where we really don't say what we are doing directly.

THE CHAIRMAN: What is your next proposal, for what rule?

MR. HAMMOND: I have another little proposition here under summary judgment rule about the affidavits. It seems that the case of Victor v. Manning in the Third Circuit was an action against a collector to restrain the collection of tax because of the plaintiff's failure to proceed with the notice of sufficiency. The Government filed a motion to dismiss for lack of jurisdiction and attached to it a waiver by the plaintiff, and the waiver wasn't sworn to or anything like that, and Judge Goodrich simply was bothered a good deal about that. He had no trouble about granting the motion to dismiss.

THE CHAIRMAN: Is that a motion for summary judgment?

MR. HAMMOND: No, this was a motion under 12(b) to

dismiss for lack of jurisdiction, and the point is solely concerned with the affidavits, and it is just a question in my mind as to whether we ought to add something to the affidavit provision in the summary judgment rule about the proof of records.

Of course, we have a provision in Rule 44. I suppose he thought that wasn't applicable to proof of documentary evidence attached to a motion.

DEAN MORGAN: He wanted to have an affidavit that that was a copy of the original waiver? That is all he wanted?

MR. HAMMOND: No.

DEAN MORGAN: I don't see what else he could have asked for. Suppose you have written admissions by the other party; can't you prove those written admissions by affidavit? I should suppose you could.

MR. HAMMOND: The difficulty in this case, however, is to see on what basis the trial judge was justified in granting the collector's motion to dismiss. The motion was accompanied, as has been said, by a photostatic copy of the alleged waiver, but the statute which makes copies of books, records, papers or other documents in any of the executive departments self-authenticating requires the presence of the seal of the particular department thereon. No seal was shown to have been on this alleged waiver, nor was

it accompanied by an affidavit identifying it."

THE CHAIRMAN: The trouble was, the Government had ample means of verifying the thing and they didn't take it. I don't think we need to supplement that. The Government lawyer ought to have seen to it that there was some sort of showing that the waiver was a genuine one, and he didn't do it.

MR. HAMMOND: Maybe that was the trouble.

THE CHAIRMAN: That was the fault, not the Rules.

Well, we are up now, as I understand it, to declaratory judgments.

JUDGE CLARK: Yes, and there is no suggestion for change. That seems to have worked out pretty well. These are references to the rule and general approval of them.

THE CHAIRMAN: Then we are up to Rule 58, Entry of Judgment.

JUDGE CLARK: Yes. Now, Rule 58, as I mentioned from time to time earlier, has caused some practical difficulties of working it out. Of course, there is one difficulty, and that is the difference of habits in the different parts of the country, which I suppose are partly the lawyers', but become the habits of the clerks. I suppose the clerks are harder to change than anyone else. I have sat in the District Court both in Connecticut and in New York, and the clerks act quite differently in the two places, which is rather interesting.

Rule 58 now provides that under certain conditions--that is, what we might term the simple cases--when the judge directs the entry, the clerk is to make it and make the judgment at once. Mr. Pickett, the clerk in Connecticut, does that right along, and I should think it worked reasonably well. On the other hand, in New York Mr. Follmer says it is impossible and he just simply doesn't do it. The reason he says it is impossible is that he says the judgment is not recordable in the land records of New York until all the blanks are filled in, including that for the taxation of costs. I might say that the practice in the Southern District seems to be, therefore, quite general in accordance with the state practice in New York, which is to have the judge do something about the matter.

THE CHAIRMAN: Well, it is to withhold the entry of judgment until the costs are taxed?

JUDGE CLARK: It is much more than that.

THE CHAIRMAN: As far as the registration of the Government in a state and county court clerk's office is concerned, to make it a lien, is Follmer's precise point. I had correspondence with him about that.

JUDGE CLARK: But my suggestion is this. Follmer bases his feeling that 58 cannot be used on that point, and then he makes it a general rule which refers to the case whether there are any blanks or not. Therefore, he never does it

whether there is any taxation of costs or not, and always waits for the lawyers. I have sat in the District Court of New York and directed the clerk, in so many words, to enter judgment at once, and then found, oh, two months or more later, that nothing has been done and they are waiting for a formal entry.

THE CHAIRMAN: What do you mean by "waiting for a formal entry"? Waiting until the lawyer --

JUDGE CLARK (Interposing): -- draws a judgment and gets it O.K.'d by the judge in a very simple manner, in the manner for recovery of money only, or the manner for the judgment for defendant. To cover the situation, I have brought up two different recommendations, at the foot of 161 and 162.

THE CHAIRMAN: If he won't obey your first order to enter judgment, why does he obey your second after you have approved it?

JUDGE CLARK: He doesn't do it in either case. You see, what happens in the second case is that the judge has now signed an order for judgment drawn by the lawyers, and he simply takes that and sticks it in his book.

SENATOR PEPPER: That is, the clerk wins.

JUDGE CLARK: That is what happens, yes. I guess the clerk always wins, for that matter. You can't do much with them. What happens in the actual result is that in the Southern District, the clerk never draws the judgment. The

lawyer draws it, the court signs it and the clerk takes it.

THE CHAIRMAN: Even if it is just a plain verdict or order for judgment --

JUDGE CLARK: That is it.

THE CHAIRMAN: -- for the recovery of a specific sum of money, he won't even enter that?

JUDGE CLARK: That is correct. As I say, I remember when the clerk was directed to enter judgment forthwith for so many dollars damages, and two months later the lawyers called me up about it; called me up at New Haven. I had gone back. They wanted to send me a form of judgment to get it approved. I said, "I thought judgment was entered two months ago." They said, "Oh, no. It hasn't been."

THE CHAIRMAN: What are your proposals for amendment?

JUDGE CLARK: I have taken two forms. The first form, which I might call, for brevity, the "Mr. Pickett Form," (that is the Connecticut clerk), is largely the present 58 except that it does, I hope, make it a little clearer and and does cover certain things--for example, bankruptcy provisions--that are not covered. The second form on 162 is the Follmer or New York form.

Looking, therefore, specifically first at No. 1, you see "Whenever any adjudication is directed by the court to be entered, the clerk shall immediately make a notation of it in the civil docket", and this notation constitutes the entry.

The judgment shall not be effective before such entry, and shall be effective from such entry notwithstanding the later filing of a formal judgment or the taxation of costs. That is a specific statement--"when the judgment is to be entered on a general verdict of a jury or for recovery of money, or for no recovery or relief, or the grant or denial of a petition or claim in bankruptcy or elsewhere."

MR. LEMANN: Or elsewhere?

JUDGE CLARK: Or elsewhere--any grant or denial by petition.

MR. LEMANN: Bankruptcy is a place in this sense--elsewhere.

JUDGE CLARK: In bankruptcy or in other proceedings, because we sometimes have petitions for naturalization, petitions for writs of habeas corpus, and so on. We have a lot of petitions.

JUDGE DOBIE: They are territorial.

JUDGE CLARK: The clerk as soon as practicable after the receipt by him of direction for the judgment shall prepare and file the appropriate judgment as of the date of the entry, but when the court directs judgment for other relief, the judge shall promptly approve the form and direct it to be filed by the clerk as of the date of the entry.

As I say, I think that is the idea of the present 58, but there are several things that are made explicit, set out

63 in cold type.

The alternative suggestion holds up the judgment. That is, "Whenever any action is taken by the court, the clerk shall immediately note it in the civil docket, as provided by Rule 79(a); but he shall not enter any judgment without written direction therefor from the court, either endorsed on the judgment or separately signed by the judge. No judgment shall be entered until it is complete, including the taxation of costs where costs are awarded." You see, that is just the converse of the other one. "When the judgment is upon a general verdict of a jury, or for simple relief, such as for money or costs, or for no recovery or relief, or the grant or denial of a petition or claim, the clerk shall enter the judgment as soon as practicable after the receipt by him of the direction by the court; but when the court directs entry of judgment for other relief, the judge shall settle or approve the form of judgment as soon as may be. The judgment shall be effective from, but not before, its entry in completed form by the clerk, who shall note the time in the civil docket."

Let me just add this, that if I were doing it, I would a little prefer the first, because that cuts out the delay which always happens when you follow the second form. The objection to the first is that I doubt if Follmer would follow it, but I think some clerks would. The second, of course, I suppose could be followed by anybody, and that, of course, is

Follmer's idea. The great difficulty with the second, the one that worries me a little, that may or may not be important, is that in actual practice, there turns out to be a gap, usually a month, and it may run on for several months, for reasons that I never can fathom, but I find it in the record between the adjudication and the judgment. I spoke of this case yesterday of Judge Wookey, where he wrote a very precise and good opinion in a patent case. Patent lawyers, I guess, are also deliberate. Then he called for findings of fact and his opinion, recast in paragraph form, appeared in September, his adjudication being in June, and then nothing more happened until they entered judgment in February.

Of course, you can say if nobody wants to act, not even the winning party, maybe it is not a situation for the court to worry about, but on the other hand, we have these statutes, including the Judge Parker bill which says that the circuit judges shall meet every little while for the speeding up of business, and we are sent around to the judges and are supposed to see why they haven't gotten their decisions out, and if after we have hurried them into decision, then it is going to be six months or more before the formal judgment is entered, it seems a little odd. That is all. Here is a considerable source of delay which, so far as I can see, is entirely useless.

SENATOR PEPPER: I can't imagine why a clerk should

take the very real risk of personal liability which he would be subject to if, after having been directed by the court to enter judgment, he omits to do so. If in the interval somebody with a judgment in another court levies upon the property or gets a prior lien on the land, the clerk, if he is bonded, is certainly subject to the default, if not his bond. If he isn't bonded he is subject to personal liability. I don't think a recalcitrant clerk ought to determine one's policy in this matter.

THE CHAIRMAN: I would like to say something about that, too. The trouble is, I think we are getting provincial about this thing. We have a clerk in New York --

JUDGE DOBIE (Interposing): Do you mean by provincial, New York or outside of New York?

THE CHAIRMAN: Provincial in New York; provincial in treating this matter just because a particular clerk in a busy district has certain ideas about it. This rule as we have it is, I think, a very simple rule. Either one of these rules that everybody proposed here is very confusing to me. Our rule is built on very simple lines. If there is a verdict it is for a sum of money, or if there is an order for judgment merely for the recovery of money, the clerk enters the judgment forthwith, because there isn't any occasion for his settling the form of the judgment. If there is any other relief granted which does involve settling the form of the

6

judgment, our rule prescribes that it shall have to go to the judge and be approved by him.

Now, let's try to separate all these ideas on which we are somewhat confused by Mr. Follmer. The first problem that arose in New York is this: This rule of ours provides that the judgment should be entered immediately upon the verdict or immediately upon the order for recovery of money by the judge without taxation of costs, and that meant that the judgment would be entered for the recovery of money and blank dollars costs. Now, under the New York statutes, a federal judgment for the recovery of money can't be recorded in the county clerk's office in New York to make it a lien on the real estate until the judgment is complete, and Follmer took it up with me and the point he made was, when you enter a judgment forthwith and the costs haven't been taxed, then the lawyer takes a certified copy of that judgment and runs over to the county clerk's office to make it a lien and he can't legally file it.

My answer to that is a simple one, that if the plaintiff's lawyer receiving the judgment wants to get a lien, he ought to tax his costs within a day or two and complete his judgment and take it over. I don't see any reason on earth why he shouldn't be required to do that.

When it comes to this business of refusing to enter any judgment except even a judgment on a verdict or order

7 for mere recovery of money, that you have got to have the form of judgment drafted by a lawyer and approved by a judge, if you adopt his idea about that, you may be conforming the practice to what Follmer has been accustomed to, but you are upsetting the practice in a large number of Federal Districts. Mr. Cherry will bear me out on the proposition that in a great many Federal courts in the West, it has been the custom from time immemorial that when a verdict is returned for a definite sum of money, or when there is an order by a judge in a jury waved case or equity case for recovery merely of dollars and cents, it has been the immemorial practice in those districts to enter the judgment forthwith.

There is only one little hitch about the whole thing, that I see. This question of liens on real estate is to be taken care of. The lawyer who wants the lien will get busy and tax his costs and complete the judgment. I have been wondering, when it came to the question of running of the time for appeal, whether a judgment entered forthwith for the recovery of so many dollars' principal and so much interest, and blank dollars costs, becomes an appealable judgment until the costs are entered. I don't think there has ever been any trouble about that in Minnesota. For instance, if a judgment is so entered, that starts the time for running of appeals because the judgment itself provides for costs, and it is a picayunish matter. When the costs are taxed four or

five days later, it relates back to the entry of judgment. That is the intent, and I think we are just confusing it. I think also that we don't need to say anything about bankruptcies or other proceedings because our rule is perfectly broad and explicit. If it is any kind of judgment except a judgment merely for money, you have to get the order to conform with the judgment approved by the court.

MR. LEMANN: Apparently, except in the Southern District of New York we have had no complaints from anybody else.

THE CHAIRMAN: None at all. I have had a good deal to do with this rule and I was provincial in drawing it because I was accustomed to the practice in many Federal courts where it has always been the habit on a verdict for money, or an order for judgment for money, to enter the judgment forthwith.

JUDGE DOBIE: This problem suggests itself to me in favor of all that you say, General. I am assuming now in the small towns of the South, the judge holding courts, for example, in seven different places in West Virginia, is anxious to get away. Usually the very minute the judge finishes, he wants to rush off. You have to hold him there for orders, for direction of these things. Some of them are not going to like it.

THE CHAIRMAN: Why should a judge be bothered with

the form of judgment for recovery of $10,000, and even when that is the idea, I don't see it. We oughtn't to draw these rules to fit the clerks' ideas in New York when we know that the rule does make provision, it does recognize and conform to a practice that has been in effect for years in other circuits.

JUDGE CLARK: May I just add this? I certainly agree, and that is what I was indicating. I prefer that form of approach, the one in Rule 58. I think if everybody agrees and Mr. Follmer gets overruled by this Supreme Court, I don't believe that will change him . If he does, I still think then that you might think a little about the wording of 58. My first alternative one is simply a clarifying one, and it does seem to me that it adds some clarification. In the first place, it says to Mr. Follmer directly that he is wrong and makes it beyond question. Senator Pepper says that there may be some problems for him. Now he says he isn't wrong because he thinks he has an excuse.

THE CHAIRMAN: Do you make anything clear that isn't clear already? Whatever Mr. Follmer says about it, I am not quite clear what clarification you want, assuming our rule should stand as it is.

JUDGE CLARK: I think that the two most direct clarifications you will find if you will look at 58, page 161, the second sentence.

/0

THE CHAIRMAN: We have explicitly provided what constitutes the entry. The notation of the judgment in civil docket as provided by Rule 79(a) constitutes the entry of the judgment and it is not affected before such entry. Why isn't that clear enough?

JUDGE CLARK: At any rate, maybe it is. I was just spelling it out a little more. Let me just state the other. The other is that our Rule 58 indicates the general policy but it isn't complete, and that came up particularly in a case that gave my friend, Mr. Pickett, who wants to follow the rule, a little trouble. He came to me about it. That is, what he should do on a petition for discharge of a bankrupt, and the judge had written a memorandum and said the petition was denied. What does he do under Rule 58?

MR. TOLMAN: Denies the application, the motion.

JUDGE CLARK: What does the clerk do? Does the clerk then write it up himself? Why shouldn't he? This raises the question--it was a rather interesting little point. Mr. Pickett in Connecticut actually did write up an order. Then counsel saw he was late. The time is short in bankruptcy, of course, and after the thirty days he ran around to the judge and said, "Under this rule the clerk had no power to do it," and the judge either didn't read the order or was good natured. In fact, there was no explanation. I am a little surprised the judge did it, but the judge signed the

second order and then he brought his appeal.

THE CHAIRMAN: Let's get right down to the terms of the rule. The rule contains this clause: "When the court directs the entry of a judgment that a party recover only money or costs . . ." That is an order denying discharge, isn't it? The other thing is, "or that there be no recovery." That, of course, isn't very apt to describe the denial of an application for discharge and recovery. If that is your point and the question was whether an order denying an application for discharge was in order that there be no recovery, is less ambiguous, you might add after the word "recovery," "or that no relief be granted."

SENATOR PEPPER: Or even as a substitute for that, that a party recover only money or costs, or that relief prayed for be denied. That covers everything else, including the petition for discharge in bankruptcy.

THE CHAIRMAN: That is the only point I see about the bankruptcy case. It wasn't very apt. The words, "there be no recovery," aren't a very apt clause to describe an order denying an application for discharge. He wasn't trying to recover in the literal sense. He was trying to get some relief.

SENATOR PEPPER: He asks for some relief.

THE CHAIRMAN: I think the rule would be construed by any court that the word "recovery," in the absence of

anything else, that the court would say right away that that is just a denial of recovery; it means the denial of any relief and we will so construe it.

JUDGE CLARK: You can see how the actual case came up and on the appeal when there was a motion for dismissal, it was too late, and how would you have ruled?

THE CHAIRMAN: I would have ruled that the order--when he entered in the civil docket the notation of the order denying the application for discharge, that was the entry of judgment denying recovery within the meaning of this rule and the time for appeal ran from it. I should broaden the word "recovery" to instruction to include a situation of that kind.

PROFESSOR CHERRY: What did the clerk do?

JUDGE CLARK: Actually, we did as we so often do in those matters; we in a sense dodged it. I suggested we do that, but the court said, "We are going to affirm this thing anyway. Why don't we just mark it 'affirmed' and say nothing about it, write no opinion?" So, that is actually what we did. I suppose in one sense if anybody dug out the records, he might even say that we held it good, but we hope it is salted down so nobody will say anything about it.

THE CHAIRMAN: You left in the words, "there be no recovery added or no relief granted."

MR. TOLMAN: This trouble arises from the failure of the clerk to obey, to carry out this rule. It seems to

me we do need an explicit statement that the entry of the judgment shall not be delayed for the taxing of costs. That is where the trouble arose, and it arose in regard to recording the thing in the register of the county clerk's office, too.

THE CHAIRMAN: That county clerk business, I think we can just pass up.

MR. TOLMAN: Yes.

THE CHAIRMAN: Because the judgment is admittedly, under the New York State requirement, isn't adequate to be filed as a lien until that blank as to dollar recovery on cost is inserted. But that is a peculiar local situation, and all the lawyer has to do is to tax his cost before he runs and gets a certified copy of the judgment. I don't think we need to deal with that.

SENATOR PEPPER: Is there any motion before the house? I don't think there is.

THE CHAIRMAN: No, there isn't.

SENATOR PEPPER: There have been several suggestions. I should be satisfied with 58 as it stands, with a slight clarifying provision to cover the bankruptcy case by substituting for the words, "or that there be no recovery," these words: "or that relief prayed for be denied."

DEAN MORGAN: You wouldn't want just that, would you, Senator, because they might deny part of the relief--"that no relief be granted"?

SENATOR PEPPER: I should think if it was going to be a slight decree requiring that some relief be granted and some not, maybe that is a case where the court ought to act.

THE CHAIRMAN: Surely.

SENATOR PEPPER: But where it is a flat finding that $10,000 with interest is recoverable, or the costs are recoverable, or the relief prayed for in the petition is denied, I don't see any reason why the clerk shouldn't act forthwith.

THE CHAIRMAN: There are just two things about it that seem to me to deserve consideration. One is whether we should broaden that narrow phrase, "or that there be no recovery," so as to make "no recovery" really mean also that no relief at all is granted. The other point is the one the Major raised, whether we ought to say explicitly that the entry shan't be delayed for the taxation of costs, but when the costs are taxed it shall relate back to the entry date--something like that. Those are the only two little quirks that really have any merit at all on this.

JUDGE DONWORTH: I wonder if there is a local rule in New York on these specific points.

THE CHAIRMAN: Yes, in the New York District Court. This rule bears right on the Major's point. Rule 58 does not state explicitly that the direction forthwith to enter the judgment on verdict by the clerk, means that he must do it

before costs are taxed. It is ambiguous. They have adopted a local rule in New York in order to fix up this matter about liens, in which in the local rule in New York they have prescribed that "forthwith" doesn't mean before costs are taxed, and that the judgment shall not be entered until they are taxed. I expressed in my own opinion to Mr. Follmer that because our rule didn't cover that explicitly, I couldn't say that the local rule was inconsistent with our Federal Rules. That is the situation.

JUDGE DONWORTH: In the Western District of Washington we have a local rule that we follow. The notation of judgments will not be delayed pending taxation of costs, but a blank space may be left in the form of judgment for insertion of costs by the clerk after they have been taxed; or there may be inserted in the judgment a clause reserving jurisdiction to tax and apportion the costs by subsequent order.

THE CHAIRMAN: That raises this question in my mind about this time for running of the appeal. I think if you are going to tax the costs after the judgment is entered, and it is entered originally with a blank space, you will have trouble about the time of appeal unless you provide that when the costs are taxes, it shall relate back to the entry of judgment.

JUDGE DONWORTH: There was often quite a controversy

between counsel in regard to the costs, where there are numerous witnesses traveling different distances, and so on, so that the filling of that blank has often been delayed for quite a while, a couple of weeks, perhaps.

THE CHAIRMAN: My disposition is to let that ride and let them work it out.

MR. LEMANN: It has given no trouble. In my part of the country we say, "Judgment for so many dollars and all costs," or if it is a judgment of dismissal and the plaintiff has been rejected, that the defendant recover his costs. I notice that is what they did in this Texas case recently, out in Texas. If it is assumed that the appeal delays began running from the date of that judgment, as somebody just said, counsel often have a good deal of argument about the costs but they wait until they see what has happened on appeal before they fix the costs. Often, I take it, appellate costs are finally included in the taxation.

JUDGE CLARK: I might just throw out this, that we have often passed down judgments with a blank left; I mean, we have taken them, certainly, as final judgments, and they come to us, "blank dollars costs," and we just never think of stopping consideration for that.

SENATOR PEPPER: Mr. Chairman, in the interest of expedition, may I suggest that we are discussing two questions at once. One is whether or not the motion that I put a few

7

minutes ago should carry, which merely substitutes for, "there be no recovery," some such phrase as, "or that relief prayed for be denied." That is one question, and then this other question about the costs, and so on. Couldn't we dispose of the first either up or down, and then focus on the other?

THE CHAIRMAN: You are right.

JUDGE DOBIE: I second the Senator's motion. I think that does clarify and improve the rule.

THE CHAIRMAN: The motion, as I understand it, is that in Rule 58, the phrase, "that there be no recovery," be eliminated, and that in place of it there be the phrase --

SENATOR PEPPER: "that relief prayed for be denied."

THE CHAIRMAN: "or that relief prayed for be denied." All in favor of that say "aye," opposed, "no." Carried.

Now, the other question is the cost business. I think we had better just let that ride the way it is.

JUDGE DOBIE: The second point is whether you make it clear that where the judgment is entered and leaves cost vacant, that that is the judgment and the time for appeal begins to run from that time.

THE CHAIRMAN: That is the general understanding, and when you tax costs, it really relates back. Here is a blank left for it and it is just a filling in. I don't think there is any practical difficulty.

JUDGE DOBIE: I think unquestionably that is, and ought to be, the rule. If there is any real danger of its

18

being misunderstood outside of New York, I would be willing to change it; if not, I would let it stay as it is.

JUDGE CLARK: It seems to me the rule raises all this confusion even if it is only one district, a district which has about a third of the civil cases.

THE CHAIRMAN: The confusion is raised by a balky clerk, that is my point about it.

JUDGE CLARK: May I add this: It is not only raised by a balky clerk, but it is raised by a rule adopted by all the judges, and I think it is also the rule of the Eastern District, too. I may say that they usually keep the same rules. I can't for the moment verify it, but I would be willing to guess that they both have the same rule.

JUDGE DOBIE: Is Brooklyn in the Eastern District?

JUDGE CLARK: Yes. They usually have the same thing.

THE CHAIRMAN: Would you like an amendment to the rule that the entry of judgment shall not be delayed pending taxation of cost?

JUDGE CLARK: Yes, I think it would be helpful.

THE CHAIRMAN: I think so.

SENATOR PEPPER: I second the Major's motion.

THE CHAIRMAN: The motion is that Rule 58 be amended by adding an appropriate provision in the proper place that the entry of the judgment shall not be delayed for the taxation of costs.

JUDGE DOBIE: Do you want to put anything in there that it shall relate back--something to indicate that the time of taking appeal begins at that time, or is that self-evident?

DEAN MORGAN: I don't think you need that.

MR. TOLMAN: I think that follows without a rule.

DEAN MORGAN: Question!

THE CHAIRMAN: There is no motion to amend the motion. We will just put the motion as it is, without that in it.

JUDGE DOBIE: All right.

THE CHAIRMAN: All in favor of inserting that provision in 58 about not delaying the entry for taxation, say "aye." It is agreed to.

JUDGE DONWORTH: Without delaying this discussion, I should like to ask if the difficulty arises from the doubt on the part of the clerk as to what he is to do. If there is a docket and he just writes under John Smith, "Judgment in favor of Jones against John Smith, $10,000," that is one thing. If he has to write out a formal declaration that the complaint is now considered ordered by the court that "the plaintiff do have and recover," and so forth, if the clerk is in doubt about that form, he waits for a lawyer to write it out for him. I would like to ask the Reporter if he has any views on that.

JUDGE CLARK: Well, of course I suppose that is something that sometimes arises, but I should think the rule with this question cleared up contains about as much direction as we could give on that.

THE CHAIRMAN: Doesn't the Department of Justice print and distribute to all these clerks, all these records? They are absolutely uniform.

JUDGE CLARK: Yes.

THE CHAIRMAN: Don't they provide for these memorandum judgments for recovery, that "the plaintiff do have and recover" so many dollars?

JUDGE CLARK: Mr. Holtzoff is shaking his head, but I can answer that I have seen them. Mr. Pickett showed me the form that is printed. I don't know where he gets it. Maybe he gets it from the Administrative Director. I asked him specifically and he brought up the forms that he had.

THE CHAIRMAN: I think that question of the form of the entry and the notations and everything can be settled by the administrative office in conformity with our rules by getting out uniform books for the clerks.

JUDGE CLARK: I guess that does come from the Administrative Director now, but as I say, I checked on that definitely and it is a simple form. It isn't to cover any of these complicated matters but it is a simple form that we can just fill out for the judgment itself--just a form of judgment.

MR. HAMMOND: I knew they drew up one for direction of the entry of judgment, and that has been adopted by the Department of Justice.

JUDGE CLARK: It is just a simple form of judgment itself with the spaces to fill in.

THE CHAIRMAN: We are ready for 59. What do you have on that?

JUDGE CLARK: We call attention again to the question of 6(b). I think there is nothing on new trial.

MR. DODGE: What is the provision as to the vacating of a judgment by the granting of a new trial?

JUDGE CLARK: What is the effect of it? It suspends the time for appeal. Is that what you have in mind? It does suspend the time.

MR. DODGE: Have we any provision of the effect upon the judgment of the granting of a new trial? Does that vacate the judgment?

JUDGE CLARK: As I understand it, even the filing of a motion does. I am correct in that, I think.

THE CHAIRMAN: It doesn't vacate it, but it suspends the operation for purposes of appeal.

MR. DODGE: Is that provided in the rules?

THE CHAIRMAN: It is the rule adopted by the courts and uniformly applied. They hold that any motion to renew trial, for instance, if seasonably filed or if not seasonably

filed, if it is entertained by a court, operates to destroy the finality of the judgment, and the judgment, although it remains on the books as a judgment, doesn't become final until the motion for new trial is denied, and the finality runs from that date. That is a matter of judicial decision and we didn't do anything about it in the rules.

JUDGE CLARK: And it was substantially reaffirmed this winter on that motion for amendment to finding case that I cited back at 52, because they used that as the analogy and said that the motion to amend the finding would have the same effect.

MR. DODGE: One of the clerks raised that question with me, suggesting that it ought not to be necessary for the judge to wait for an order revoking the judgment where a new trial has been granted. The effect of the granting of a new trial is to revoke the judgment.

PROFESSOR SUNDERLAND: Didn't the granting of a new trial just vacate the judgment?

SENATOR PEPPER: Is it really true that it revokes the judgment, or merely operates as a stay of execution?

THE CHAIRMAN: It vacates it.

JUDGE DONWORTH: That is, the actual granting --

SENATOR PEPPER (Interposing): The motion for a new trial, I mean.

THE CHAIRMAN: It doesn't do anything except

suspend the time for running of appeal.

SENATOR PEPPER: And stays execution.

JUDGE DOBIE: Nothing on new trials?

MR. DODGE: They have been bothering the courts for revocation of the judgment when a new trial had been granted. I wondered if that was necessary.

THE CHAIRMAN: No.

We go on, then, to Rule 60.

JUDGE CLARK: Rule 60--we have several suggestions of detail. First as to 60(a), Clerical Mistakes, there are two different suggestions as to that. The first is the suggestion we have had from outside and we rather disapprove of it, to limit that in time. The suggestion is made, however, that the power conferred by Rule 60 should be limited in time preferably to three months appeal period. We say we do not believe, however, that the limitation is advisable, but I bring it to your attention.

DEAN MORGAN: That is just for (a), Clerical Mistakes?

JUDGE CLARK: Just for (a). (b) has a limit, anyway, you know.

JUDGE DOBIE: You don't think there ought to be any change there?

JUDGE CLARK: Not on this one. Not on this point.

JUDGE DONWORTH: Does the Reporter make any

recommendation regarding this recent decision by the Court of Appeals of the District of Columbia that the failure of the clerk to mail a notice was a clerical error?

JUDGE CLARK: I don't quite think that would come up here. There is a possibility of your considering that in connection with (b), the other part of the rule. (b) provides for mistake, inadvertence, surprise, and so on, and the court there in that District of Columbia case held that Rule 60 didn't apply because it wasn't a clerical mistake in the first place, and under (b) that is directed to the parties and not to the action of the officials. I should suppose if you were going to think of doing this at all, it would be a query under (b), as to whether it should be made a little broader.

THE CHAIRMAN: The granter of the notice by the clerk is covered in some other rule. What rule is that?

JUDGE CLARK: That is true, 77.

THE CHAIRMAN: We haven't come to that in Rule 77 about notice of the entry of judgment.

JUDGE CLARK: That is 77, which appears on 212.

THE CHAIRMAN: Was Judge Donworth's question as to whether that should be treated as an oversight or omission?

JUDGE DONWORTH: It is just as well to pass that point.

THE CHAIRMAN: You have no recommendation for 60(a), have you?

JUDGE CLARK: Well, there are two things I want to discuss. Perhaps we should take them up separately. The first is a suggestion made for time limit. I don't recommend it. Does anybody want to bring it up?

THE CHAIRMAN: If nobody wants it, we will pass on to your next proposal.

JUDGE CLARK: The next one has reference to the same section and it is a problem that has arisen somewhat; that is, may the trial court act under this provision while an appeal is pending? We should rather think that they could. The language is pretty broad. It was so held in this case cited at the foot of the page in the Southern District of New York. There seem, however, to be other cases which say no. At the top of 165 is a Seventh Circuit Court case which says generally that after appeal, the District Court loses all authority , and a case from the District of Michigan which says specifically here it loses authority.

Now if you read on to the next paragraph of the comment, you will see that we mention that there is some question that has come up at different times under the Rules as to the general power of the District Court after notice of appeal is filed, and we discussed that somewhat further under 73(a). I would say this, that first it is something of a problem. Second, I should doubt, myself, whether we should try to patch up this rule. You will find further dis-

cussion of other cases on page 191, under 73(a).

DEAN MORGAN: Why don't we pass it until we get there? That is the place to handle it, isn't it?

JUDGE CLARK: I should think so, yes, but wouldn't you think, Eddy, that there was power here anyhow, in view of the limited feature of the thing and the wide statement here? The rule says "at any time."

SENATOR PEPPER: May I move, Mr. Chairman, in the interest of expedition, that any question arising under Rule 60 be deferred for the moment and taken up for consideration when we reach Rule 73?

THE CHAIRMAN: If there is no objection, that will be so ordered.

JUDGE CLARK: 60(b). First, our Comment I is on the question whether the rule preserves the substance of the formal writ of error coram nobis and bill of review. I think it was our view that it does and the note so stated. There is quite a little judicial authority on that, and I should say that we don't need to do anything about it, as I see it. The law apparently is written in that way. I think that was a special form of remedy and didn't take away the other existing rights.

As to the second comment, page 166, I think that perhaps is of some importance and we are really suggesting that as an addition to Rule 60(b). It is a question whether

it covers a judgment procured by fraud, and that has been discussed, you will see, in the authorities we cite first. We suggest an addition to cover it, and that addition is underlined in the recommendation at the foot of the page.

MR. TOLMAN: I move the adoption of that recommendation.

JUDGE DOBIE: That just makes it clear and shows that the rule does apply to a fraud, isn't that the idea?

JUDGE CLARK: Yes. It has been suggested, no reference having been made to fraud, that the rule doesn't now cover it, although there has been a case holding the other way, but this settles it.

JUDGE DOBIE: I second the Major's motion that we add that recommendation of the Reporter.

MR. LEMANN: Is there a case the other way? There is none noted on page 166, is there?

JUDGE DONWORTH: Of course, with this note in it, we still have the reservation at the end of (b) that the independent suit may lie, but nevertheless I think it wise to have this suggestion.

JUDGE DOBIE: I second the motion that that be included.

THE CHAIRMAN: Is there any further discussion? It is moved to amend Rule 60(b)

MR. LEMANN: This would be a limiting rule, then?

DEAN MORGAN: No, no.

THE CHAIRMAN: It is moved to amend by inserting after the words "excusable neglect," the phrase, "or (2) through the fraud, misrepresentation or other misconduct of an adverse party."

MR. LEMANN: May I ask a question before voting, to be sure I understand? I just talked to Mr. Dodge about the cases cited on page 166, two cases on which we are both in accord. "Relief from a judgment obtained by extrinsic fraud may be secured by motion within a 'reasonable time', which may be even more than 6 months after the judgment was entered." This is also supported inferentially by a case in the Ninth Circuit. Do I understand that if we add these words the Reporter suggests, we would deny these cases because we would make it plain that it couldn't be done after more than six months? I am not sure. Mr. Dodge gave me that idea from his reading.

DEAN MORGAN: I should think so.

THE CHAIRMAN: That means the man would have to bring an independent suit. If it is more than six months he has to bring an independent suit to set the judgment aside.

MR. LEMANN: We want to correct these cases, is that it? I got the impression from the way the Reporter had written this--"Although Rule 60(b) says nothing regarding fraud, and although the provisions of earlier drafts

incorporating such grounds were omitted, it has been held," etc. That is a strange way to put it, because the rule as it stands does not say anything regarding fraud, and these were fraud cases. I shouldn't think you would use the word "although." I am not sure I understand the situation.

THE CHAIRMAN: The situation as I get it is that the court has held that the court in which the judgment was entered without an independent suit may set it aside on the ground of fraud even after the six months, because our rule doesn't have anything to do with fraud. Now, if we put fraud in, my impression is that it would definitely mean that you couldn't move in the original action to set it aside for fraud unless you did so within six months, isn't that right?

JUDGE CLARK: I think so.

MR. LEMANN: I thought one of the effects of the amendment was to bring fraud into cases that you could act on within six months.

DEAN MORGAN: That is right.

MR. LEMANN: Now I understand the purpose is to make it more than six months. I am a little confused whether it is a liberalizing or a limiting amendment. I thought at first it was liberalizing.

JUDGE DOBIE: It brings fraud under the Rules but limits it to six months. Afterwards, you have to bring an independent suit.

MR. DODGE: We don't affect the independent suit, do we, in any way?

DEAN MORGAN: No.

JUDGE CLARK: I think it does both. It makes clear that the remedy is here. It limits this remedy to the other cases, and why not? I mean, why isn't it the logical thing? It is the same and shouldn't it be treated the same? It clarifies and limits.

MR. DODGE: This does not exclude the bill of review.

JUDGE CLARK: No.

THE CHAIRMAN: All in favor of that amendment say "aye," opposed. It is agreed to.

Anything more on Rule 60?

JUDGE CLARK: Let me just ask this in passing. Of course, Hill v. Hawes, that District of Columbia case, while it does particularly come under the action of the clerk, may suggest this point, and perhaps you ought to think of it a moment here. A court held that a party could not move under this because it wasn't his mistake, and in a way I don't know but that it is a little too bad that 60(b) didn't apply to that situation. I am not wholly sure, but I throw it out. What do you think about that? Here the wording is that he can only move for his own mistake and not the mistake of the clerk.

DEAN MORGAN: Why don't you just strike out "his"?

THE CHAIRMAN: Do you want a clause in here that the

judgment be vacated because the clerk didn't notify the party that it had been entered?

JUDGE CLARK: I don't know that I would want to say finally, but, yes, I think it should be thought of at least. You see, there the District Court did try to act, and the Appellate Court held it had no power to act. If the court gets sympathetic and thinks it is inadvertent, and so on, there is something to be said for its having the power, isn't there?

MR. HAMMOND: Hadn't certiorari been granted in the Hill v. Hawes case?

JUDGE CLARK: Yes.

THE CHAIRMAN: I have an idea we had better let that rest until the decision comes down. It won't be until fall, will it?

JUDGE CLARK: Isn't it going to be argued?

MR. HAMMOND: I don't know. I can check it very easily.

JUDGE CLARK: What do you think of that?

SENATOR PEPPER: That doesn't open the door too wide and it wouldn't appear to me to be an unreasonable limitation. After all, the question is not whether it was, but whether there has been such mistake, and so forth, as should move the court to act.

JUDGE DOBIE: I move that the word "his" be stricken out.

92

PROFESSOR MOORE: I don't believe that would quite do. He was not complaining that the judgment was really taken against him through mistake, and so on. He was complaining that he didn't get notice of the judgment, and hence didn't have before him the fact that he must take an appeal within, under the District Court's time, thirty days.

SENATOR PEPPER: I wasn't thinking of a particular case. I was just thinking apart from any question of mistake by the clerk or oversight by the clerk, of the general proposition that if there is to be a corrective jurisdiction in the court on the ground of mistake, inadvertence, surprise or excusable neglect, there is no reason for limiting those categories to where it was the mistake of the party. Either it is a mistake which the court ought to take cognizance of or ought not, but the dividing line is not whether it was the party's mistake, but whether under the circumstances there was such mistake as the court thinks calls for equitable relief.

THE CHAIRMAN: Well, Mr. Moore's point is that that wouldn't quite fit the cases of failure to hear about a judgment so you could appeal.

DEAN MORGAN: That might very well be.

THE CHAIRMAN: Because this rule relates that the entry was had and the judgment was taken through mistake. In fact, there was no mistake about that at all. The mistake came in, not after the entry, in not giving him notice of it,

93

and he thinks the language of the rule isn't improved by striking out "his" and leaving it mistake of the clerk. The clerk didn't make any mistake under this rule in regard to the taking of the judgment. Judgment was properly entered without mistake.

SENATOR PEPPER: As to that, I should think that the change, if any, should be made in (a), not (b). I was merely trying to relieve (b) of what seemed to me to be an unreasonably narrow restriction; but if the question is what clerical mistakes should be relieved against, that ought to be an amendment to (a), oughtn't it?

JUDGE DONWORTH: I think Senator Pepper's suggestion is well taken, that independently of that suit, the "his" shouldn't be in here.

SENATOR PEPPER: That is all I meant.

JUDGE DOBIE: I agree with that.

SENATOR PEPPER: I think we ought to deal with the question of clerical mistakes, if we deal with it, under (a). Wouldn't that be so, Mr. Moore? Couldn't that be dealt with?

PROFESSOR MOORE: Senator, I agree with you that "his" ought to be taken out.

SENATOR PEPPER: Yes.

PROFESSOR MOORE: I am inclined to think if you want to cover Hill v. Hawes, you ought to do it under 60(b) and not 60(a).

SENATOR PEPPER: How could we do it under (b)?

PROFESSOR MOORE: The reason it shouldn't be done in 60(a) is the theory that those were merely clerical mistakes in the judgment order and that those can be corrected at any time, and I should think you would want a time limitation such as you have in (b), that because of the mistake--sure, it is a clerical mistake--of the clerk in sending the notice, that the court can vacate the judgment, allow a new one to be entered, and then that would give the party adequate notice and time to take an appeal.

We can cover that in 60(b) if you want to cover it there, but I don't think it ought to be covered in 60(a).

SENATOR PEPPER: Very good. All I meant was that there are two questions.

PROFESSOR MOORE: Yes.

SENATOR PEPPER: One is the limitation by the personal pronoun "his" on the general jurisdiction to act in cases of fraud and mistake. Then there is the second question, and distinct from it, as to what ought to be done to cover the case of neglect by the clerk. It is all right with me, if it is needed, if it is done in (c). All I meant was to take one step at a time, and I thought Judge Dobie's motion that we strike out "his" was a good one. I understand you would agree to that.

THE CHAIRMAN: In order to focus my mind on what

the effect of striking out "his" would be, would you give me an illustration of a case where the party against whom the judgment was entered didn't make any mistake, wasn't taken by surprise, but somebody else made a mistake? Just illustrate it.

SENATOR PEPPER: I had the idea that it might easily be the mistake of a notary, that it might easily be the mistake of a clerk of the lawyer of the party, somebody who would be excluded by the narrow use of the word "his" but whose mistake was just as material and called just as much for supervisory jurisdiction as if the man himself had done it. That is all I meant.

THE CHAIRMAN: I know, but I couldn't visualize just what kind of situation that would be. Of course, "his" includes his lawyer. His lawyer is himself, his agent.

SENATOR PEPPER: I wouldn't be sure of that. Where it is taken against him through his mistake--I am not sure that that means the mistake of somebody in his office or his clerk or a notary public.

THE CHAIRMAN: This rule is practically a re-write of a good many practice rules on this subject. Do they contain the word "his"?

DEAN MORGAN: I don't think so. I think the ordinary code provision doesn't contain "his."

PROFESSOR MOORE: This was taken almost verbatim from the California Code as a result of Judge Olney's suggestion. I wouldn't be surprised but that it is a verbatim copy from California.

MR. DODGE: If we take out the word "his," would that enable the party in Hill v. Hawes to get relief?

THE CHAIRMAN: No, because the entry wasn't made by mistake.

MR. DODGE: Hill v. Hawes suggested to the Chief Justice a serious defect in our Rules.

THE CHAIRMAN: That is another problem we take up.

MR. DODGE: We come to that later, do we?

THE CHAIRMAN: We take that up second. The Senator made the point that this word "his" is a separate proposition.

SENATOR PEPPER: I don't think it is worth spending time on.

DEAN MORGAN: As I remember the code provision, it doesn't have "his" in it.

THE CHAIRMAN: I just wanted to be sure that I knew the picture of the case where the man himself against whom the judgment was entered, or his lawyer, hadn't made any mistake and he wasn't surprised. What other kind of mistake by somebody else ought he to be allowed to rely on?

DEAN MORGAN: Suppose it were a mistake by the clerk, other than just clerical?

97

PROFESSOR MOORE: The entry of judgment under Rule 58 when perhaps he shouldn't have entered it. Wouldn't that arise?

THE CHAIRMAN: That is an unauthorized entry. All he would have to do is go to the judge and say, "Under the rules this thing ought never to have been entered," and get it vacated on that ground.

JUDGE DONWORTH: A mistake in the identity of the person served with process. There may be a report of a deputy marshal, and so forth.

THE CHAIRMAN: I don't object to it. I just wanted to understand it.

Well, the motion is to strike out the word "his" in Rule 60(b) before the word "mistake," first sentence. All in favor of the motion say "aye." That is agreed to.

Now, the second proposition is whether we can put a clause in here which allows the vacation of a judgment by the court if, after the entry, the clerk has failed to give the party notice of the fact.

JUDGE CLARK: In order not to be done on the ground of lack of notice, I don't know whether I would suggest it or not. I feel we might want to see what happens in Hill v. Hawes, but the way to do it would really be that way; that is, add to mistake, inadvertence, and so on, "or through lack of notice of the proceeding taken against him."

18

THE CHAIRMAN: You would have to put a separate clause in here because this rule isn't worded here, really, to the matter of taking the entry of the judgment. It is to the rendering of it, not to what happens afterwards.

JUDGE CLARK: I think, particularly as we have marked fraud as (a), it wouldn't be wise now probably to make a new No. 3; but shouldn't our approach to it be, not setting aside of the judgment, and so on, but that he can act because he has failed to have the appropriate notice?

THE CHAIRMAN: The only thing that would help him on the right of an appeal would be to vacate the judgment.

MR. LEMANN: Ordinarily, is this so important? I got the impression that the trouble in the District of Columbia was because they had such a short period for appeal. Is it customary throughout the country to provide that the clerk's failure to give notice of entry of judgment should extend the time for appeal? I am accustomed to the idea that I have to find out what has happened to my cases and find out if there has been a judgment. Our clerk isn't even required to tell me. I have to keep posted.

JUDGE DONWORTH: That isn't quite the question, Monte. It is not a question of extending the right of appeal. It is the power of the court to vacate the judgment so that he can enter a new judgment.

MR. LEMANN: You mean there is a judgment against me.

I don't know it. Twenty days is the time allowed for appeal in the District of Columbia by rule. I don't find out about the judgment until thirty days; then what do I do? I ask the court to vacate the judgment? That comes almost to the same thing as extending the time for appeal.

THE CHAIRMAN: It is just whipping the devil around the stump.

MR. LEMANN: It is giving me more time because I can go to the court any time I find out. That might be six months, or conceivably longer. Then I would get the judgment vacated and the case would be tried over, I suppose, and the whole thing would begin over. It is a startling suggestion to me. Maybe that is provincialism.

THE CHAIRMAN: If we did that, we would have to do something more than provide for postcard notice by mail, because all a fellow would have to do when he wanted to take an appeal after the time had expired would be to go to the court and say, "Well, the clerk may have mailed the thing but I didn't get it," and we would have to amend the other provisions making it compulsory on the party in whose favor the judgment was rendered to serve a notice of the entry within the time for appeal, and file proof of it, to button the thing up.

I have a feeling that what we would be doing, really, is something that the Federal Statutes don't allow, and never

have allowed; that is, to extend the time of appeal if you haven't a notice, instead of saying, you can vacate the judgment because you haven't got notice and immediately enter a new one, which is equivalent to saying that the time for appeal shan't commence to run until you have a notice. It doesn't seem to me to be real to say that you are doing anything else but extending the time for appeal by that process.

MR. LEMANN: Did you refer to notice by the adverse party? My impression was that the only party required to give notice of judgment was the clerk. Is that correct?

THE CHAIRMAN: The present rule provides that the party in whose favor the judgment is entered may serve the notice of the entry, but he isn't obliged to. The clerk is bound to mail to the lawyer the notice of the entry, and if we are going to give him a right to set aside the judgment so that a new one can be entered and really grant him an additional time to appeal because he hasn't the notice, we would have to have something a lot more formal than a mere mailed notice by the clerk.

MR. LEMANN: One way you might do it is to require the fellow who got the judgment actually to make the service for the term of the judgment.

THE CHAIRMAN: And provide that if he doesn't do it, the other party, if he suffers any loss, will have a right to have the judgment vacated.

MR. LEMANN: No, just say it delays the time--the judgment shall not be final until that happens, if you want so to handle it. Say if I get a judgment against you and I want to start the days of appeal to run, I must serve you with a copy of the judgment.

THE CHAIRMAN: My notion is that this case is pending before the Supreme Court and they were considerably aroused, as you know; the Chief Justice was. He sort of overlooked the fact that it was a statute that made the time run from the entry and not from notice, and our Rules weren't to blame for it.

We will defer it until fall, even if the decision isn't handed down until fall. We will have a chance to take a second look at this after we have heard what they have had to say about it, and time to incorporate it in our report.

MR. LEMANN: I think that would be wise, and I think we ought to read the briefs in the case meanwhile, if they are available.

JUDGE DOBIE: I move that we postpone this until we hear something from this case.

THE CHAIRMAN: If there any objection to that? Then we will postpone it.

SENATOR PEPPER: Did that go up on certiorari, Mr. Chairman?

THE CHAIRMAN: Yes, and it has been granted, but I

12

doubt if the case has been argued.

JUDGE CLARK: It was put on the summary docket.

MR. HAMMOND: I can find out by going over to the clerk's office.

THE CHAIRMAN: Do it sometime during the day. I don't know that it is important, anyway. If the decision comes back next Monday, then we can deal with it earlier than next fall. That is all that means.

MR. LEMANN: The curious thing to me is, as I recall it, when I got your letter, I looked this up and found that this 20-day limit for appeal is provided by rule of the Court of Appeals of the District of Columbia, whereas everywhere else the time for appeal is provided by statute and it is 90 days. I just wondered why it was that there was a special situation in the District of Columbia.

THE CHAIRMAN: That is because the Act of Congress regulating the practice of the District here provided that it be fixed by rule, I suppose, and they have since changed the rule, I understand, and made it 30, instead of 20.

MR. LEMANN: That is right.

MR. HAMMOND: I don't know.

MR. LEMANN: That is what they have done; they have changed it to 30, but even at 30 you have just exactly one-third of the time in the District to appeal that you have anywhere else in the country, which seems very strange to me

23

in the Federal Courts.

THE CHAIRMAN: There are lots of cases under the Federal Statutes that you have to appeal in 30 days.

MR. LEMANN: I am speaking of the ordinary private litigation. In ordinary private litigation, everybody else, as I understand the Federal Court, has 90 days, but if you are in the District of Columbia you have only 30 days today.

SENATOR PEPPER: You have no vote here, which makes quite a difference.

JUDGE DONWORTH: I wonder if anyone has looked up the statute, the Act of Congress which changed the name of the court in this District to the Circuit Court of Appeals, and whether that didn't make applicable the three months' clause allowed for appeals to the Circuit Court of Appeals.

THE CHAIRMAN: Evidently not, because the court did have a 20-day rule and now they have a 30. I should assume they knew whether they had authority to do that or not.

JUDGE DOBIE: You are talking about the District of Columbia?

JUDGE DONWORTH: I am talking about the fact that the court is now the United States Circuit Court of Appeals.

JUDGE DOBIE: Not so designated.

JUDGE DONWORTH: I thought there was an Act of Congress so designating it.

JUDGE DOBIE: Court of Appeals for the District of

Columbia?

MR. HAMMOND: They have changed the name by an act but they didn't do anything else but change the name. That is my recollection.

JUDGE CLARK: I think that is true. It is not the Circuit Court of Appeals but the United States Court of Appeals for the District of Columbia.

THE CHAIRMAN: We have no matter before us. It is agreed, then, that we lay this question over of trying to deal with that loss of right of appeal through failure to hear about the judgment until we hear from the pending case before the Supreme Court.

We will pass on to Rule 61? Anything in that?

JUDGE CLARK: On 61, there is nothing for change. In those comments that I put in, we expressed a little regret that the courts seemed to be citing the statute. They are citing the old statute rather than the rule, and the interpretation of the old statute was limited.

DEAN MORGAN: Your colleaguesdid that.

JUDGE CLARK: Yes, and also the Supreme Court in Palmer v. Hoffman. They relied on the statute, not on the rule. The statute, you may remember, was rather narrowly construed in the McCandless case.

THE CHAIRMAN: You mean they are giving the same interpretation to our rule that they formerly gave to the

105

statute. That is more accurate.

JUDGE CLARK: No, no, the other way around was more accurate. They are actually relying on the statute and they cite the statute and forget the rule.

THE CHAIRMAN: How can you fix that up by an amendment?

JUDGE CLARK: I didn't suggest we could.

THE CHAIRMAN: We will pass that.

JUDGE CLARK: I did say it might be a good thing if we got the statute out of the Judicial Code. That is really what ought to happen, as it does in Wisconsin, Arizona, and so on. They take this superfluous material out of the statutes when they get through with it.

THE CHAIRMAN: We will put it out but the fellows who print the Code haven't dropped it.

JUDGE DOBIE: It has been very liberally construed in the Fourth Circuit.

THE CHAIRMAN: We are down to 62, Stay of Proceedings to Enforce a Judgment.

JUDGE CLARK: The only question there is one that is brought up by the Department of Justice and by Mr. Berge, the Assistant Attorney General. He has run into trouble in denaturalization proceedings where, after judgment, he would get a supersedeas bond and it would hold up the matter. He brings up the question of internment of some of these fellows,

whether that is to be held up by the filing of a supersedeas bond. I believe that Judge Otis there came to the rescue of the Government and held that even though the statute in form seemed mandatory, it couldn't be suspended, but in the Seventh Circuit (look at the footnote on 171), the court ordered the release of the defendant on bond.

Now, it is a problem and I sympathize with the Department, but in the first place, by the time these Rules take effect, which would be in the spring of 1945, I think his troubles will be either greater or less. I don't know whether there is anything we can do much with, but there it is and it is a serious question for him.

THE CHAIRMAN: I haven't quite grasped the idea. If you allow a man against whom judgment for money has been rendered to be superseded, and the poor fellow has his citizenship to protect, and the lower court judgment entered cancels his citizenship, the Department, as I understand it, wants that cancellation to go into effect, notwithstanding the man hasn't had time to take an appeal and have the judgment reviewed. Is that what we are after?

JUDGE CLARK: What they really want to do is to intern him; get him denaturalized and get him interned during the war, as dangerous.

THE CHAIRMAN: Deprive him of the right of appeal and intern him until his citizenship is restored, until an

appeal. That is the gist of it.

JUDGE DOBIE: Mr. Berge says he doubts the advisability of it, and possibly the best thing to do is to propose an amendment to the Alien Act or U. S. Code. I move we pass it.

MR. HAMMOND: Yes, I talked to a representative of Mr. Berge's office, and they are all agreed on that. They have to amend the Alien Enemy Act if they want to do anything.

JUDGE CLARK: All right, that is all on that.

THE CHAIRMAN: Amend it so they can incorporate the provision that they can intern a citizen against whom a suit is pending to cancel his citizenship?

Well, we will pass on to 63.

JUDGE CLARK: On 63, we have nothing. It seems to be working all right. We refer to some cases there, but I think there is nothing there.

THE CHAIRMAN: Anything under 64?

JUDGE CLARK: On 64, the first comment is on the summary eviction matter. I understand, Mr. Hammond, we don't need to worry about that. What do you think?

MR. HAMMOND: I think we have covered that very thoroughly now, especially by the amendment to the summary judgment rule. The plaintiff can file that at any time. It comes clearly within it. I think I talked with Mr. Holtzoff about it. You remember that day I was in your office.

MR. HOLTZOFF: Yes.

MR. HAMMOND: And you called up somebody in the Lands Division and I pointed out to them the fact that they could use our summary judgment rule for the purpose of getting the summary eviction, and it just didn't seem to have occurred to them, and they thought it was a good idea. They still objected to the fact that a plaintiff couldn't file a motion for summary judgment until the answer had been filed, but now we have changed that rule, Mr. Holtzoff, and plaintiff can file a motion for summary judgment at any time.

MR. HOLTZOFF: It seems to me this problem will be solved by a motion for summary judgment.

THE CHAIRMAN: All right. Has the Reporter, then, anything to suggest on 64?

JUDGE CLARK: I did suggest that we consider drawing uniform rules for attachment, and so on. I think that is something we ought to consider. I doubt if we are going to do it now, but it has been considered a defect in the Rules that we do not have conformity here on these very important matters. The only thing would be whether sometime we want to consider whether you didn't want a draft presented to you, but we haven't presented any draft now.

THE CHAIRMAN: There is nothing we can do about it now.

MR. DODGE: The question has arisen in Massachusetts whether you can make an attachment in a suit that would have

been a suit in equity under an old practice, there being no attachment in an ordinary suit of equity under the rule of the state. How is that left by this?

JUDGE CLARK: I don't know. I should think probably you could not under our rule. We say it is under the law of the state, and if the law of the state says that we have to consider whether this was in the nature of an equity action, and if it was, I guess there would be no attachment.

PROFESSOR SUNDERLAND: Wouldn't you run into the question of substantive law there, seizing property?

JUDGE CLARK: I don't know.

PROFESSOR SUNDERLAND: If you provide rules for those things, you would run up against that question of Erie Railroad.

THE CHAIRMAN: The right to seize, yes. Well, we haven't anything before us on it. We shall go to 65, Injunctions.

JUDGE CLARK: The rule, I think, on the whole seems to be doing all right. In Rule 65(c), the Department of Justice suggests that there ought to be a provision for recovering against the surety on an injunction bond in its form which now appears as to the appeal form in Rule 73(f). That is somewhat comparable to the question we were discussing a little while ago as to bail bonds. I don't see why that couldn't be done, and we put in a provision at the foot of

page 176 for the addition of a paragraph to 65(c) doing that.

THE CHAIRMAN: That reads: "The person giving the security thereby submits himself to the jurisdiction of the court and irrevocably appoints the clerk of the court as his agent upon whom any papers affecting his liability on the security may be served. His liability may be served on the clerk of the court who shall forthwith mail copies to the person giving the security if his address is known."

MR. TOLMAN: I move the adoption of that.

THE CHAIRMAN: That is the same thing we have on cost and supersedeas bond, isn't it?

JUDGE CLARK: Yes.

THE CHAIRMAN: Is there any objection to that?

JUDGE DOBIE: I move its adoption.

JUDGE DONWORTH: I second the motion.

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

JUDGE CLARK: That is all I have on injunctions.

THE CHAIRMAN: We come to 66.

DEAN MORGAN: Now Judge Donworth comes in.

JUDGE DONWORTH: I am a good loser, and I lose on that. The only consolation I have is that the United States District Court for the Western District of Washington made a local rule.

JUDGE CLARK: What is this? I don't know that you

.11

have lost, have you, Judge? What are you talking about?

DEAN MORGAN: You haven't lost yet. You always postponed your stuff until we got to it.

THE CHAIRMAN: You haven't lost it.

JUDGE DONWORTH: The general rule here is that a plaintiff may dismiss an action at any time of his own motion if the defendant has not answered. My point is that if there has been a receiver appointed, it is absurd to let a plaintiff dismiss that suit and disarm the court from its control over the property merely because there has been a delay in the filing of an answer. The District Judges for Washington said they wouldn't by any means permit a suit to be dismissed where they had an officer in charge without their being consulted.

JUDGE CLARK: Well, Judge Donworth, I didn't realize that we were so close intellectually, although I always assumed we were. Why isn't that contained in the foot of 179 in connection with our other suggestions?

DEAN MORGAN: 179, you mean?

JUDGE CLARK: Yes. We make a general suggestion covering the matter of the proper receiver to sue, the suggestion that the Supreme Court did not put into effect when we made those two amendments, one as to the Longshoremen's, which was accepted, and another as to applying the Rules here. Then it also contains your suggestion.

JUDGE DONWORTH: I am very glad to hear it.

THE CHAIRMAN: You never lost it before the Committee. The Committee approved it and it went to the Supreme Court and the Court threw it out, and I always thought they threw it out, not because they objected to the amendment, but because they wanted at that time to confine themselves to the matter of extending the scope and not amending the Rules. So they adopted our Longshoremen's rule which included those cases in the scope, but they rejected what seemed to them a rather minor amendment to the Rules as they stood. They were standing pretty tight on the proposition then that they didn't want to be tinkering with the Rules so soon.

JUDGE DONWORTH: I can see the reason for that.

THE CHAIRMAN: The fact that they rejected it then is no reason for our putting it up again if they think it is a meritorious amendment.

JUDGE DONWORTH: The Washington District rule is that, "No action in which a receiver has been appointed shall be dismissed by any party except by leave of court and on such notice to other parties as the court may prescribe." Is that substantially what you have?

JUDGE CLARK: Yes. You see the last part of our underlined provision there. The provision in general is that in all other respects except administration, and so on,"including all appeals and all matters of capacity,"--that expression is to cover this question that has troubled the courts as to

3

which receiver ancillary, and so on, should sue--these Rules are to govern, "except that any action wherein such an officer has been appointed shall be dismissed only by order of the court."

JUDGE DONWORTH: That is satisfactory to me. It is not quite the language of the other rule but it is all right.

THE CHAIRMAN: What do you mean by your proposed amendment, by this phrase which says, "In all other respects, including all appeals and all matters of capacity"?

JUDGE CLARK: That is the discussion under 17(b).

THE CHAIRMAN: I haven't had time to read it this morning. Will you please tell me what you mean by it?

JUDGE CLARK: In Bicknell v. Lloyd-Smith, the court held that Rule 17(b) prevailed over Rule 66 with respect to suit in federal court by a state receiver, and that meant--now, let's see, which receiver did that mean sued?

PROFESSOR MOORE: The state receiver was suing, and under New York law he would have capacity to sue. The federal court held that he had capacity to sue in the federal court. Then in Kelley v. Queeney, it was a case of whether a federal receiver appointed in another federal court had capacity to sue in the Western District of New York, and the court held that he did not, that 66 prevailed.

THE CHAIRMAN: There is a conflict between circuits,

then.

PROFESSOR MOORE: No, sir. The first case, the Bicknell case, is a Second Circuit case, but there the court discusses only the capacity of a state receiver to sue in a federal court. The second case dealt with the capacity of a federal receiver to sue in a federal court.

JUDGE CLARK: Without ancillary appointment; so that they are a little different situations although the idea is a good deal the same.

THE CHAIRMAN: Is it sufficient that you just use the word "capacity" without saying "capacity to sue"? Is that good?

DEAN MORGAN: Yes, I think you ought to have that, "to sue or be sued."

MR. TOLMAN: I didn't know what it meant.

THE CHAIRMAN: That is my idea--capacity to sue. I understand that, but I was wondering whether it is good, whether you want to put those words in, or whether it is enough just to say "capacity."

DEAN MORGAN: "Capacity to sue or be sued."

PROFESSOR MOORE: "Capacity to sue or be sued." That is what is in our minds.

THE CHAIRMAN: I think most lawyers would understand it better that way.

DEAN MORGAN: Yes, I think so.

15

THE CHAIRMAN: "Capacity to sue or be sued."

MR. DODGE: Does that free the foreign receiver under Rule 17(b)?

JUDGE CLARK: That is the intent, yes.

MR. DODGE: That provides, "In all other cases capacity to sue . . . shall be determined by the law of the state in which the district court is held."

JUDGE DONWORTH: What rule is that?

MR. DODGE: 17(b) is the one that Judge Hand thought was inconsistent with Rule 66.

PROFESSOR MOORE: This change in 66 would deal only with capacity of a federal receiver to sue or be sued in the federal court, as I would understand it.

JUDGE DOBIE: You don't try to touch the state receiver in any way, do you?

PROFESSOR MOORE: 17(b) governs that. If he has capacity to sue under state law, then he would have.

JUDGE DOBIE: Without any appointment or any ancillary?

PROFESSOR MOORE: Yes, sir.

JUDGE DONWORTH: He would have to show diversity of citizenship or some other federal ground, would he not?

PROFESSOR MOORE: That is correct.

THE CHAIRMAN: This proposal also reincorporates Judge Donworth's point, puts it back up to the Supreme Court another time.

.6

Are you ready to vote on it?

MR. DODGE: I would like to be a little clearer about it. How far is this proposed to go? In the federal court in the Southern District of New York, you want to let what receiver sue what ancillary appointment?

PROFESSOR MOORE: Any federal receiver can sue.

MR. DODGE: Appointed anywhere in the country?

PROFESSOR MOORE: Any federal receiver, yes.

MR. DODGE: How does 17(b) do it?

PROFESSOR MOORE: Well, 17(b) was held not to prevail over 66, and to affect the capacity of a federal receiver to sue. Whether or not a state receiver would have capacity to sue in a federal court would be determined by the state law. Since he has capacity to sue in New York, he would have capacity to sue in the federal courts of New York.

MR. DODGE: You refer the capacity to sue to these Rules. Nothing in these Rules deals with it except 17(b).

THE CHAIRMAN: We are dealing in this amendment wholly with federal receivers because it is an action in the federal court in which the receiver has been appointed that we are talking about. Isn't that so?

MR. DODGE: Has the practice heretofore followed by the courts of the United States recognized the right of a foreign federal receiver to sue?

PROFESSOR MOORE: No, sir.

17

MR. DODGE: Then you come back to 17(b) as the only part of our Rules that would be applicable.

JUDGE DONWORTH: Isn't there a federal statute that says that the appointment of a receiver in a District makes a good qualification for the receiver throughout that circuit?

JUDGE DOBIE: I think it gives him jurisdiction over property.

MR. LEMANN: For that circuit. That was railroad receiverships particularly. That was confined, I think, to the circuit and has relatively limited application. On page 179 the Reporter cites a case which followed Judge Hand's case, and he has distinguished Judge Hand's case and held that a federal receiver could not sue without an ancillary appointment. Judge Hand's case was a state receiver suing in a federal court?

PROFESSOR MOORE: Yes, sir.

MR. LEMANN: And he has had no trouble. He has said, "Notwithstanding Judge Hand had no trouble, somebody else might have some trouble, so we had better make this plain that Judge Hand was right." Am I right in understanding that we wouldn't change the later case which held that there must be an ancillary appointment for a federal receiver? Mr. Dodge points out that 17(b) wouldn't control that because that would be a case of a federal receiver seeking to sue in another

federal district, and all 17(b) would cover would be a state receiver suing in a federal court.

PROFESSOR MOORE: The federal receiver would have capacity to sue by the law of New York. Therefore, he would have capacity to sue in the federal court of New York, wouldn't he?

MR. DODGE: A foreign federal receiver can sue in the state courts of New York?

MR. LEMANN: What was the basis of this decision on 41 Supp. that you cite on page 179 distinguishing the Bicknell case, by which of course that court would have been controlled because that was a New York District Court and they would have been controlled by Judge Hand's opinion, and they said that a federal receiver could not sue in a federal court other than that appointing him without an ancillary appointment?

PROFESSOR MOORE: The theory of the court there was that the former federal rule had always been that a federal receiver did not have capacity to sue in another federal court, and that we had continued that practice by Rule 66. We dealt with that specific matter by the general rule on federal receivers. That is the way the court distinguishes.

MR. LEMANN: What did they do with Judge Hand's decision? They say it didn't apply because he was dealing with a state decision.

PROFESSOR MOORE: He specifically left open the

problem of the capacity of the federal receiver.

DEAN MORGAN: Won't that now depend upon the state law?

THE CHAIRMAN: Yes.

DEAN MORGAN: The law in the state in which the court is sitting?

PROFESSOR MOORE: Yes.

DEAN MORGAN: That is what you want?

THE CHAIRMAN: Let me ask you a question. I understand that the general rule has been heretofore that the federal receiver can't sue in any federal court except the one in which he has been appointed. If he wants to go out of that jurisdiction he has to get an ancillary appointment. That is the old, the ancient rule. Now you come along, and as I understand the intended effect of your amendment, you mean to provide, not that all receivers would sue in federal courts in all jurisdictions, but that that is permitted to a federal receiver to sue in another federal court only where the state law in that particular other federal court would permit him to sue in a state court. That is your purpose. If you are going to allow a federal receiver to sue in a federal court outside of the jurisdiction appointed him, why should we say he can only do that where the particular state law would allow him to bring an action in the state court? What is the reasoning back of that? If we are going to allow him to go into other

jurisdictions to sue without an ancillary appointment, why should we restrict him? In cases where the state law would allow it, what is the reason for restricting it that way?

MR. DODGE: Aren't the state statutes which allow a foreign receiver to sue in their courts very few and very rare?

PROFESSOR MOORE: I am sorry, I didn't get the question.

MR. DODGE: Aren't the state statutes very rare which allow a foreign receiver to sue in their courts without ancillary appointment?

PROFESSOR MOORE: No, sir, there are quite a few--I don't know whether in the majority of states or not, but there are quite a few states.

MR. DODGE: If we want to allow foreign receivers to sue, I think, as the Chairman says, it would be very much better to say so explicitly and not leave it to the particular statutes of the states of which there may be only a comparatively few?

THE CHAIRMAN: I can't see any reason for letting the state law muss it up. What do we care? This is federal business--a federal receiver suing in another federal court. Why should we draw a line of distinction between those cases where they can do it in the state court and those where they can't? I think we ought to say either that they have to get an ancillary appointment to sue in another federal court or

that none of them have to get it in any state.

JUDGE DOBIE: I should agree with you a hundred per cent; I think we should say specifically he should be able to sue without the necessity of any ancillary appointment.

MR. DODGE: Say so expressly.

JUDGE CLARK: I guess we can change that easily enough, can't we? There isn't any reason why we can't do it, is there, that you see?

PROFESSOR MOORE: I agree with you, Mr. Chairman. The only reason we went this far, no farther, was that it looked perfectly silly to hold that the foreign federal receiver could sue in a state court of New York but couldn't sue in a federal court.

JUDGE DONWORTH: This is merely a doubt I am throwing out. Would there be any trouble over the claim that we are extending the jurisdiction of the court appointing the receiver--which we cannot do--if we allow that receiver to act ipso facto in another district?

THE CHAIRMAN: That would go against the amendment as it is because the state law can't extend the jurisdiction of the court appointing the receiver, and yet we are recognizing the fact that if there is a state law allowing a foreign federal receiver to sue in the state --

JUDGE DOBIE (Interposing): I don't believe there is any difficulty about the point that Judge Donworth raises. Of

course, he has to show some basis for getting in, but if he can show the requisite jurisdictional facts, I think it would be very advisable. It seems to me pretty silly when a receiver comes into North Carolina appointed by a federal court in another state and he can sue in North Carolina because their state law permits it, and then he wants to bring exactly the same suit in Virginia and he can't sue there. That seems to me to be complicated and bad.

MR. LEMANN: You would have to change 17(b), wouldn't you?

DEAN MORGAN: No.

MR. LEMANN: It says, "In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held." Now, you would have to say that was simply controlled by 66 as to receiverships, because if you adopted the provision that has been suggested, you would be superseding the state law. You would have a federal receiver in North Carolina permitted to sue in the federal courts in Virginia, when under the state law of Virginia, perhaps, he wouldn't be able to do it.

JUDGE DOBIE: I agree with that.

MR. LEMANN: Therefore, there would be a conflict, it seems to me, between 66 as proposed and 17(b) which from a draftsmanship standpoint I think we ought to take care of.

THE CHAIRMAN: You can readily do that in the

23

earlier rule by simply saying, "except as provided in 17(b)."

MR. LEMANN: That is right.

JUDGE DOBIE: I make that motion, if it is proper, Mr. Chairman.

THE CHAIRMAN: Are you satisfied that it is all right for the federal courts to adopt a rule that allows any federal receiver capacity to sue in any federal court around the United States? Would there be any kick-back on that?

MR. DODGE: Who has authority under his appointment to bring suits.

THE CHAIRMAN: I don't suppose we need to say anything about that. The judge who appoints him knows whether he should be allowed to do it or not, I suppose.

MR. LEMANN: Of course, that wouldn't do away with the necessity of the ancillary qualification, perhaps, where he wanted to do some things besides bringing suit. Suppose he wanted to come in and take charge of the property; he would have to qualify there in the Second District.

JUDGE DOBIE: I think it ought to be limited absolutely to suits.

MR. DODGE: Capacity to sue.

JUDGE DOBIE: Yes.

DEAN MORGAN: Or be sued.

MR. LEMANN: The capacity used to be confined, Judge Donworth. A receiver appointed in Louisiana couldn't

take charge of property in Mississippi in the federal court.

DEAN MORGAN: You couldn't do that.

JUDGE DONWORTH: I don't think that is confined to railroads, though.

MR. LEMANN: I think not, but I think it was intended primarily to cover their case.

THE CHAIRMAN: Now, the motion is--we won't try to frame the provision. Is Rule 66 about receivers the rule that we are dealing with here?

JUDGE DOBIE: Yes.

THE CHAIRMAN: Yes. Instead of having the proposal which the Reporter sets forth on page 179 of his report contain a provision that expressly gives federal receivers capacity to sue in any federal districts, that coupled with that will be an appropriate exception or reference will be made to the previous rule dealing with capacity of parties, referring to Rule 66, so as to make them coordinated. Is there any further discussion? If not, all in favor of that proposal say "aye." Carried.

JUDGE DOBIE: That is Rule 17(b)?

THE CHAIRMAN: Yes, the earlier rule.

JUDGE CLARK: This is just capacity to sue, not to be sued?

THE CHAIRMAN: Oh, no, to sue or be sued.

DEAN MORGAN: Both.

MR. DODGE: To sue or be sued?

MR. LEMANN: It ought to work both ways.

DEAN MORGAN: That is another problem.

MR. DODGE: Capacity to be sued?

DEAN MORGAN: Capacity to be sued, yes.

JUDGE CLARK: We just won't know, that is all.

JUDGE DOBIE: I think it ought to extend to both, sue or be sued.

THE CHAIRMAN: Suppose the receiver taking a trip to New York is the receiver appointed for the California federal court; do we want to provide that you could get service on that man in New York in a federal court suit and compel him to respond there? I was thinking of it in my discussion in terms of cases where his own court wanted him to go into another state and bring a suit.

MR. LEMANN: Where he had to, to get the defendant, to get service.

THE CHAIRMAN: I am not so sure that we want to make him subject to suit in any other district just because he happens to be temporarily there.

MR. LEMANN: I think you are right.

THE CHAIRMAN: I think it ought to be limited, that our extension ought to be limited to his capacity to sue.

JUDGE DOBIE: I think you are right.

THE CHAIRMAN: I am afraid that there might be some

question.

JUDGE DOBIE: Exactly. You are a receiver appointed by the District Court from New York and you come down to the Farm and Country Club at Charlottesville toplay golf; I don't think the marshal ought to rush out there and serve you. I think I would limit it to capacity to sue.

THE CHAIRMAN: Capacity to sue in another district where the court appointing him has authorized him to do so. That will negative the idea that anybody can sue him there without the permission of the appointing clerk.

MR. LEMANN: Suppose the state law said it could be done.

JUDGE CLARK: That would then apply here.

MR. LEMANN: You would have to be careful in drafting this to negative that. You have a general implication of the state law in 17(b). You have to limit that.

PROFESSOR MOORE: Put an exception in 17(b) to the effect that capacity to sue or be sued in respect to a federal receiver is governed by 66.

MR. LEMANN: You have to make it plain in 66 that he cannot be sued; that he only can sue. Otherwise, somebody will say you haven't covered it.

THE CHAIRMAN: I may not be very scientific in my point because "capacity to sue" and the right to bring suit are different sorts of things, but I just gagged at the

.7

idea that we are doing anything that looked like subjecting the foreign receiver to suit.

JUDGE DONWORTH: I think you are right. I think there is a federal statute that says a receiver appointed by a federal court may be sued in respect of his doings in the operation of the property without the consent of the court appointing him, but that has nothing to do with the locus and I think you are entirely right about restricting him, not enlarging the matter by expressly giving the right to sue him.

THE CHAIRMAN: We might fix it up by saying he has capacity to sue or be sued in any federal court, but this shall not be construed to enlarge the right now fixed by law to sue him. I think you will have to refer this to the Reporter and have him bring in another draft at our next meeting after further consideration. Don't you think so?

JUDGE CLARK: All right.

JUDGE DOBIE: I think so.

PROFESSOR SUNDERLAND: "Capacity to be sued" puts in a counterclaim against him.

THE CHAIRMAN: That is interesting. Certainly I should think he would be allowed --

JUDGE DOBIE (Interposing): I think if he submits himself to the jurisdiction of that court --

PROFESSOR SUNDERLAND: If he has no capacity to be sued, how could you file a counterclaim?

THE CHAIRMAN: You are right about that. I am not very scientific about it. It may be that I am all hay-wire and that the mere statement of capacity doesn't mean that you have any right to sue.

DEAN MORGAN: He might have a privilege against suit.

THE CHAIRMAN: It is the understanding that the motion is that that matter shall be referred to the Reporter, with the thought that if we can give him capacity to sue in any federal court outside of its own jurisdiction, it is safer to do it, and we will come in with a draft to that effect and a proper amendment will be made to the previous rule on capacity.

DEAN MORGAN: In other respects, Mr. Chairman, with that modification, then, I would like to move the adoption of the Reporter's recommendation on page 179.

JUDGE DONWORTH: I second that motion.

THE CHAIRMAN: That includes Judge Donworth's provision about voluntary dismissal of receivership cases?

DEAN MORGAN: That is right.

THE CHAIRMAN: All in favor say "aye," opposed. Carried.

MR. LEMANN: Ought you now to put in some reference in 41 governing dismissal, the fact that you cannot dismiss in a receivership case? Someone will say that 41 and 66 conflict.

DEAN MORGAN: This says in other respects the Rules shall apply, except --

MR. LEMANN (Interposing): You have a limitation on the right to dismiss in 66 as amended.

DEAN MORGAN: Ordinarily this limits the application of the Rules generally to receivership.

THE CHAIRMAN: Mr. Lemann's idea is that a lawyer who doesn't happen to see 66 will read 41, and 41 is broad enough to allow the dismissal of a receivership suit, and then he wants a cross reference from 41 to 66.

MR. LEMANN: That is right. Also, not only a lawyer will overlook it but someone will make an argument that the rules conflict with each other, that you have a broad statement in 41.

DEAN MORGAN: What have you got under Receivers? Look at Receivers and see what you have.

MR. LEMANN: 66 as amended says, "any action wherein such an officer has been appointed shall be dismissed only by order of the court," whereas Dismissal, in 41, contains no limitation.

DEAN MORGAN: Wait a moment: "The practice in the administration of estates by receivers," and so forth, "shall be in accordance with the practice heretofore followed," and so forth. And then, "In all other respects," and so on, "these rules shall apply, except . . . ."

MR. LEMANN: I don't think I have made my point, Eddy.

DEAN MORGAN: I think you have perfectly clearly made your point.

MR. LEMANN: Then I don't understand your answer to it.

DEAN MORGAN: My answer is that anybody who is dealing with receivers will have to look at Rule 66 because that is the place where we deal with receivers specifically. Are you going to put an exception in every rule that it doesn't apply to administration of the estates of receivers? That is what you would have to do according to your notion.

MR. LEMANN: I would turn to Dismissals and see that it says, "subject to the provisions."

DEAN MORGAN: You would turn to other things, wouldn't you, other rules?

MR. DODGE: 66 applies only to the practice in the administration of estates, and does not apply to a preliminary dismissal of receivership before there is any administration, does it?

DEAN MORGAN: It deals with the whole scope of the Rules with reference to receivers.

MR. DODGE: I should think in Rule 41 there should be an "except as provided in 66."

JUDGE DONWORTH: I put a note on 41 as to 66.

51

THE CHAIRMAN: The lawyers won't see that. The motion is on everything now provided in Rule 66, that you can't dismiss a receivership action without an order of the court; that the Reporter put a cross reference in Rule 41 to make it clear that the broad provisions about dismissal in 41 are qualified in receivership cases by Rule 66. Are you ready for the question? All in favor say "aye," opposed, "no." That is carried, and we will go to lunch at one o'clock.

MR. TOLMAN: Gentlemen, last night Judge Donworth and I sent to the Lands Division suggestions for amendments in the draft, the mimeographed draft which they had submitted to us. This morning I had a conversation with the head of the Division and he says that we will undoubtedly agree upon all the matters that we have submitted to them, but we will have to have one more conference. In the meantime, since we can't get our final draft to you here, there has been a request that this mimeographed draft be retained by those who desire it, with the statement that it is still subject to further amendment. They are here for anyone who wants them.

THE CHAIRMAN: We have a minute before lunch and I am going to read a letter to the Attorney General urging action on this condemnation rule. I just want to see whether you think we are committing the Committee too far. It says: "My dear Mr. Attorney General:

"Your letter of the 15th about rules in condemnation

32

cases was received and presented to the Advisory Committee yesterday.

"It has been impossible for the Committee to take up the matter at this meeting. We are barely able to do the work laid out for us in connection with proposed amendments to existing rules, but we would have been willing, I am sure, to find a way to consider a condemnation rule, if we had had an opportunity to study a proposed draft. We ought to have such a draft sufficiently in advance of a meeting so our members may study it.

"I understand our subcommittee and your representatives have nearly reached substantial agreement as to the form of a draft to be submitted to the whole committee. If such a draft can be made ready and distributed to our members within the next week or so, we will consider and reach a conclusion about it at our next meeting which we expect to hold in June.

"We all appreciate the urgency of the matter to the Government and you may be sure we will do our utmost to report the rule to the Supreme Court when it reconvenes in the fall, and I see no reason to doubt that we will succeed."

That gives us a chance, if we pass on this rule in June, for instance, to send it out to the Bar during the summer and to report to the Court on it in the fall. Do you think I have gone too far in my promise?

5

PROFESSOR SUNDERLAND: Does that imply we send the condemnation rule up alone?

THE CHAIRMAN: It doesn't say one thing or another about it.

PROFESSOR SUNDERLAND: It seems to commit us on that rule when we aren't committed on that rule.

THE CHAIRMAN: I wouldn't care if it did. I am not so sure that we are very anxious to have the condemnation and our other rules go through at once, because if they don't like the condemnation rule in Congress, they may hold up the other, and it wouldn't hurt my feelings if we found that we couldn't get our general amendments ready by January 1, but the Department is very eager to have this thing brought to a focus on the condemnation. What is the harm if we adopt the condemnation rule, if that is satisfactory and the Court says it is O.K.; what harm if it does go up and let the Department have a separate fight in Congress on it?

JUDGE DONWORTH: Does your letter, Mr. Chairman, imply that this condemnation statute or rule will be adopted by us without submission to the Bench and Bar of the country?

THE CHAIRMAN: It doesn't say anything about that one way or another. All I talked about is reporting to the Court in the fall, and I said that deliberately with the idea that we would not send it out to the Bar of the country. I thought of saying to them, "We won't report it until we have

consulted the Bar," but I just thought there wasn't any need for saying anything about it. We will just go ahead and do it.

JUDGE DONWORTH: All right.

THE CHAIRMAN: That is why I wanted to read it, to see what you thought.

JUDGE DONWORTH: My view is that the matter is of national importance and that the lawyers of the country will want to see this before it gets beyond the stage of amendment.

PROFESSOR SUNDERLAND: They won't interpret a letter where we say we will submit it to the Court in the fall, as undertaking to submit it in final form to the Court with our approval without having gone to the Bar?

THE CHAIRMAN: Don't ask me. I read the letter to you to see whether you interpreted it in a way that is objectionable.

SENATOR PEPPER: It was clear to me as you read it that it was notice to him that we couldn't act on it now, but if he did certain things within the next week or so, we would act on it in June, then we would submit it to the Bar, and that we hoped to be able to do something about it. That is all I got out of it.

THE CHAIRMAN: I didn't say anything about submitting it to the Bar. That is implied in the very fact that we are not going to put it up to the Court until they meet in October. I didn't say in October; I said in the fall. That

435

gives us the opportunity to distribute it to the Bar during the summer. I considered whether I ought to tell him we were going to do that, and then I thought, what is the use? However, if you want me to say in the letter that we expect then to distribute it to the Bar during the summer in time to make a report to the Court in the fall, I will be very glad to do it.

MR. LEMANN: The only purpose would be to prevent misunderstanding on his part. That is what we would plan to do. I think your letter would certainly not be inconsistent in any way with ourdoing it. Anybody familiar with our procedure ought to read that into it.

SENATOR PEPPER: I guess that is what I did.

MR. LEMANN: I did, too, until Judge Donworth raised the question. That might save misunderstanding. Tell him so he will know it.

THE CHAIRMAN: We might say we will do our utmost to go through the usual procedure we follow and before we report the rule to the Court, we expect to distribute it to the Bar. Maybe it is a good thing to speak right out frankly and say so. I think that is certainly what we are going to do.

I will vary that sentence and say that of course it will have to go to the Bench and Bar, the way our other rules do.

SENATOR PEPPER: Make it clear that is not going to

be a separate submission, holding this up as a target, but that it would go along with the other matter. Wouldn't that be true?

THE CHAIRMAN: Well, you see, here is the difficulty: I haven't yet had time to see the Chief Justice and get his permission now to distribute our draft that we make in June to the Bar, sight unseen by the Supreme Court. I was going to take this condemnation matter up with him at the same time as the other; and suppose the Court refuses to allow us to distribute these Rules to the Bar this June and says, "No, we want to come back in the fall and look them over." If the two things are going together, that would hold up the Attorney General on the other rule because he certainly couldn't get it ready by January 1 if you are going to send it out to the Bar after October 1. So there is a little trouble about that.

SENATOR PEPPER: Would it be your thought that there might be a contingency in which the only thing that we would submit to the Bar would be this proposed body of condemnation rules?

THE CHAIRMAN: Don't you think it is possible? I mean, of course, we will submit our amendments later, but it seems here is the Attorney General with all these cases pending. It is a Government job. It isn't a matter that is common to others, and they want this thing put through. They

are even talking about having the court promulgate the rule and get a special resolution through Congress to make the condemnation rules take effect at once. If we have got to tie up the condemnation rules with our amendments in our distribution to the Bar and anything that happens so that we can't get permission to send our own Rules out in June, then that "busts" the Attorney General's rule for January 1. Of course, he could get it ready in February and the Court could submit it to Congress then and ask for a special resolution allowing it to take effect even though it wasn't filed January 1 to the Congress. I don't know how we would handle that.

SENATOR PEPPER: The reason I asked was that I thought it would be unfortunate from the Government's point of view if they were submitted as a sort of separate target for the Bench and Bar to shoot at, because it will excite a lot of criticism, and I should think it would have a better chance of approval if it was part of our general submission, and not the only thing before them, but maybe there is nothing in that.

THE CHAIRMAN: The question now is what we are going to say to the Attorney General about it, and I guess we had better adjourn to lunch and take it up afterward. I thought maybe we could settle it promptly.

... The meeting adjourned at 1:10 p. m. ...

THURSDAY AFTERNOON SESSION

May 20, 1943

The meeting reconvened at 1:45 p. m., Chairman Mitchell presiding.

THE CHAIRMAN: The meeting will come to order, please.

I will read again this letter to the Attorney General as I have changed it and we will see whether you want to correct it any further.

(The Chairman read the letter as changed.)

JUDGE DOBIE: I think it is fine.

THE CHAIRMAN: As long as you are not worried about this putting us in too deeply, it is all right.

We have now finished 66, as I understand it. Mr. Moore, will you go on with Rule 67. There are no changes suggested in that, are there?

PROFESSOR MOORE: That is correct.

THE CHAIRMAN: What have you to say about Rule 68.

PROFESSOR MOORE: There is one rather formal change proposed as to the manner of serving the offer; and then there is one change of substance. The change of substance deals with a situation that has been called to our attention, where the plaintiff got a decree that his patent had been valid and had been infringed. The plaintiff took an appeal and he won out, but before the accounting came on the defendant made an

offer that the plaintiff could take a certain amount as judgment against him. The plaintiff did not accept the offer, went ahead with the accounting and recovered less than the offer, and the accounting before the Master amounted to quite a sizable sum. Defendant contended that he wasn't subject to the costs after he had made his offer.

There is no case reported on it, but the lawyer (the counsel for the plaintiff) wrote me about it and did say that the District Court had decided against him that he could not recover costs against the defendant from the time the defendant had made the offer which preceded the accounting.

We propose to cover that situation and also the situation where you may have a trial and judgment--an appeal that comes back for a new trial--and the plaintiff wants to make an offer before the second trial--or the defendant does--and we feel that if he does that he should not be liable for costs after that offer if the plaintiff fails to recover more of a judgment--a more favorable judgment--at the second trial. The amendments to accomplish that appear in the first two lines. We substitute "hearing" for "trial" and for the final disposition of the claim.

THE CHAIRMAN: Page 183 of the Reporter's document.

PROFESSOR MOORE: And then add the final paragraph.

THE CHAIRMAN: What was the trouble in your particular case?

PROFESSOR MOORE: Well, in that case--

THE CHAIRMAN (Interposing): Why did the Court refuse to recognize the offer? Because it was made before the trial as to the validity of the patent even though before the trial on the accounting; was that the reason?

PROFESSOR MOORE: The case is not reported, but from the counsel's report of it, the Court finally decided it as we have drafted it here; but the plaintiff was trying to contend that the offer was no good since it was not made more than ten days before the trial on the validity of the infringement had begun.

THE CHAIRMAN: I think the Court was right, and the Court should construe the word "trial" as being a trial split up that way as to the matter of the right of recovery followed after that by the interlocutory judgment which was rendered at the trial as to the amount of the recovery or the accounting.

JUDGE DOBIE: There is a long line of cases on that point, gentlemen, in connection with specific removal cases where the petition for removal is filed before the trial begins; and they say that the summoning of the jury, and things like that, is setting the stage, but the very minute that you use the means, that is the beginning of the trial and it is too late. I would say the decision is right.

THE CHAIRMAN: You are not trying to change the result

arrived at by the Court as to the interpretation of the Rule?

PROFESSOR MOORE: No, sir, we are trying to adopt that and trying to cover that situation where you have a second trial.

JUDGE DOBIE: Now, on this amendment "before the hearing", if he made this tender before the accounting, that would be in time.

PROFESSOR MOORE: To toll the costs from there on.

JUDGE DOBIE: I think so, because in some of those patent cases, that is the biggest thing.

PROFESSOR MOORE: That was true in this case. The costs on accounting were very large.

JUDGE DONWORTH: It is a very expensive litigation, as everybody knows, and this Rule is intended to discourage litigation and encourage settlements; that is its purpose, of course.

THE CHAIRMAN: That last proposal at the end of the amendment is to deal with cases where there is a new second trial after the first is set aside, is that it?

PROFESSOR MOORE: Yes, sir. It requires a new offer before it (the second trial) occurs. That would toll costs from there on if the plaintiff failed to recover more than was then offered.

THE CHAIRMAN: But suppose ultimately, after the first trial, he offered a certain sum and won, and then a new

trial was granted, and in the final wind-up he doesn't get more than he offered in the first place. Why wouldn't that original offer be allowed to protect him against the costs on the first trial? They are to abide the event usually of the second trial. It says: "An original or other prior offer shall have no effect in proceedings subsequent to the granting of a new trial."

JUDGE DOBIE: Maybe the idea there is that a lot of testimony may have come out and things may have changed so that he wouldn't be willing to be bound by that offer in the light of what came out in or at the first trial.

DEAN MORGAN: He isn't bound by it anyway if it isn't taken up within twenty--ten days. He is not bound by it at all.

PROFESSOR MOORE: We put it in a case where if at the first trial he doesn't take what the defendant offers, and then there is an appeal, and that is the way the case would stand at that point, the plaintiff would be entitled to recover his costs on appeal. The judgment is knocked out and sent back for a new trial; and again on the new trial the plaintiff recovers but this time less than is now offered by the second offer. You think the plaintiff should lose all of his costs up from the time of that first offer?

DEAN MORGAN: If he doesn't recover more than the amount of the first offer, certainly. Why not? If the

plaintiff wants to make another offer after the first trial, then he can make another and a larger offer. I mean the defendant, rather.

THE CHAIRMAN: This amendment not only makes clear the right of defendant to make a new offer before the second trial; that would be all right. But it seems to take away from the defendant any benefit he has by having offered prior to the time any trial was had a certain sum which in the long final wind-up amounts to more than the plaintiff recovered.

PROFESSOR MOORE: But without any Rule 68 the plaintiff would get costs, would he not, on the whole suit if in the end he wins out, unless the Court used its discretion to tax the costs otherwise?

THE CHAIRMAN: Why should he without your amendment? If he were to make an offer before the first trial of a stated sum which is not accepted, and then the litigation goes on for one trial, and then another trial and then another trial (three trials) and finally there is a final wind-up, and the recovery is for less than the amount originally offered by the defendant, I should think that would save the defendant the costs of the whole business, or at least it ought to.

PROFESSOR SUNDERLAND: The general theory of a new trial is that it generally reinstates you to the same position that you were in upon the original trial.

THE CHAIRMAN: I am not arguing against this amendment. I am just trying to find out what it does. I gather (I may be wrong in the thought) that this clause says it will have no effect in proceedings subsequently.

PROFESSOR MOORE: You are correct, sir.

MR. TOLMAN: Mr. Chairman, I think you are exactly right and correct about that but the situation that is really existing here is a little different, that is, there is another consideration besides the one you have in hand. The Senior Circuit Judge of the Seventh Circuit talked to me shortly before I came here in regard to a case before him and he said that your rule doesn't provide for a second offer so that the man who is beaten on the first trial and knows he is going to suffer a bigger loss can make a bigger offer, and then save his costs on the second trial.

THE CHAIRMAN: That is all right. I wouldn't want to object to a provision stating that on the second trial the defendant can make a new and bigger offer so that he, at least, saves the costs from then on.

MR. TOLMAN: Yes.

THE CHAIRMAN: But what I am objecting to--

MR. TOLMAN (Interposing): Is the phraseology.

THE CHAIRMAN: Is to what the resolution would be on the costs of the second trial which are usually to abide the costs of the first trial.

JUDGE DONWORTH: If he makes a new offer, I think it ought to supercede the first offer, but the sentence that says that the first offer doesn't apply at all, I think, is wrong. I think the first offer continues until a new offer is made and then the first offer is abandoned from the time the new offer is made, I would say.

THE CHAIRMAN: Let's take that now. Suppose before the first trial he makes an offer of $10,000 and then something happens on the appeal which makes him think the plaintiff isn't even going to get as much as that, and then before the second trial he makes another offer. Your idea is that he never would offer less; he would let his original offer for more stand because that would be the wise thing for him to do, wouldn't it?

JUDGE DONWORTH: Yes.

THE CHAIRMAN: So that the only case where he would be apt to file a second offer would be for the purpose of enlarging it and if he did enlarge it and the judgment were less than the enlarged offer, at least he would save the costs of the second trial, is that it?

JUDGE DONWORTH: Yes.

THE CHAIRMAN: Don't you think that there is something about your amendment that really ought to be fixed up so as to deal with this situation we are discussing?

PROFESSOR MOORE: We had taken a slightly different point of policy. We felt that the plaintiff should get his

costs up until that offer really became good--his second--because the plaintiff in the first suit recovers more than his offer.

THE CHAIRMAN: Oh, I know, but he doesn't get a final judgment. He gets a temporary judgment.

PROFESSOR SUNDERLAND: That doesn't do him any good.

THE CHAIRMAN: That doesn't do him any good. He has only got a temporary recovery. He gets an offer for more which turns out to be wrong and it is reversed. I think the policy--

SENATOR PEPPER (Interposing): It sounds to me as if the plaintiff had just bet the balance of his costs against the chances of getting a larger verdict the second time. I don't see that there is any hardship on him under that situation that you develop. I wish you would make it a little clearer to me.

PROFESSOR MOORE: The defendant makes an offer for "X" dollars and at the first trial the plaintiff recovers more than that.

SENATOR PEPPER: But by supposition the plaintiff refuses to accept it.

PROFESSOR MOORE: And he recovers more.

THE CHAIRMAN: He doesn't recover it.

PROFESSOR MOORE: He does at that stage.

DEAN MORGAN: He gets a verdict at that stage.

SENATOR PEPPER: He gets a verdict for more money, and under the operation of the rule the offer is withdrawn, so

that is done for. Now then the defendant succeeds in getting a new trial.

PROFESSOR MOORE: And renews his offer.

THE CHAIRMAN: He only saves the costs of the second trial.

SENATOR PEPPER: Sir?

THE CHAIRMAN: He would only save the costs under this amendment for the second trial. He would be soaked for the costs of the first trial even though he had offered more than the plaintiff ultimately would recover.

SENATOR PEPPER: I can't see why the plaintiff is in a meritorious position to make the claim that in that event he would be making because the defendant (as it turns out) has offered all which in substantial justice, he was ever liable to pay.

THE CHAIRMAN: Never was required to pay.

SENATOR PEPPER: That's right.

THE CHAIRMAN: I think the two things that have been mentioned and that need attention are that the rule ought to be so worded that it is perfectly plain that like the patent case the offer doesn't have to be made. The only right to make an offer ought to be limited to the time prior to the trial of the validity of the patent. The rule ought to make it clear that you don't--if you don't make it then, and then there comes along a second stage of accounting or assessment of damages, it

is permissible for a defendant to step in then and make an offer on that, on the actual recovery, and save himself the subsequent costs. There ought to be clarity about that.

The other thing that the Senior Circuit Judge raises is a point that where there are two trials on the same issue the rule, as literally worded, might force him to make his offer before the first and he ought to have the privilege of coming in before the second trial and making his offer then, and at least saving himself the subsequent costs. Now, those two things have merit, but this amendment, I am afraid, goes farther than that. If you decide on what you want to do I think we could refer it to the Reporter and ask him to bring back a draft in June that would cover it.

JUDGE DONWORTH: I would like to ask Mr. Moore what basis there is in justice for the basis of granting a new trial nullifying an offer that was made before any trial.

JUDGE DOBIE: And accepted.

JUDGE DONWORTH: No, not accepted.

THE CHAIRMAN: Refused.

JUDGE DONWORTH: That is right. If a man expects a series of trials that will affect his judgment, his opinion about the litigation, and if he makes an offer before any trial, why should the fact that there has been an abortive trial nullify his offer? I don't see it.

SENATOR PEPPER: Under the rule as it stands his

offer is deemed withdrawn if it isn't accepted in writing within ten days.

DEAN MORGAN: Yes, but it still has effect.

THE CHAIRMAN: But it only operates to save him his costs.

DEAN MORGAN: Yes, it operates to save him the costs, but I thought the Judge was speaking as treating the offer as pending.

THE CHAIRMAN: No, he nullified it as a basis for saving costs.

JUDGE DONWORTH: It nullifies it altogether. "An original or other prior offer shall have no effect in proceedings subsequent to the granting of a new trial." That goes too far.

PROFESSOR CHERRY: Can't we have a vote, Mr. Chairman, on that proposition?

THE CHAIRMAN: There hasn't been any motion, and I don't feel at liberty to make one. I suggest that we refer it to the Reporter so that we make the rule clear that you don't have to make this offer--as in the patent cases you can make it at any stage and save yourself the subsequent costs; and the other point ought to be that there is nothing in the rules here that prevent you from making two offers; of making an offer before the second trial as well as one before the first, if you wanted to.

BF
13

PROFESSOR MOORE: Mr. Chairman, on that first (on the patent situation) we thought we had covered that in the first two lines. The typist should have had those words, "final disposition of a claim" underscored, and we substitute "ten days before the hearing begins" for "the final disposition of a claim."

THE CHAIRMAN: Maybe you have, but I am not so sure that that is right. Maybe we will agree to that when it comes back, but I would like to have you chew that over to be sure that you think you have that covered.

PROFESSOR MOORE: On the second, we apparently had the policy directly opposite from what you want.

THE CHAIRMAN: But you do think that there ought to be some amendment at the end such as the Senior Circuit Judge of the Seventh suggested. As it reads literally it says "before trial" and there isn't anything here to suggest a second offer or impliedly permitting it, and after the first trial the defendant ought to be allowed a second offer. If he has never made any, he could make it then or if he has made a first he could make a second one enlarging his first offer, if he didn't want to rest on his first one or thought it was too small, in which event he could make it bigger and save himself the later costs. That is what we are driving at, isn't it?

JUDGE DONWORTH: Yes. I am willing to go to the extent of saying that if he does make a second offer after the

first trial, his first offer from that time on has no effect. He should be allowed to make this second offer. If he makes a second offer, I think his making of the second offer nullifies his first offer. But if he doesn't make the second offer his first offer continues on.

THE CHAIRMAN: Does it nullify the first offer so that he isn't protected against the costs on the first trial if his first offer was big enough?

JUDGE DONWORTH: Well, that is my thought, yes.

MR. LEHMANN: In other words, if you offer $10,000 and then there is a new trial granted and you say, "Well, it is not worth the ten; I will offer five," and then finally the fellow gets six, you are stuck for the costs?

THE CHAIRMAN: Of the first trial although you have offered originally and he has refused more than he got.

JUDGE DONWORTH: But he didn't--he needn't make a second offer; that is where I differ--the main point of difference--with Mr. Moore. He says that the granting of a new trial kills the first offer altogether. That I don't like.

THE CHAIRMAN: The trouble with your example, Monte, is that a defendant once having made a $10,000 offer which is refused, would never make a second one of less, because it is no longer open to the plaintiff to accept that, and it is better fortification against the costs than a reduced offer would be, so the only chance of a man's making a second offer

BF
15

(the first one having been refused so that it is no longer open for the plaintiff to get it) would be to enlarge his offer. He would never reduce it.

MR. LEMANN: Wouldn't that be so, Judge?

JUDGE DONWORTH: I think so.

MR. LEMANN: I wouldn't have thought it would come up very often. When people are trying to settle I think the costs are usually a small element of it. While it has some application, I shouldn't think it has a great deal. It has not come up in cases much, Mr. Moore, has it?

PROFESSOR MOORE: I have a case.

MR. LEMANN: You have a case?

JUDGE DOBIE: We had a case before us under that statute as to where the clerk merely compares the transcripts with the records and the question is whether he gets 5 cents or 15 cents. In that particular patent case the difference ran to $4,000. Those patent case costs are terrific.

SENATOR PEPPER: I move the reference to the Reporter of such amendment as the Chairman has outlined, and then, if I get the sense of the Committee, I move that the redraft shall not subject a defendant who has originally tendered an amount as large as or as great or greater than the sum which he has been ultimately found liable to pay to any of the costs that have accrued since his original offer. That differs from Judge Donworth's view, and I put it just to get the sense of the

Committee.

DEAN MORGAN: I second that motion.

THE CHAIRMAN: All in favor of that motion say "aye". That is agreed to. That is all under Rule 68.

DEAN MORGAN: There was another matter about a new trial.

THE CHAIRMAN: Where is it found?

PROFESSOR MOORE: In the second and third lines, and again down in the sixth and seventh lines the words "in the manner provided in Rule 5(b)" are inserted. That is rather formal and was put in because of some doubt raised by the Nabors case that is set out on page 181. It accords with that case.

There, the defendant made an offer, filed it, and attempted to have it filed as a pleading and have it served by an officer of the court upon the plaintiff hoping to make it a part of the record (so it would appear apparently to the jury) and the Court said it was not the proper practice; that the offer should be served as provided by Rule 5(b), and these words are inserted.

MR. DODGE: Rule 5(b) already refers expressly to an offer of judgment.

PROFESSOR MOORE: Merely to make sure that that is the reference.

DEAN MORGAN: And this says "served".

PROFESSOR MOORE: I should have thought that would be in there anyway.

THE CHAIRMAN: This Rule 68 says "served", it doesn't say "filed" at all.

PROFESSOR MOORE: You can't properly file it until it has been accepted.

THE CHAIRMAN: What is your pleasure as to that?

DEAN MORGAN: I move it stay as it is.

MR. DODGE: I second the motion.

JUDGE DONWORTH: As outlined here?

MR. MORGAN: No, as far as the serving is concerned. This is another amendment.

THE CHAIRMAN: The rule stays as is, not the amendment.

JUDGE DONWORTH: All right.

THE CHAIRMAN: We are down to Execution now, Rule 69.

JUDGE CLARK: I think there is nothing there. We made a little comment, that's all.

THE CHAIRMAN: Rule 70.

JUDGE CLARK: In Rule 70 we bring up whether you want to renew your suggestion as to registration of judgments in other District Courts.

THE CHAIRMAN: The Court rejected that.

JUDGE CLARK: That is the one.

THE CHAIRMAN: And obviously for fear of a substantial

reason.

MR. LEMANN: The Reporter thinks we have a New Deal Court and maybe we will get a new deal.

JUDGE CLARK: The Court, as now constituted, ought now to have an opportunity.

THE CHAIRMAN: Yes, but the rule in question would allow you to get a judgment against a fellow anywhere in the United States without suing him there just because you had a judgment in another court. The Court turned that down, and this so-called new Court that you are talking about is a good deal more strict about what is substantive law and what is procedure than the old Court was inclined to be, so if they rejected it once I don't think we ought to slam it back at them again. It is really a thing that ought to be done by Act of Congress because you will always have a doubt as to whether it is valid or not.

DEAN MORGAN: If I can pick my defendant, I'll fix it all right. If I can get the Socony Oil Company as defendant I can register them anywhere.

THE CHAIRMAN: Is there any proposed amendment to 69 except this one about trying to renew a rejected recommendation of ours?

MR. DODGE: That is under 70.

THE CHAIRMAN: I mean 70.

MR. LEMANN: Nothing else but this rehearing suggestion.

BF
19

THE CHAIRMAN: Do you want to try it on the new Court or don't you? I hear no motion, so we will pass it.

MR. LEMANN: I am for it.

THE CHAIRMAN: Rule 71.

JUDGE CLARK: Nothing on that.

THE CHAIRMAN: Rule 72--nothing on that--the Committee should consider whether or not it would be desirable or helpful to call the Court's attention again to this inconformity in appellate procedure. We put it up to the Court before and it plainly said that they thought their practice ought to conform with the practice we provide on appeals to the Circuit Court of Appeals so that the appeal could be had by filing a notice instead of by allowance of citation, and we hope they will do it.

JUDGE DOBIE: We made a suggestion to them before, didn't we?

THE CHAIRMAN: They didn't accept it.

JUDGE DOBIE: Their reception was about as cold as a mother-in-law's kiss. (Laughter)

THE CHAIRMAN: We have had a feeling that where direct appeals are applied for from a state court or a three-judge court or something, that this practice of filing a petition and getting an order of allowance, although it may really be a matter of right, has the effect of checking up on the lawyer if he has gotten off on the wrong foot or done the wrong thing, and the judge to whom he applies

for the allowance of his appeal sets him straight about it; and both lawyers and courts are saved some trouble. I have heard some of them express that idea. I am not in favor of putting that back now.

JUDGE DOBIE: Do you think that there is anything in the compromise that you would talk over with the Chief, or would you rather not do that?

THE CHAIRMAN: I would be perfectly willing to mention to him the fact that we made that suggestion once and the Court didn't accept it; and the Committee just thought the Court ought to think about it again and see what they say about it. That is all right. I am not afraid to do that.

JUDGE DOBIE: I think it is desirable to make it myself. I think it is unfortunate that we have separate ways.

THE CHAIRMAN: Is it the sense of the Committee that it is rather too bad that it isn't done, so I could tell the Court that?

JUDGE DONWORTH: That is not in any rule here now, is it?

THE CHAIRMAN: Yes, Rule 72 provides that appeals from a District Court to the Supreme Court shall be in the manner of allowance of citation and jurisdictional statements, and all that should be followed.

JUDGE DONWORTH: Oh, yes.

THE CHAIRMAN: We have power (the Court has power) to promulgate a rule that an appeal from the District Court to the Supreme Court should be taken in precisely the same manner as if it were the Circuit Court of Appeals.

JUDGE DONWORTH: I see; I didn't get that.

THE CHAIRMAN: I am asking whether in speaking to the Chief, the sense of the Committee is that it ought to be done.

PROFESSOR SUNDERLAND: I move that that is the sense of the Committee.

JUDGE DOBIE: I second the motion.

THE CHAIRMAN: All those in favor, raise their right hands. That is practically unanimous.

JUDGE CLARK: I understood that the reason the Court hesitated was as to the question of how to handle appeals from the state courts; but I should think that could be treated as a separate matter or they even might revise those rules.

THE CHAIRMAN: You say our rule couldn't touch that.

SENATOR PEPPER: Mr. Chairman, may I make a public confession of ignorance. I am trying to make out what Rule 71 is about--probably something very obvious that I have overlooked--and I have turned with confidence for light in the Reporter's memorandum, and all I find is "reported decisions indicating use or interpretation are completely lacking." So, it didn't help me a lot.

JUDGE CLARK: I don't know that I can give you an exposition--any complete exposition.

THE CHAIRMAN: Give us an illustration of how it applies.

JUDGE CLARK: I am not even sure that I can thoroughly do that, but we had this in the Equity Rules and when it came down to us from the Equity Rules we had somewhat the same discussion as to whether it could ever mean anything, and we weren't at all sure, but there it was in the Equity Rules and there was practically no interpretation of it in the Equity Rules but it was ancient and we didn't want to set aside the Ark of the Covenant, so we included it.

THE CHAIRMAN: I can see the second part of it, "and, when obedience to an order may be lawfully enforced against a person who is not a party, he is liable to the same process for enforcing obedience to the order as if he were a party." Suppose you get an injunction against a defendant and all its officers and so forth from doing anything? The agent may not be a party.

DEAN MORGAN: No, but this is in favor of a party, not against.

THE CHAIRMAN: I am talking about the second part.

JUDGE DOBIE: The first one is favoring him; the second one is against him, after the semi-colon.

THE CHAIRMAN: I can understand the second part of it because you often have injunctions running against people who

are not parties, but it is the first part that I don't understand.

DEAN MORGAN: Unless it is a class action.

THE CHAIRMAN: Is that it?

JUDGE CLARK: Mr. Moore suggests the case of a Master getting an award of costs, and this would give him the opportunity to use execution to get the costs. I wonder if perhaps some of it might not properly apply against a Master? I remember some years ago the Supreme Court disciplined a Master and I wonder if that wouldn't come under this.

SENATOR PEPPER: Maybe it is just as well to have a little corner of mystery in the rule; let this be our secret.

JUDGE DOBIE: I think that was the case that was given in the notes before that was debated, about a Master.

MR. LEMANN: I gather there is a good deal of mystery in the Rules without having recourse to 71.

THE CHAIRMAN: As long as nobody knows what the rule means and nobody will ever resort to it, it is harmless. (Laughter) Nobody is able to answer your question.

Rule 73.

JUDGE CLARK: I think this is what has generally been well commended by the authorities. First as to the way: There have been some questions raised as to an informal notice of appeal and in the Fifth Circuit it is held that the filing of a waiver of notice and acceptance of service is a sufficient

commencement of an appeal. There is a chance for a little discussion there. I should think on the whole that we have nothing to do about it. I think the law is developing all right about it, so I don't make any suggestion as to the notice itself.

The second question which is discussed, beginning with 190, is one which we have discussed a little bit already, and that is as to what power the District Court has after notice is filed. There have been several old problems under that. One of them is, whether the old rule that perfection of an appeal deprived the lower court of jurisdiction; [illegible] means the filing of the notice of appeal here or whether it means the filing of the record; and there have been some decisions either way on that. There are decisions along toward the lower part of the page that say after notice has been filed the District Court has no power to proceed further in the matter. There was one case in the Southern District where they held otherwise, and they held that they could have an intervention in that case. I am not at all sure what, if anything, we should try to do about this. In fact, I finally came to the conclusion (or we did) that perhaps it might be a good idea for the practice to simmer down more.

We have had suggestions of amendment to Rule 73, and you will notice one at the foot of page 191:

"Along these same lines, suggestion has been made

to amend Rule 73 so that the district judge may, after notice of appeal has been filed but before docketing, dismiss an appeal on stipulation of the parties or upon appellant's motion. One lawyer, however, has termed a change of this sort 'unnecessary'."

MR. DODGE: The clerk in Massachusetts raised that same question with me. He says, "If within the power of the Committee, I think it would be desirable to have it on the motion of the appellant. At present under the decisions and the rules of the District Court, it has jurisdiction down to the filing of a notice of appeal. Accordingly, when the appellant desires to abandon, an appellee must docket it in the Court of Appeals and obtain an order of dismissal there."

JUDGE DOBIE: I was rather under the impression that it was the docketing that formerly divested the lower court of jurisdiction because we frequently have motions to docket an appeal and then dismiss it.

JUDGE CLARK: There is a question that is not entirely settled, as you can see from these authorities. There is the case of Miller v. United States from the Seventh Circuit, and a case from the Eighth Circuit and in Michigan that have held that the District Court had no authority after the notice.

SENATOR PEPPER: Held what, sir?

JUDGE CLARK: That the District Court had no authority after the filing of the notice.

THE CHAIRMAN: Judge Dobie, doesn't the fact that you docket and dismiss show that the assumption is that the lower court has gone, and you have to get the upper court's dismissal of the appeal? Doesn't the mere fact that you walk up there and docket for the purpose of dismissing recognize the fact that the lower court is without jurisdiction even before it is docketed?

JUDGE DOBIE: Where we entertain a motion to docket?

THE CHAIRMAN: Yes.

JUDGE DOBIE: There may be something to that.

THE CHAIRMAN: That practice, which has been universal for years, is based upon the theory that once the appeal is allowed or the notice of appeal is filed, the upper court has jurisdiction which it can't exercise until there is a docket; but it has it. That is the court you have to go to to have an appeal dismissed.

JUDGE DOBIE: I think you are right there. There is nothing before the upper court until it has been docketed so it may have the power.

MR. DODGE: That involves the preparation of a record and payments--an entrance fee, all for the sake of getting this dismissed.

THE CHAIRMAN: You are proposing that we put in an express provision that without docketing an appeal in the Court of Appeals the parties may dismiss the appeal by

stipulation.

MR. DODGE: The appellant may dismiss.

JUDGE DONWORTH: The second sentence of Rule 73 answers this to some extent: "Failure of the appellant to take any of the further steps to secure the review of the judgment appealed from does not affect the validity of the appeal." That is plain that the filing of a notice has accomplished the transfer of jurisdiction to the other court.

MR. HAMMOND: That is what the Committee intended before.

THE CHAIRMAN: And that is carried out by the rule about records on appeal which expressly provides--

MR. HAMMOND (Interposing): Rule 75.

THE CHAIRMAN: If you desire to get action by the lower court even by dismissal you can get an incomplete record and docket it.

JUDGE CLARK: There is another provision that has some bearing, and that is--

THE CHAIRMAN (Interposing): You see: "If, prior to the time the complete record on appeal is settled and certified as herein provided, a party desires to docket the appeal in order to make in the appellate court a motion for dismissal, for a stay pending appeal, for additional security on the bond, or for any intermediate order, the clerk of the district court at his request shall certify and transmit to

the appellate court a copy of such portion of the record or proceedings below as is needed for that purpose."

JUDGE CLARK: Then 73 gives the District Court express power with reference to a bond which, I suppose, contains or carries some inference that it may lack power otherwise, particularly in view of this provision in (a) to which Judge Donworth referred which says that it is ground for such remedies as are specified in this rule or the action of the appellate court.

THE CHAIRMAN: The only real proposition that is before us, is the suggestion by Mr. Dodge that we put a clause in the appropriate place, probably in this appeal to the Circuit of Appeals rule that allows the appeal and to dismiss the appeal without going to the Circuit Court and docketing the case.

SENATOR PEPPER: I second that motion.

JUDGE CLARK: May I just comment on that a little. Another case has come up to which we called your attention, and that is the case of clerical corrections of the judgment under 60; still another case where it has been granted is in this intervention case that I speak of. That was a case where someone appealed from the District Court and said, "We are not properly represented by the appellant, and we ought to be allowed to come in and protect our own interests." So the District Court allowed them to come in and they promptly

filed a notice of appeal. The reason I mention these things is that I suppose if we start specifying we should exclude the others, and if we are sure that we want to exclude all the others, that is all right. But for my part I felt we didn't quite know all the cases yet and I didn't think there had been enough problems, and the law was developing somewhat and we might, perhaps, wait and see. That is all I have to say.

MR. DODGE: You have cited several cases which indicate that the courts have been troubled with the questions of the right of the District Court to dismiss an appeal.

THE CHAIRMAN: Which a District Court can't do; that is perfectly plain as against the objection of the appellant, that the District Court can't dismiss any appeal. It is always the practice to docket and dismiss or to make a motion to dismiss. But what I am thinking about is where the parties--I suppose without any rule, if the plaintiff and defendant, the appellant and respondent sign a stipulation before the case had been docketed that the appeal be and the same is hereby dismissed (stipulated that it was dismissed) I don't suppose or believe that anybody would claim that the appeal was still pending, would they? The question you speak of is a case where the appellant wants to dismiss and quit, and you think he can't do it against the objection of the respondent. It is extraordinary to think that he would object, if he did, without docketing. Don't you think that we had better leave the thing

as it is and let it stew a little longer?

JUDGE DONWORTH: I am inclined to leave it as is. I think there might be some conflict if you let the appellant dismiss the appeal. He might claim some rights in the upper courts and in the cases already there might lead to confusion.

MR. DODGE: He can do it now. All those questions are raised but they are raised in the Circuit Court of Appeals after docketing, and it is my feeling that it ought to be the easier way of getting the District Court to dismiss it and avoiding the expense of having the record certified and paying an entry fee and going before the three-judge court.

DEAN MORGAN: Will the appellate court always dismiss on the request of the appellant even though with the objection of the appellee?

THE CHAIRMAN: I was trying to think while we were thinking about this where there could be any case in which the respondent had any objection to the dismissal of the appeal. It restores the respondent to judgment in the lower court. I can't think of a case where he would want to object.

MR. LEMANN: If he wanted to cross-appeal he could still do that within the 90-day period if the other fellow dismissed his appeal for and during that period, and if there were cross appeals pending the appellant couldn't dismiss as to the cross appeal because he would be the appellee as to that.

JUDGE CLARK: We just had a case that is rather curious and which is a little farther advanced than this, but somewhat of the same idea. We had a patent case and one of the parties got before us. The gentleman for the patent was, as is the present law, the appellant, and below the court had held the patent invalid, and when he got before us, having taken the appeal properly, he said he wasn't going to contest that as his patent didn't infringe, but he wanted to wipe out the judgment of invalidity, and the defendant wanted to go ahead because he wanted to nail down the judgment of invalidity; and our court held (somewhat over my dead body) that we lost jurisdiction because there was no case at controversy. I thought we had jurisdiction to do what we should, and wrote a dissent along the lines stated, but the majority ruling was no case in controversy under the Constitution.

MR. DODGE: You can make it the power of the District Court by providing that the District Court may upon motion made with notice to the appellee dismiss the appeal upon the appellant's motion.

SENATOR PEPPER: That is before the docketing of the appeal.

MR. DODGE: Yes.

THE CHAIRMAN: Yes, you can put a clause like that in. There are a number of cases in the rules where we specifically say that certain things may be done in the District

Court after an appeal is taken, and there is no harm or inconsistency in adding something to that list.

JUDGE DOBIE: That would save time, too, Mr. Dodge, because frequently the District Court and the Circuit Court of Appeals may not be meeting for some time. We finish in June and won't meet again until October.

MR. DODGE: It is quite important where the parties have made a settlement and the other party wants to be sure his rights are protected.

THE CHAIRMAN: Why not put in a rule saying that on the stipulation of both parties or on motion of the appellant an appeal may be dismissed by a District Court before the case is docketed in the Court of Appeals?

MR. DODGE: I so move.

SENATOR PEPPER: If you are going to let the thing happen on motion of the appellant as one alternative, why put in the stipulation as the second alternative?

DEAN MORGAN: Or a motion after the hearing.

THE CHAIRMAN: If you go through the form of a motion by the appellant, if both parties sign a stipulation--that was my idea.

DEAN MORGAN: But you want to provide for a hearing--on motion after hearing, I suppose. The Senator was thinking of ex parte motions of the appellants.

JUDGE CLARK: Is it the idea that the District judge

will have discretion or must he withdraw? If he is going to withdraw he has got to grant it, and I should then think that you might say that the appellant may withdraw his notice any time up until docketing.

DEAN MORGAN: Yes, unless you are going to give him discretion.

THE CHAIRMAN: There are questions of that kind. Suppose he hasn't docketed and there are all kinds of expenses which have been incurred in the way of the preparation of a record on appeal, and then the appellant walks out and withdraws the notice, as you call it. Where does that leave the respondent for his costs on appeal? It is sort of treating the matter as if no appeal had ever been taken. It seems to me that Mr. Dodge's idea is the better one. Either on stipulation he must, or on motion by the appellant he may, dismiss an appeal before the case is docketed in the Court of Appeals.

SENATOR PEPPER: That is all right with me. I'll second that motion.

MR. LEMANN: If it is on motion by the appellant shouldn't he give notice to the other side? If it is done by notice--by motion by the appellant alone it should be with notice to the other side.

THE CHAIRMAN: Our other rules take care of that, I think. We have a general rule that requires notice of

motion.

SENATOR PEPPER: I move the question.

THE CHAIRMAN: Are you ready to vote on that? All in favor say "aye". It is agreed to.

MR. LEMANN: What should be done about the other point that the Reporter raised about Rule 60(a) on clerical mistakes; to remove the uncertainty as to the power of the District judge to correct clerical mistakes after the notice of appeal? You raised that on the 6-day question, and he just referred to it again. Six days seems to be pretty broad but the Reporter says some courts have felt that after notice of appeal the District Court could not correct clerical mistakes. Suppose the notice of appeal is given and a transcript prepared and then the appellee says that there is a clerical mistake in the transcript after it has been filed in the appellate courts?

THE CHAIRMAN: I should think if you did it you would want to limit it to the power before the transcript of the record has gone up because you wouldn't want him tampering with the record after he certified a different one.

MR. LEMANN: That is right; that is what I was thinking of.

THE CHAIRMAN: If it is going to be granted it ought to be stated that clerical mistakes of this kind ought to be corrected by the District Court after the appeal has been

taken.

DEAN MORGAN: Well, the District judge isn't going to certify the record as correct if it has got mistakes in it.

THE CHAIRMAN: But you see, he doesn't certify it.

MR. LEMANN: He doesn't certify it.

THE CHAIRMAN: No, it is only where there is an agreed statement, and things of that kind.

JUDGE DOBIE: Or if there is any dispute, I believe he can settle it.

THE CHAIRMAN: He can settle it where there is a dispute as to the accuracy of it.

JUDGE DOBIE: Yes.

THE CHAIRMAN: But that wouldn't be this case.

JUDGE DOBIE: No.

THE CHAIRMAN: If you want to make a change it ought to be in Rule 60(a) which should state that such mistakes, if an appeal is taken, may be corrected after notice is filed or before the record on appeal is transmitted to the upper court.

SENATOR PEPPER: I second Mr. Lemann's motion.

THE CHAIRMAN: Is there any further discussion? All those in favor say "aye". It is agreed to.

JUDGE CLARK: We can pass on, then, to the next.

THE CHAIRMAN: The next one would be 74.

JUDGE CLARK: There are two or three things more.

THE CHAIRMAN: In 73?

JUDGE CLARK: In 73, yes. We have one suggestion for a change. There were some other suggestions that came to us. One was that notice of appeal be filed with the District Judge rather than with the court, and we said no on that. In the matter of time, I think we have covered that. [illegible] There was quite a question that came under Rule 6(b), but I think we have covered it, so I take it that takes us to comment II on page 193 dealing with 73(g). I think there is a clerical mistake in 73(g). There are several places that refer to "the date of a notice of appeal," and obviously we don't mean the date the lawyer may have put on the document. We mean the date of the filing of the notice of appeal, and we suggest that we put in in the three places in the rule where that occurs the words "the filing of" before "the date".

JUDGE DONWORTH: I move that that be done.

THE CHAIRMAN: Before notice?

JUDGE CLARK: Yes, that is it.

JUDGE DOBIE: I second the motion.

THE CHAIRMAN: If there is no objection that is agreed upon.

MR. HAMMOND: Under 73(a), I don't know whether the Committee wants to bother to correct this or not, but it says in the second sentence: "Failure of the appellant to take any of the further steps to secure the review of the judgment

appealed from does not affect the validity of the appeal, but is ground only for such remedies as are specified in this rule." I don't know--I don't find any other remedies specified in this rule. It is just a question of whether you want to strike it out or not.

THE CHAIRMAN: There is dismissal.

MR. HAMMOND: Not in this rule.

JUDGE CLARK: I suppose we had in mind, particularly, (e) which is a case, I suppose, where the appellant does the rectifying.

MR. HAMMOND: I don't think it makes any difference.

THE CHAIRMAN: But we have added, "or for such action as the appellate court deems appropriate, which may include dismissal of the appeal."

MR. HAMMOND: It seems rather footless to make a remedy specific in the rule if there are none such.

MR. DODGE: There is one in paragraph (e), isn't there?

DEAN MORGAN: There is one in (c), too: "After a bond on appeal is filed an appellee may raise objections to the form of the bond or to the sufficiency of the surety for determination by the clerk."

JUDGE DOBIE: Yes.

THE CHAIRMAN: The last sentence.

DEAN MORGAN: It depends on what you can do with

these minor defects.

MR. HAMMOND: That is so.

THE CHAIRMAN: Well, we can go on.

JUDGE CLARK: Nothing more on 73.

THE CHAIRMAN: We are down to 74, and that is what, severance?

JUDGE CLARK: That is right.

SENATOR PEPPER: Mr. Reporter, before you go on to that, I have a vague recollection (and you will make it definite) that at some earlier stage of our proceedings today we passed over some rule with the understanding that its consideration was to be taken up in connection with some later rules, and I think in connection with some subsections of 73. Am I wrong about that?

JUDGE CLARK: There was this--and this may be what you had in mind. When we were back discussing 60(a) and (b), the question of the power of the court, I said that there were other circumstances where it came up under 73.

SENATOR PEPPER: That is what I thought. But we have dealt with that now?

JUDGE CLARK: That is right, yes.

SENATOR PEPPER: Thank you. I don't want to let anything pass unnoticed.

THE CHAIRMAN: Will you go on then to Rule 75.

JUDGE CLARK: Rule 75. Again I say that it seems to

me that I think this rule is working very well. There is some criticism that Judge Sibley every little while breaks loose with, but it always seems to me that he is wrong about it. Among other things that the judge complains of is passing on the record.

MR. LEMANN: He complains very bitterly.

THE CHAIRMAN: As long as I am one of the guilty parties on this rule, I might as well take this in hand. I have four suggestions to make to Rule 75, and the first one is, that there is nothing in this rule which allows any cheap or easy way of getting a record up where the appellant is allowed to appeal in forma pauperis. That has arisen in two circuits and it is quite obvious that where parties are well able to pay their way about getting a record and paying for a transcript some of the procedure provided for might well be silent on the subject, and the courts have no power under this rule to relieve a forma pauperis defendant of these expenditures. Without attempting to formulate a rule, my recommendation is that the matter be referred to the Reporter to add a provision to Rule 75 in the appropriate place that where an appeal is allowed in forma pauperis, the District Judge may by order specify some different manner in the interest of economy by which the record on appeal may be settled and prepared and leave it to the District Judge in every case to say, "Well, you needn't do that; bring me in a summary statement

just like a bill of exceptions, and if I approve it, in she goes." There ought to be something on the subject to allow freedom of the method of settling a record under the guidance of the District judge and with his approval and certification in a forma pauperis case.

MR. DODGE: Isn't there any general statute dealing with that? What happens when the Supreme Court grants a Writ of Certiorari and permits the parties to proceed in forma pauperis?

THE CHAIRMAN: There is no statute. If there were a statute that was passed after this rule was adopted; it might affect it, but the statute supersedes the rules but do not permit the making of any exception in the case of forma pauperis, and if you want to read those Circuit Court decisions you will find that the point was very well made and the judges very cleverly ducked the matter and fixed up the thing in that case to get the pauper by.

SENATOR PEPPER: Shall we take the four points up one by one, sir?

THE CHAIRMAN: Yes.

SENATOR PEPPER: May I move that when the Reporter reconsiders this rule that he make the provision suggested by the Chair giving the District judge power to deal with the economies in the preparation of the record on appeal?

JUDGE DONWORTH: I second the motion.

JUDGE CLARK: I think this is a good idea and we can

say something. You probably know that there is the Judge Parker bill now before Congress which will help out all this reporting situation.

THE CHAIRMAN: This isn't a reporting situation. It is a matter of getting a cheap way of getting the record set. I have got another thing to say about the reporter.

SENATOR PEPPER: I move the question so as to get it out of the way, first.

THE CHAIRMAN: All in favor of some forma pauperis rule along the lines I stated, say "aye". That is agreed to.

Now, the next point is, if you will read the rule you will find that it is totally silent as to any method except on an agreed statement, for preparing a transcript or any kind of a statement as to the proceedings at a trial in cases where there was nothing stenographically reported--it was not stenographically reported. The rules are very explicit that where it is stenographically reported, the proceedings and the trial and the evidence and so forth, are made up from the reporter's transcript, and you designate sections of the transcript. I will confess that when I had to do with the rule I was so accustomed to the idea that there was always a stenographic reporter in court that it almost escaped my mind; and I don't know of any case that has yet arisen where an appeal was taken and there was no stenographer at the trial. But I tremble in my boots every time I think of the

situation where that might happen, and there is absolutely nothing in this rule as to how a District Judge can determine what took place or make up a narrative statement or anything of that kind. So I would like to put a clause in here that if the case has not been stenographically reported, a statement of the proceedings at the trial, and so forth, should be made up in narrative form and approved by the Judge and certified as part of the record--or something like. No case has arisen that I have seen, but one might arise at any time.

SENATOR PEPPER: I make a similar motion with regard to that point.

DEAN MORGAN: I second it.

THE CHAIRMAN: Just a sentence or so will do it.

If there is no objection, that is agreed to.

Now, here are two other matters and they are both Sibley matters. One of them didn't arise in Sibley's court; it arose in the District Court in Pennsylvania (Kirkpatrick) and is now pending in the Circuit Court of Appeals for the Third Circuit. For a long time the Government, under Acts of Congress, has been in the habit of letting, on public competition, contracts to court reporters who report cases in which the Government is a party. It isn't done in every district, but the administrative office which took that over from the Department of Justice in many busy districts lets contracts on competitive bids to shorthand reporters to report in court

Government cases, cases in which the Government is a party. We have a rule which we stuck in here--it is later on.

MR. HOLTZOFF: It is Rule 80.

THE CHAIRMAN: It is Rule 80(b), an exact copy of a recommendation of the Judicial Conference which we adopted verbatim (thinking the Judicial Conference was a safe thing to rely on) which says that each District Court may designate one or more official court reporters in the district and fix by rule of court the compensation which such stenographers shall receive. Under that rule, we will say, Judge Kirkpatrick appointed an official reporter and the administrative office let a contract to a shorthand expert to report Government cases, and Judge Kirkpatrick says that contract, that system, has been set aside by his order appointing an official reporter and nobody but an official reporter is allowed in the courtroom, and the Government-contract reporter is left out on the edge, and the official reporter charges a good deal more than the contract reporter. We have gotten some correspondence about that (I have forgotten from whom) from the Department of Justice, and I was shocked at the idea that any lower court would take the view that by providing generally for official reporters, this Committee or the Supreme Court, without a word being said in the Rules, had intended to abolish the Government contract system for Government reporters in Government cases. We certainly wouldn't have done that for

the world if we had ever thought about it, and that case is now pending, and it may be that it will be decided before the next meeting. We haven't gotten a decision yet, have we?

MR. HOLTZOFF: No, it hasn't yet come down.

THE CHAIRMAN: I would like to see the Reporter take note of that situation and prepare a draft for an amendment to the rule making it clear that there is nothing in this rule that tends to abrogate the Government-contract reporter system.

JUDGE CLARK: Mr. Chairman, we have already done that and we make a suggestion which may or may not be adequate on page 219.

THE CHAIRMAN: It may be that that Court of Appeals case will be such that we won't need any amendment.

JUDGE CLARK: I mean that we have discussed the same matter and you will find in the comment just prior to that the Department's position with reference to Judge Parker's bill which would take care of the matter; and then we say, however, that in the event Judge Parker's optimism about passage of the Act is not confirmed, we state what the Department's objections are on page 218 and over on 219, and at the very end we tackle the subject, I may say, perhaps, a bit cautiously but that is the way we approached it right at the very end.

THE CHAIRMAN: Of course, there is no use in trying to predict what Congress is going to do about authorizing

official reporters at Government salaries. We will have to take the situation just as it is.

MR. LEMANN: Doesn't this relate to Rule 80? Ought we not pass this until we come to Rule 80, just to keep your notes straight? Wouldn't it come up under Rule 80? That is where your notes come up.

THE CHAIRMAN: The point is that it comes up in 75 because you haven't got a reporter to make a transcript if he is not an official reporter. Maybe it ought to go into 80.

MR. LEMANN: Wouldn't the fellow under 80 be the reporter who is referred to in 75?

THE CHAIRMAN: Judge Kirkpatrick wouldn't allow his clerk to make up those transcripts for records on appeal on the basis of the transcript prepared by an official Government reporter. So, it hits both rules, and maybe the other rule is the place to put it in.

JUDGE CLARK: Do you want me to just read it?

THE CHAIRMAN: You have got it in 80?

JUDGE CLARK: That is where we discussed it, yes.

THE CHAIRMAN: Let's pass it, then. I brought it up under this rule because it does affect this rule, too, but I think 80 is the place to put it in.

SENATOR PEPPER: Well, isn't the third of your points particularly germane to 75(b)? The principle may be involved in 80 but if the point that you have discussed was to be

specifically dealt with, oughtn't that to be here?

THE CHAIRMAN: I have an idea that if you said over in 80 that the official reporter appointment didn't abrogate the right of the Government to have a contract reporter in a Government case that would do the business under 75.

MR. DODGE: Then the evidence would always be stenographically reported.

SENATOR PEPPER: Yes, I see.

THE CHAIRMAN: Then, the other suggestion--we will leave it until we get to 80 anyway--Judge Sibley has held that if the reporter isn't an official reporter a transcript isn't worth anything and you can't use it, and he has held, for instance, one of the parties to the case without an official appointment from the court (there being no other reporter around) goes into court and hires a competent shorthand man to go in and report the case, and he is just as competent as anybody else, and if he isn't, his transcript is subject to correction by the trial judge anyway under these rules; and then you try to get up a record on appeal by filing that man's transcript, and designate parts of it for appeal. Judge Sibley won't have it; he won't recognize any transcript that isn't prepared by an official court reporter and certified as such. I think that isn't very uncommon, but very usual; I think it is quite common, isn't it, in the Federal Court for one party or the other to take a competent man into court with him and

then if somebody decides to appeal, why, then you have got that transcript and why throw away that into the wastepaper basket; why not put a provision in this rule that says "which was stenographically reported." That is broad enough to cover that case. He simply says it wasn't stenographically reported because it was not by an official reporter. If you have both an official one and a private one, of course, you ought to use the official reporter.

JUDGE DORIS: There are very few official reporters in the South. It is very common now for one party to bring in a stenographer. We have never questioned it.

THE CHAIRMAN: Sibley says you can't do that. That is why he doesn't like these rules if you have to do such things like that.

MR. LEMANN: It is two years since I sent my correspondence up to you, and I transmitted the substance of what you said to him.

THE CHAIRMAN: I hope you didn't really transmit it literally.

MR. LEMANN: No, you cautioned me about some personal references, but my recollection now is a little vague; but I think he explained that they got a lot of very sloppy transcripts before the Fifth Circuit and it added a great deal to their burden in going out and examining the records, and he seemed to think that the preceding practice had gotten them

better transcripts; that the District judge now has nothing to do with the transcript under our rules. You don't go to him at all. We took it from the District judge. You get the clerk to certify the docket and the reporter to certify the transcript and you take that up, take it to the Court of Appeals; and he said many of their transcripts, their records, came from little places, little towns, and the records were badly made up and just added to their troubles. Is that about right, Mr. Mitchell?

THE CHAIRMAN: That is a different thing from this. He takes the position, the broad view, that no record ought to be certified unless the District judge has taken it upon himself to read it over and see that it is all right and correctly certified, and he wants to shovel back on the District Court the job of going through every transcript and every proposed record on appeal, and approving it before it goes up, and cutting out matters that he doesn't think ought to be in it, and all that sort of thing. Of course, the system we adopted was the Equity system that had been in force in Equity cases for many years in which one side designated a part of the record and the other a part of it, and the judge didn't have any checking to do. I think Judge Sibley is practically wrong in saying that if you tried to do that you would get any better results. If there is a row between the plaintiff and the defendant as to whether the transcript is correct or not, that does go to the judge.

MR. LEMANN: Under 75(h).

THE CHAIRMAN: But if there isn't any row they will just hand it to the judge and he will certify it like that and he won't undertake to relieve Judge Sibley's court of the possibility of unnecessary or inaccurate matter in there by reading it through. So, if we adopted Sibley's idea it wouldn't have any real result, but that isn't what I am driving at. I am not trying to change the rules to allow that. He takes the position that the man isn't a reporter at all unless he has been officially certified, and you can't use his transcript and I want to amend 75(b) by some appropriate provision that the case is stenographically reported when there is a reporter there whether he is official or hired by a lawyer or not, always regarding the fact that if there is an official reporter in the courtroom, why, his transcript has to be used. I haven't worded the amendment. I think there are a good many cases in the Federal Courts in smaller communities where they don't have regular reporters at all. Sometimes a man is brought in that everybody knows and he sits in the courtroom and one man pays him or maybe the two lawyers get together and agree to share the expense.

MR. LEMANN: Does Judge Sibley go so far as to say that he won't accept that? What happens in all these little towns in Mississippi and Louisiana and Georgia where they are called in?

THE CHAIRMAN: He says that he won't have anything to do with a transcript that wasn't prepared by an official reporter and certified. A reporter has to certify that he is an official reporter and all that.

MR. LEMANN: I didn't realize that he went that far.

THE CHAIRMAN: I recommend an amendment to 75(b) in appropriate language making it clear that a case is thus stenographically reported in court within the meaning of this rule so that a transcript can be used notwithstanding that that reporter may not be an official reporter or a Government reporter if he is the only reporter present. That is the substance.

MR. DODGE: I suppose if a stenographer is hired by one party only and the other party objects that he is incompetent the judge would have to have some power of passing on the competency.

THE CHAIRMAN: He has got that now. There is a rule here that says the court has the power to correct wherever there is a question arising as to the question of the reporter's work, and if he thinks it is inaccurate.

JUDGE DOBIE: I second that motion if nobody has not done it before. We have never had any trouble. We have always taken it.

THE CHAIRMAN: I suggest that our Reporter look at Sibley's discussion.

JUDGE DOBIE: There are very few good shorthand reporters in Virginia at all, and usually where there is any case of any importance they will get one from the big towns.

JUDGE CLARK: Judge Sibley's case, I think, is at the top of page 198: "Judge Sibley questions whether a case is stenographically reported if the reporter is not one officially designated or appointed by the court. Judge Sibley's views are also expressed in Middleton v. Hartford Accident & Indemnity Co. (C.C.A. 5th, 1941) 119 F.(2d) 721." We haven't that reported yet.

DEAN MORGAN: Do you want to put the motion, Mr. Chairman? I moved and Judge Dobie seconded it.

THE CHAIRMAN: All those in favor of that motion say "aye". That is agreed to.

JUDGE CLARK: I think we had better run through some of these comments. Most of them we say no to. Comment II is an old suggestion.

JUDGE DOBIE: How about comment I? Judge Paul made that same one to me.

JUDGE CLARK: I wasn't up to that.

THE CHAIRMAN: What page?

JUDGE CLARK: Page 195, comment II on the middle of the page. The old suggestion repeated by Dean Pound in his book that the appellate court ought to have power to take evidence. Now, there may a real question as to whether we can

do anything about it, and while theoretically it is a good thing, I don't think it has seemed to me terribly important; at least, it is more a theoretical reform than otherwise.

JUDGE DONWORTH: They do that in Admiralty.

JUDGE CLARK: They do that theoretically, yes; I have never seen it done in Admiralty.

THE CHAIRMAN: Go on to Judge Paul's suggestion.

JUDGE CLARK: His suggestion is as to the word "promptly". Of course, that has been raised by others; as to the word "promptly" as to designations in the record; as I say, several have made that suggestion. I think you might well look at our comment II, which is that a time limit should be put on the counter-designation. They are both the same general idea.

MR. LEMANN: You have got a limit of forty days.

THE CHAIRMAN: Let's get to the bottom of that. There is a limit on the counter-designation. But here is your proposition. The ultimate limit, as Monte has just said, is forty days, and every man who takes an appeal has got to watch out for that and see to it that he makes his designation promptly enough after the appeal to enable him to come through the final wind-up within the forty days. I have always felt that the ultimate limit of forty days is the thing to drive at, and it is utterly immaterial and unimportant as to whether the service of designations by the appellant should be five

days or ten days, and the moment you put ten days in there, then you are running to the judge because the reporter hasn't written up the transcript and asking him for an extension of time within which to serve your designation of the record because the reporter hasn't got it ready.

MR. LEMANN: Which judge would you run to?

THE CHAIRMAN: The District judge. All this is done by the District judge, and the Circuit Court of Appeals hasn't anything to do with it. So, I can't understand why these judges don't realize that it isn't necessary for a time limit to be placed on the first step of the thing. Your time limit is on the final wind-up and the important thing is that you are running the risk of getting caught by not acting promptly enough so that when your final wind-up is reached you are in no position to ask for an extension. Now, I think that having in mind the fact that nobody ever knows how soon the reporter's transcript is going to be ready, (it may be a week or a month or what not) you certainly wouldn't want to say a month, and to put that in as a day limit or a week limit is just silly because it is just meaningless and it means running to the District judge for extensions and all the rest. It seems to me that it is sort of dumb in not seeing that the real pressure comes at the end, at the ultimate period, and to have a lot of intermediate steps, five days for this, ten days for this, adding up to forty, is just foolish, because they will not be

obeyed, and can't be obeyed because the reporter's transcript is slow.

JUDGE DOBIE: Of course, that would all come in when you asked for an extension of time. The judge would say, "When did you file the designation?" And he would say, "I filed it on the 39th day." The judge would say, "If you filed it on the 39th day and you expect him to get it out in one day, that is not very good. Motion for extension of time--for further time--is denied."

JUDGE CLARK: Of course, I am not making any recommendation, but I suggest that the overall time limit covers all this.

THE CHAIRMAN: It is not only that it does, but it is the fact that the small time limit on the first step just means orders and extensions and bothering the District judge.

JUDGE DOBIE: I think the judges can take care of it and I think what has probably happened in these cases is what has happened so often. One of these cases happened to irritate Judge Paul and he immediately thought it was important and he rushed to us. He is a good judge.

THE CHAIRMAN: First class.

JUDGE CLARK: As to (b) on page 197 to 199, that is the suggestion that Mr. Mitchell has already made about the non-official stenographer. We make the same suggestion so that is already covered.

Rule (e), Form of Testimony, page 200. Mr. Fisk of Boston has written a formal rule here which we quote. The general gist of it is, as I take it, for further use of the narrative form of testimony, and in effect if any party is dissatisfied with the narrative statement he may require that testimony in question and answer form be substituted for all or part of the testimony, and in conformity with Rule 75 here, may require designated exhibits or specified material to be substituted for the narrative statement of their substance.

THE CHAIRMAN: Is that necessary?

JUDGE CLARK: The narrative statement isn't very important now. The Judges don't like it very much so far as I can see, and you really don't get it very much except by agreement, and it is in general my feeling (at least, as I think of the spirit of the rules) not to have too many matters for the District court to settle, and in fact, we ruled in the Second Circuit that the court has no power except to correct the record; that the District Court cannot strike out from the record; that either party can get the thing put in the record. That doesn't necessarily mean that it is printed because printing is entirely in the hands of the Circuit Court, and the Circuit Court is to say if it is to be in the record they are not going to require you to print it, but the District Court isn't going to go into that. I don't think that is necessary.

JUDGE DORIE: You disapprove of Mr. Fisk's suggestion,

do you?

JUDGE CLARK: Yes.

JUDGE DOBIE: I move that it be left as is.

DEAN MORGAN: Yes.

THE CHAIRMAN: There being no objections, that is agreed to.

JUDGE CLARK: As to the bringing back of Assignments of Error by some Circuit Courts, we have got quite a discussion here over the cases. Of course, they can do a lot in their briefs that we can't and shouldn't attempt to control. We could, however, make our point a little clearer, and we recommend, as stated in the middle of page 203, that assignments of error are abolished.

THE CHAIRMAN: What subdivision of the rule would that be under?

JUDGE CLARK: That is (d). Under Statement of Points, we start out by saying that assignments of error are abolished.

JUDGE DONWORTH: The Courts of Appeals wants some record of what they are to review--some designations, I mean, of the points complained of, and if you don't call it assignments of error, you have got to call it something, haven't you, to indicate what is put before the appellate court?

JUDGE CLARK: My point is that here we abolished them, and they are back in.

THE CHAIRMAN: We haven't abolished them in the

Circuit Court of Appeals; they can furnish them in a brief, and I am afraid if you abolish them and you say here that you only have power to abolish the assignments of error filed at the time of appeal, they will say that you haven't got the right to put assignments of error in your briefs, and then it seems to me the question is, what is a designation. When you designate all of the record to go up or only part of it, and respondent wants to know what points you are going to raise above so that he will know what parts of the record to add, it is required here that if the whole record isn't ordered up by the appellant he must serve on his adversary his designation with a concise statement of the points on which he intends to rely on the appeal. Now, when you say in one breath no assignment of error at the time of taking the appeal, and in another breath that you have got to file a concise statement of your points on appeal, why, it seems to me that they are running head on because that concise statement is a very perfect assignment of errors.

MR. LEMANN: Of course, you wouldn't have to do that unless you only designated a part of the record. That might be the answer to your last objection. But I think your first point is very difficult to meet because if you say assignments of errors are abolished you may give the lawyers the idea that they will never have to make them at any time or any place. Of course, we can't control the courts of appeal that want

them in the briefs.

JUDGE CLARK: May I comment on this? In the first place, the designation for the record is quite a different thing. It is intended for a different purpose. It is actually quite different in form; it is merely for the purpose of saying what we are going to get into the record, and you don't have it when you take up the whole record; you only have it as a warning to the other fellow so that he can broaden out his record as needed.

THE CHAIRMAN: Charlie, I think this would do it, wouldn't it? Instead of saying that assignments of error are abolished, which might be construed as trying to prevent their being used in the appellate court, you could say that no assignments of error need be incorporated in a record on appeal.

SENATOR PEPPER: Won't that be subject to the exception in the case of Rule 72 because in that rule we provide that where there is an appeal direct from the District Court to the Supreme Court of the United States that the appeal should be taken by petition accompanied by assignments of error?

THE CHAIRMAN: This only relates to the Court of Appeals; that is the Supreme Court.

SENATOR PEPPER: Yes, but we say assignments of error are abolished.

JUDGE DOBIE: What about something like this--that no formal assignments of error are necessary?

THE CHAIRMAN: This rule applies to records on appeal in the Circuit Court of Appeals.

SENATOR PEPPER: I understand that, sir, but if we used general language such as assignments of error are abolished might not that be taken by somebody to mean what it says, and if so, shouldn't we restrain the generality of it?

JUDGE CLARK: I am perfectly willing to take Judge Dobie's suggestion or Mr. Mitchell's suggestion. I was going to add my second point, which is, that these Circuit Court of Appeals are really requiring it twice. That is what I am trying to avoid. I am not trying to tell it to them where they use it in their briefs. They use somewhat different terms. They specify points of argument, and so forth. But the point is that these Circuit Courts of Appeal are requiring it in the record, and that is what I want to stop.

THE CHAIRMAN: How would it be to make it this way: No assignments of error need be incorporated in the record on appeal, but if the appellant does not designate for inclusion in the complete record, and so forth, he shall serve with his designation a concise statement of the points on which he intends to rely on appeal.

JUDGE CLARK: I think that is all right, isn't it?

THE CHAIRMAN: Now, that makes it clear that you are

not abolishing assignments of error in the brief if the appellate courts want them.

JUDGE DOBIE: I second that heartily.

THE CHAIRMAN: Is there any further discussion? If there is no objection, that is agreed to.

JUDGE CLARK: The next is (e) on page 203. I think that is--

JUDGE DOBIE (Interposing): That has been covered, hasn't it?

JUDGE CLARK: Yes, that is in the forma pauperis idea, and I think that is covered.

Page 204, (f), Stipulation as to Record. There is just a short comment.

Rule 75(g), page 205. There is a suggestion again of Mr. Atkinson, who is a good man even if we don't follow him, that the appellant should prepare the record rather than the clerk. He points out that in some districts the clerk insists upon doing the actual work and charging a fee.

JUDGE DOBIE: That was like a case we had. The appellant did all the work, and all the clerk had to do was to compare it, and the question was whether he could charge 5 cents or 15 cents. We held 5 cents against the comptroller.

THE CHAIRMAN: I [illegible]like--Are you through with that one matter?

JUDGE CLARK: Do you want to do anything about it?

We don't particularly recommend anything. You can handle it, can't you, Armistead?

JUDGE DOBIE: Yes, we don't have any difficulty at all. I think it would be a mistake to make the change because I think it is going very nicely.

THE CHAIRMAN: I have before me a very nice letter addressed to Judge Donworth by the clerk of the Court of Appeals at San Francisco. He makes a number of suggestions. I don't think many of them need be considered here. If you like I can write a letter on it. But there is one thing I would like to ask the Committee about. You will note in 75(b) that it says: "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 two copies of the reporter's transcript of the evidence or proceedings included in his designation." The last sentence says: "One of the copies so filed by the appellant shall be available for the use of the other parties and for use in the appellate court in printing the record."

When the rule was drawn it was drawn with the purpose that one of these two copies then would be certified up as the official record on appeal, and the other copy should be sent along so that the Circuit Court of Appeals could use it for printing. This clerk out in California sort of assumes that this original copy (not the one to be used for or

available for printing, and so forth) becomes a record of the District Court and he can't certify it up to the Court of Appeals, and he has got to make another, and the question I want to ask you is, whether you think that rule is susceptible to that interpretation or not; because I think we assumed that neither one of these copies was part of the record in the District Court so that it had to be preserved in their files and it isn't a part of the record; and both copies, the one certified and the other, shipped along so that the Circuit Court, if it didn't want to have its original certified record torn up by the printer, could send the copy to him. Do you think that that rule is fairly susceptible to such an interpretation as this clerk places on it?

JUDGE DONWORTH: Mr. O'Brien called on me in connection with his amendment. He feels quite concerned about it. He says that there is always a complete stenographic copy of the proceedings filed in the District Court. I didn't suppose that was universal but he says in every case tried there is a record filed there. If that is true, he says it is an utter waste of money to require the appellant to furnish two copies more when both parties have the use of this copy that is already on file in the District clerk's office. What about that, Mr. Reporter?

JUDGE CLARK: I will say this: I think we all thought that both copies could be used. I have run into some

question of that kind myself, that is, that the District Court always seemed to think that they always ought to have something in their files. It doesn't seem to me that it is necessary. It seems to me that it is more tradition than anything else. But apparently they feel lost if their files are that way. I suppose it is generally true about files, and it is a good thing in many respects. For most things you have to get an order of the judge to take anything out. So, while I don't think it is susceptible to that interpretation, yet this does worry District Courts, and it is conceivable that we perhaps ought to put in something that they can let the record go out of their hands.

THE CHAIRMAN: Suppose we say then in 75(b) where it says: "One of the copies so filed by the appellant shall be available for the use of the other parties and for use in the appellate court in printing the record," that one of the copies shall be for certification as the record on appeal, and the other copy shall be available for use.

JUDGE DONWORTH: I understand that Mr. O'Brien's objections go a little deeper. He says you don't need any copy because there is a complete transcript in the clerk's office already.

THE CHAIRMAN: There are two different propositions and he makes them both.

JUDGE DONWORTH: I know there are.

THE CHAIRMAN: I'll read it to you if you want me to.

JUDGE DONWORTH: I wouldn't take up the time.

THE CHAIRMAN: He states explicitly that he makes the additional point that you make, that sometimes there is already one copy on file and that you don't need two more.

MR. LEMANN: Is it pretty plain that two copies ought to be required and one of those goes to the C.C.A.?

THE CHAIRMAN: Both of them do. One is certified and the other one is sent along to help if they want to print, otherwise the official record goes to the printer and cuts it all up, and it isn't a very desirable practice.

MR. LEMANN: Down my way I had assumed that just that thing happened; that the C.C.A. only ever got one copy and that was always the previous rule. I don't know whether they are getting two now.

JUDGE DONWORTH: It would suit me if the Chairman follows his suggestion of writing to Mr. O'Brien, but I hope the Chairman will give full consideration to the detailed suggestions because Mr. O'Brien is a very competent and conscientious clerk, and not only does he desire to have the thing done right (which, of course, everybody does) but he thinks that these rules require a waste of money and duplication of effort.

MR. LEMANN: Suppose we require three copies.

THE CHAIRMAN: Suppose we take up his points

separately. To meet one of his points I have suggested to make the matter clear that he can use both these copies which can go up to the Circuit Court of Appeals, one as the certified record and one informally, and that he doesn't have to keep one in his file and have a stenographic copy. We can say that one of the copies so filed shall be used for certification of the record on appeal--as part of the record on appeal--and the other copy shall be available for the use of the other parties and for use in the appellate court in printing the record. That is point one.

His other point is that if you have got other copies on file already and you don't need any more--we can correct if you want by adding a clause that will cover that and say that if there are two on file or one on file already, he only has to see that the total is two--something like that. Those meet both his objections.

JUDGE DONWORTH: All right.

PROFESSOR SUNDERLAND: Is that certified copy ever made use of? Don't they use the printed copy exclusively?

THE CHAIRMAN: The printed one?

PROFESSOR SUNDERLAND: Yes.

THE CHAIRMAN: Where, in the Court of Appeals?

PROFESSOR SUNDERLAND: In the C.C.A.

THE CHAIRMAN: Oh, many times they don't print it at all.

PROFESSOR SUNDERLAND: But if it is printed they don't use the certified copy.

THE CHAIRMAN: You mean to send it to the printer?

PROFESSOR SUNDERLAND: I mean the judges themselves don't use it; they don't consult it.

JUDGE DOBIE: We don't require the printing of all the records, as you know, in the Fourth. We think it is a wonderful rule and is working beautifully. That is all we send to the judge who writes the opinion.

THE CHAIRMAN: Judge, suppose you certify up the written record from the court below and for some reason it is to be printed in the Circuit Court of Appeals. Is it satisfactory to you to take that orginal certified record and send it to a printer and have it out up by the printer, or wouldn't you like this additional record spoken of in the rules as a copy along with it?

JUDGE DOBIE: Yes.

THE CHAIRMAN: Which you can use for printing and treasure the certified copy in the file.

PROFESSOR SUNDERLAND: Do you use the certified copy when you have this printed record?

JUDGE DOBIE: We don't require them to print everything excepting what the parties designate--only what the parties designate. Then the printed record comes up and that is always sent up to the judge who really writes the opinion.

THE CHAIRMAN: Do you always send the official certified record to the printer to let him cut it up?

JUDGE DOBIE: No.

JUDGE CLARK: The only thing that is filed with us is a printed copy and the district clerk certifies that.

JUDGE DOBIE: It is printed below.

MR. LEHMANN: In my circuit nobody ever looks at the printed thing--I mean the typewritten transcript--except the printer, and the clerk, and he never requires but one; and Mr. Dodge tells me that is all they do in Boston, send one to the C.C.A.--the certified one which they use for the printer and don't have any use for an extra copy.

THE CHAIRMAN: That is what I was trying to bring out here, whether one copy really isn't enough. It isn't a question of whether the upper court uses the certified copy; it is a question of whether they feel it is profitable to have it sent to the printer and have it cut into pieces for the linotype man.

DEAN MORGAN: We debated this thing for three or four hours originally, and Senator Pepper wrote a poem about its being a world-shaking decision, and we decided to have two copies.

THE CHAIRMAN: Maybe we decided it wrongly. Here is an item involving expense, and why shouldn't we consider it in deciding whether we have gone far enough?

DEAN MORGAN: I think that is the question, whether we ought to require two again. We ought to say one copy.

MR. LEMANN: Might not this be the thing we ought to do, perhaps? Ask the Reporter to write to the nine Circuit Courts of Appeal--there are only nine letters which would be necessary--and ask them just what they are doing; how they are getting along; and whether they need two copies; and whether this printing point that you raise is really important. We will have that when we come back here.

THE CHAIRMAN: That is a good idea; and if they only need one certified, are perfectly willing to trust it to the printer, why, we will wipe out this two-copy business.

DEAN MORGAN: And save expense then for the litigant.

MR. LEMANN: And if this gentleman's practice in San Francisco is to have one copy down there, why, then he can have one of the two.

THE CHAIRMAN: The question will be referred to the Reporter so that he can write to the clerks of the circuits and ask them if they need two, one certified and one a copy not certified for printing purposes, or whether it would be perfectly satisfactory to the court if only one original certified transcript be sent up, and then draw the rule accordingly. Is there any objection to that?

MR. DODGE: It may be the custom in every circuit if one party, the appellant, orders the evidence written out

the stenographer invariably writes out an extra copy for the clerk of the court. That is the only way in which your clerk out there could always have a copy anyway.

DEAN MORGAN: That is the only way, but the court wouldn't pay for it.

MR. DODGE: If nobody ever ordered it written out the clerk would never have a copy of the testimony.

JUDGE DONWORTH: He brings up another point, as I understand it, and that is if the appellee asks for more of the record than the appellant intended to send up, he thinks the District Court should decide in the first instance who is to stand the expense of that first matter which the appellant wanted to sent up. He says the District judge should have the right to pass upon that because at present the appellee desires to burden the appellant with all the expense he can and he demands a lot that he doesn't need.

JUDGE CLARK: I might say that is the next thing I was coming to here.

THE CHAIRMAN: What have you to say about that?

JUDGE CLARK: We have discussed that. There have been suggestions made of that kind and we have held definitely to the contrary in the Second Circuit, and I think we are following the idea of the rules and the definite suggestion of the Chairman that it didn't do very much good to stage a contest in the District Court over what should go to the appellate court

because after you had staged it there you then restaged it in the appellate court to see if the District Court had decided correctly what should be before the appellate court, and it seemed to us, (and I think that was the idea of the rule) that the better way was to get it up there at once.

JUDGE DONWORTH: That isn't quite the point.

JUDGE CLARK: Yes, I think it is, if you will excuse me. The question of printing is where the expense comes and is a different matter and we treat it differently in our court. I might say there, too, that we voted for the Judge Parker rule: we voted for it a year ago and haven't got around to putting it into effect, but even though we have not put it into effect we have dispensed with printing quite a little and particularly on these controversial points so the way this thing now works with us is that we have said in opinions that those issues are not for the District Court but are for the appellate court; and then they come to us at once and say it is going to cost so much and so forth, and we dispose of it now very summarily and say never mind printing it; bring it in to us in any form, typewritten or otherwise, and, of course, when we get our rule as to the amount of printing work, why, they wouldn't even have to do that. I might say that my suggestion has really been the opposite. It is on page 207, and it is to make it definite the other way, as we think it is implied already.

THE CHAIRMAN: May I ask this? I have read this

statement of the clerk of San Francisco very carefully, and I am afraid we are confusing the matter of printing costs with something entirely different. As Judge Donworth says, I think his point is different--the point of the clerk out there. I don't think we ought to do anything about it myself. The appellant designates a part of the record. Then the respondent designates another part of the record, and the clerk's point is that the respondent often designates more than he really ought to, and he thinks that the appellant ought to have the right to go to the District judge and have the District judge say, "Well, I don't think this stuff really is needed. I concede your right to have it put in, Mr. Respondent, but I think initially you ought to advance the costs of putting or of having the clerk put it in the transcript and pay his fees for having to do it." It is an advance payment. It doesn't fix on the respondent the final bill for that cost. The judge is going to be asked to say, "Well, I think you have asked too much and I think it is unfair to have the appellant pay the money for printing this part of the record. I think you ought to advance money for such and such parts that I don't really think ought to be there but for which you have asked and you have a perfect right to have it." Then that goes up to the appellate court and if the appellate under its power, under these rules or its own rules, settles a question of whether there has been too much stuck into the record, he can say

whether that initial expenditure by the respondent ought to stay with him or whether it ought to be transferred to the appellant. The question of the printing costs is something quite different; that is handled wholly in the upper court. That puts it back to the District judge, and in the cases that the clerk speaks about to require in some cases the respondent to bear initially, I mean, advance the money for part of the expense of the record on appeal, the only justification for the request is that the clerk thinks the respondent is demanding too much in many cases and trying to foist expense upon the appellant and make it a case of maybe deterring him from going on. On the other hand, generally speaking, we don't like the idea of having the respondent bear any of the costs of appeal or finance the appeal or the appellant. That is what it amounts to, even temporarily. That is the issue, isn't it, Judge?

JUDGE DONWORTH: I move that the suggestion of Clerk O'Brien be left in the hands of the Chairman for his disposition.

THE CHAIRMAN: If we didn't accede to any of the suggestions of Mr. O'Brien, I was going to write him a nice letter and tell him we talked them over carefully, and maybe I will give him our reasons, but I am not going to decide them.

MR. LEMANN: Suppose the District Court makes the respondent pay for these extra things? That would cover

the stenographic costs in copying them out in the lower court. The main expense is in the printing of them. When you got up to the C.C.A. the clerk there would print everything unless you got an order from the C.C.A. itself not to print the extra parts. That part of the controversy I presume would have to be presented to the C.C.A.

THE CHAIRMAN: That is right.

MR. LEMANN: And that is really the main expense--in the printing part of it.

JUDGE DOBIE: Under our rules that is handled up there. Not long ago a man printed a thousand page appendix. There was a necessity in the case for printing a page and a half, and he printed a thousand pages, so we assessed all the costs of printing against him. He said he didn't have too much time to do it so he left it to his clerk, and when the clerk didn't know what to do he said to put it in; and we said if you do it again we will sting you again.

MR. LEMANN: A man might win his case on appeal and yet burden his record up with a lot of unnecessary stuff that was not necessary in there to win.

THE CHAIRMAN: Monte, the point about [illegible] asking the respondent to finance part of the expense of getting the record of appeal up is more narrow than you said. It hasn't anything to do with the reporter's costs--paying the cost of the reporter for getting up the transcript. The appellant has to

see to it that a transcript is prepared and he pays for it. This cost that the clerk wants to have the respondent pay is only the clerk's fees for certifying, and it is a very minor thing, and I doubt if we ought to be asking or allowing the parties to go to a judge and ask the respondent to finance part of the appeal when the item involved is simply the clerk's certification fees on the record. That is the way I look at it.

JUDGE DONWORTH: I am not asking for any particular ruling on the subject.

THE CHAIRMAN: If there is no objection we will pass over that suggestion of Mr. O'Brien.

What else have you, Charlie?

JUDGE CLARK: If you want to consider on page 207 our suggestion as only clarifying 75(h), we add at the end thereof the following sentence: "Other issues as to the content and form of the record shall be presented to the circuit court of appeals."

THE CHAIRMAN: Does that mean while you are getting it up?

JUDGE CLARK: Yes, that is what happens now. How to correct the Record: The District Court has power therein stated to correct the record; other questions go to the Circuit Court.

THE CHAIRMAN: I guess that is so except that the

upper court has the old-fashioned idea of "certiorariing" them into the record; that is just what you mean, isn't it?

JUDGE CLARK: Yes, that is, as I say, what we have held in two or three cases, and there just have been several questions about it, and it may not be necessary. I should think that was the conclusion anyhow.

THE CHAIRMAN: We already have an order, a rule here, that the Circuit Court of Appeals at any time can call upon the lower court to certify a particular matter, haven't we?

JUDGE CLARK: Yes, but there are several judges who do raise a question at least similar to the one raised by the clerk that the questions of lessening the amount of the record ought to go to the District Court. There have been some questions as to whether it shouldn't be done, and, in fact, the question came to us where the District Courts had acted and we held that they were in error. There were a couple of cases--it was, in a way, very amusing. The District Court had stricken the matter from the record as it was unnecessary to present the matter on appeal, and then the appellant printed it in order that we could see what error the District Judge had committed in striking it out.

JUDGE DOBIE: Do you think that it would be helpful to add that?

THE CHAIRMAN: This rule already says:

"If anything material to either party is omitted from the record on appeal by error or accident or is mis-

stated therein, the parties by stipulation, or the district court, either before or after the record is transmitted to the appellate court, or the appellate court, on a proper suggestion or of its own initiative, may direct that the omission or misstatement shall be corrected, and if necessary that a supplemental record shall be certified and transmitted by the clerk of the district court."

JUDGE CLARK: I think there is an implication there; but what you read isn't quite on the point I am talking about. The appellee asked for certain parts of the record to go up. The appellant said that is too much and goes to the trial judge and the trial judge says that that is too much and strikes it out. What I am saying here expressly is that the trial court has no power to strike it out. I think that is the implication there already.

THE CHAIRMAN: I see, all right.

MR. LEMANN: Would your sentence add anything? You say on that, "Other issues as to the content and form of the record."

THE CHAIRMAN: You see the part I read refers to omissions by error or accident.

MR. LEMANN: How about the first sentence: It is not necessary but if any difference arises as to whether the record truly discloses what occurred in the District Court, the difference shall be submitted to and be settled by that

court and the record made to conform to the truth.

JUDGE DOBIE: That doesn't give the power to cut out.

MR. LEMANN: Does this?

JUDGE CLARK: First, please let me say again that it is just clarifying. But what seems to us not so sure is that the District Judges don't read it that way.

SENATOR PEPPER: What is that, sir?

JUDGE CLARK: The District Judges read that that they have power in correcting the record; that they had power to correct it because it had superfluous material.

THE CHAIRMAN: I agreed to the amendment on the sole ground that the rule, as it stands, only relates to omitted parts or providing for the correction of a record omitted by error or by accident, whereas I think this amendment would make it clear that if some things had been deliberately omitted, whether the question would be raised as to whether they ought to be in or not, it goes to the Circuit Court of Appeals for decision and not to the District Judge.

MR. LEMANN: Is the amendment or suggestion as to that on page 207?

THE CHAIRMAN: Yes, the last two lines on the page.

MR. LEMANN: I don't think it is made as clear by the amendment as it might be. I should think that somebody reading this amendment (this added sentence) would get much more than he has now; that other issues must be presented to

the court of appeals, and the question is, what other issues that 75(h) now entrusts to the District Court. If you want to make it plain, I should think you could do a better job than this of making it plain.

SENATOR PEPPER: Where was this to be added, Mr. Reporter?

JUDGE CLARK: I suggested it at the end.

SENATOR PEPPER: That would be a new subsection?

JUDGE CLARK: No, at the end of (h).

SENATOR PEPPER: That is the reason I asked the question, because (h) is captioned "Power of Court to Correct Record," and the greater part--all of the rule, as now included, does deal with corrections in the record. This isn't a question of correcting the record; it is a question of amplification of what the appellant is proposing to take up to the Circuit Court.

MR. LEMANN: I think Senator Pepper is quite right. It seems to me it would come under 75(b) or 75(e) rather than 75(h).

JUDGE CLARK: I think (h) already contains this by implication, and if you want to call it "Power of Court to Correct Record"--

MR. LEMANN: Isn't it quite different from the correction of the record? There is nothing in (h) now that does not relate to some imperfection in the record of anything, whereas what you are talking about is not anything--

THE CHAIRMAN (Interposing): What we are talking about is certiorari and diminution of the record, if you happen to know what that means. That is where the Circuit Courts of Appeal were told that a part of the proceedings below that weren't incorporated at all in the record. It isn't a mistake in the record; it was just simply an incomplete record, and they have issued a writ of certiorari and diminution of the record in order that the District Court certify up those additional parts of the record below that hadn't already been certified, but that isn't a correction as the Senator says. It is a supplement, an elaboration.

SENATOR PEPPER: I was wondering whether we ought not to deal with this matter, which I agree is important, in 75(h) which has to do with the transcript, because, after all, it has to do with this suggestion, with amplifying what the appellant is proposing to include in the transcript, does it not?

JUDGE CLARK: I should think that the proper place, it would seem to me, was here in (h) and perhaps there is a little difficulty with the title only. What (h) really is, by express statement as well as by implication, is the extent of the District Court's power over the record, and we put in (h) the affirmative statement of the extent of the power, and what we are--what I am adding is the negative statement; and the matter is a little broader than the one the Chairman

referred to of dimimution and so forth of the record. The matter brings up the whole question of the District Court's power to shape the record, and we have said originally that the court may correct the record, and I think the whole implication is that is all he may do in the case of a dispute, and the question having arisen, then I just simply put in the negative. He may correct the record but he cannot do the other things that have been claimed he should do. Maybe it isn't necessary to clarify it but it is just to make it clear to the District judges who have thought that they had that power.

SENATOR PEPPER: Then your thought is that by changing the caption of "Power of Court to Correct Record" that you no longer focus attention merely upon necessary corrections but give him the power, or deny him the power, as the case may be, to do thus and so?

JUDGE CLARK: Yes.

SENATOR PEPPER: I see.

THE CHAIRMAN: I think that is the place for it.

JUDGE DOBIE: I think it is all right to go into (h).

THE CHAIRMAN: That is to change the title.

SENATOR PEPPER: Yes, I was misled by the presence of the word "correct" because it seemed to me it wasn't a matter of correction.

THE CHAIRMAN: Is it your pleasure then that Rule

75(h) be changed by making the suggested change in the title of that subdivision and by adding at the end of the subdivision the provision of page 207 of the Reporter's report reading:"Other issues as to the content and form of the record shall be presented to the circuit court of appeals"?

SENATOR PEPPER: I second that.

THE CHAIRMAN: All in favor of that say "aye". That is agreed to.

We will adjourn for a little while.

(A brief recess was declared.)

THE CHAIRMAN: The next proposal relates to Rule 75(j), and it is a matter that I suggested. If you will permit me I will explain how it came up. This is an amendment to the rule which is proposed to be put in at the end of (j) and which allows the respondent to go ahead and get the record prepared in the court below and certified and rushed up to the Court of Appeals. I will tell you again how the thing arose. That is still our old friend the Black Tom case.

After we got a judgment in the United States District Court defeating the plaintiff, it was along in March I think, why, the other side, of course, filed their notice of appeal. They had to file it then within twenty days. They then didn't do a thing. They were obviously trying to prevent it from getting in at that term in the Court of Appeals, and put us off another six months and try to get a settlement out of us

because, as I say, it cost us $700,000 a year in money, and I got hold of John McCloy, who was associated with me (now Assistant Secretary of War) and I said, "See here, isn't there anything in our rules here at all to allow the respondent to expedite an appeal by himself getting up the transcript?" I said, "We are going ahead and doing it and getting it up and then we will put the other fellow in a position where he will have to go before the appellate court and move to strike out the record on the ground that he didn't take it up; not on the ground that there was anything wrong about it, and it would be a real admission that he just is fighting for delay, and I don't believe he will dare to do it."

To make a long story short, as a result inside of five days we had the transcript ready, designated the whole record so that there wouldn't be any record as to what the other fellow wanted to do, had it certified by the clerk, and inside of a week had the case docketed and the record on file in the Circuit Court of Appeals; and sure enough, the other side made a motion to strike it because under these rules the respondent didn't have any right to do that; and then he lost his nerve and quit because you see we were going to go in and burn him up, and the result was that we got the case up there, and he instantly moved to have it advanced. It was an important case to the Government, too, and the court advanced it and heard it at the June term and decided it, and we saved over six

months. So I made a mental note to send it to the Reporter to fix it up so that the respondent could do that. The appellant hasn't any constitutional rights, and so this amendment comes along.

JUDGE DOBIE: There is a similar provision, you, of course, remember, in removal of the cases. If the moving defendant doesn't file a case up in the Federal court, why, the plaintiff can do it. I think it is a good idea, General.

JUDGE CLARK: I raise two questions: the first one, if he is not in default, isn't that his right?

THE CHAIRMAN: A matter of right? Couldn't we make a rule that either side has a right to get the record immediately? Isn't that a matter of right?

DEAN MORGAN: I should think so.

JUDGE CLARK: I should think to take it away under the rules it would be so. At the same time, he should be given a certain time.

THE CHAIRMAN: He is given it by our rules.

JUDGE DOBIE: The rules give and the rules take away, and the hell with him either way.

THE CHAIRMAN: Now, we say that he has got the right, and the other fellow can do it, too. I don't know whether there is any question about that.

JUDGE CLARK: The other question I ask is on a decision by our courts which I think is wrong, but nevertheless

is a decision, that it is only what the appellant brings out which brings the case in controversy before us.

JUDGE DOBIE: You are only bringing the questions the appellant raises.

DEAN MORGAN: That can't be true of the record.

THE CHAIRMAN: You see, there was a little quirk about that because the appellant didn't designate any part of the record, but we met that by simply bringing ourselves in the whole darn thing and if you want to put in a lot of machinery by which the respondent makes the first designation-- I didn't think it was necessary. I think the court has got it. There is a circuit (maybe it is yours) that has a rule which says if the appellant doesn't promptly bring the record up the other fellow can.

JUDGE CLARK: Rather curiously, we have the rule, too. I say rather curiously, because it does seem to me that in view of the decision to which I referred there is some doubt about it, that is, if an appellant indicates or says that he has no question before us our jurisdiction is gone.

JUDGE DOBIE: The appellant raises the questions and determines all that, and we just hold him back.

JUDGE CLARK: What questions does he raise? There will be nothing to show, you know.

THE CHAIRMAN: There isn't if the whole record is designated below. He doesn't have to file any assignments of

error. We just abolished that so we are taking the record up just as is and the appellant has designated the whole record. He can't say that there is any question of our power. I would be ashamed if the law would be that way.

JUDGE CLARK: I was ashamed that the law was taken to be that way and I said so, but I didn't stop it from being that way for the Second Circuit.

THE CHAIRMAN: What does that hold?

JUDGE CLARK: That is the case I spoke of, the patent case. The appellant told us--and this didn't come up until we got into the argument--and you see it wouldn't. Appellant decided that he would not press the claim of infringement, but would only press objection to the finding below that his patent was invalid, and my brethren said that once you said he conceded there was not infringement, that there wasn't a case of controversy before us; that we lost the jurisdiction, and although neither side asked for the judgment, of course, the appeal was dismissed for lack of jurisdiction.

THE CHAIRMAN: I think this is entirely different. This isn't any question of forcing the issue on the appellant or not. We are just placing the record here, putting it in his lap, and saying, "You make any points you want to." We are not taking the record up to force any issue on the appellant, and we are simply getting the record up there by making his own case, but making him do it right away.

JUDGE DONWORTH: Have you formulated an amendment?

THE CHAIRMAN: The Reporter has one on page 208, and I would add to it that the title of the section be enlarged. The title of Section (j) of Rule 75 now is "Record for Preliminary Hearing in Appellate Court." That is a partial record. We ought to add another sentence to the title: Power of the respondent to have the record certified--the record on appeal certified and the case docketed; something like that.

JUDGE DONWORTH: I move that the suggestion of the Chairman be approved.

THE CHAIRMAN: Is there any discussion?

PROFESSOR SUNDERLAND: In the title, power of appellee.

JUDGE CLARK: Yes, the power of appellee.

THE CHAIRMAN: Yes. All in favor of the Reporter's suggestion for allowing the appellee to hustle up the record and docket it say "aye". That is agreed to.

JUDGE CLARK: The next is (k), several appeals. I don't know that I want to do anything about this. I will just suggest it. I raise the question of whether one notice of appeal shouldn't do for all parties, which is a little different idea from the one we had. The matter came up in that case that we stated here, Matter of Barnett, which was a kind of foolish thing in a way, but that is what often

happens. That was a case where a bankrupt had made an assignment to her mother, and the mother was the one really involved and they had the same counsel, and the counsel wasn't very bright. When the counsel came to take the appeal he appealed in the name of the bankrupt, the daughter, and then Judge Hand asked him at the argument--he said, "You really don't want anything against the bankrupt," (they had an order that the bankrupt return a document) and the appellee promptly withdrew all claims against the bankrupt leaving the mother high and dry. The brief was signed on behalf of both mother and daughter, which shows how they do things. Then there came the question of whether we should dismiss the appeal again as being no case of controversy, and that time I hung on to Judge Frank long enough so that in that case we considered it. But Judge Learned Hand dissented on the ground that we had no power to act. The point is this: It may be a little of a trap; it turned out to be one. It was partly the stupidity of counsel but it was a little of a trap because he thought he had gotten a complete appeal up and he hadn't. Our scheme now is that each party must go practically on his own, file a notice of appeal, and then they can consolidate, so to speak, and have one record, but each has got to go through the form himself.

DEAN MORGAN: Does that mean that one appellant can practically force the other persons to be parties to the record on appeal?

JUDGE CLARK: Yes, if you want to put it that way; but I would say this, that now one appellant forces all parties to the record in a sense when he files his notice for he brings up all others as appellees because there is no question of designating who are the opposing parties, and so forth, because you just file your notice of appeal in the District Court and then everybody who is in the case is an appellee.

DEAN MORGAN: But suppose none of the others show up. Are you going to go ahead and say that they ought to have shown up and we will try to fix it up because we think they ought to have shown up? Is that what you are going to do?

PROFESSOR SUNDERLAND: You can't do that.

DEAN MORGAN: But that is just what they do do.

PROFESSOR SUNDERLAND: If you notify them and they don't appear, that is their privilege of severance, and they are out.

DEAN MORGAN: But isn't that what you did, Charlie? That is just what you did.

JUDGE CLARK: We decided the case for the old lady then.

DEAN MORGAN: You said if the old lady were here you would decide it for her or you might decide it for her, and so forth. The old lady wasn't there and the appellant who was there said that he didn't appear for the old lady.

SENATOR PEPPER: And the people who had the claims

against the bakrupt withdrew them.

DEAN MORGAN: Yes.

PROFESSOR SUNDERLAND: I don't see how they did it.

DEAN MORGAN: The answer is that they did it. She was in jail.

SENATOR PEPPER: I can see Learned Hand's point of view. (Laughter)

DEAN MORGAN: I would have been in jail if that had been done to me, but it would be beyond all the rules of the game.

JUDGE CLARK: Judge Frank wrote the opinion and he said that a lawsuit was no longer a game of chance. It was an attempt to do justice. I have cited his case from time to time.

DEAN MORGAN: Then he went back.

JUDGE DONWORTH: What is the motion?

THE CHAIRMAN: Is there any action there?

JUDGE CLARK: There is, at least, a spirit of levity developing which, I guess, indicates that there is no action.

THE CHAIRMAN: May I ask the indulgence of the Committee to go back to just what we did recently about the provision for allowing the appellee to get the record up? I think there is a provision in the amendment that isn't quite satisfactory. On page 208 of the Reporter's report, his present proposed amendment is:

"If an appellant fails promptly to settle the record and have the same certified and transmitted as herein provided, the appellee himself may expedite the appeal by having the record transmitted and having the case docketed for the purpose of having the appeal determined."

That always raises the question as to whether he has had a reasonable time to do it, and in the case I spoke of we had the record up there in six days, and if we had that qualification on it we would have been too soon because he had not failed promptly to get it up. He intended to fail promptly but he hadn't yet gone that far.

SENATOR PEPPER: Anticipatory breach.

THE CHAIRMAN: There is another difficulty there. As it reads, the appellee may himself expedite the appeal by having the record certified and transmitted. That is narrow and it probably would mean that he would have to wait until the other fellow designated the parts that he wanted and all that, and that the only thing that he could expedite might be the certification by the clerk which might be paying his fee. Without formulating the amendment, I ask that it be referred to the Reporter to strike out that condition "If an appellant fails promptly to settle the record," the other fellow can, and to rephrase the amendment so as to provide whatever machinery there may be necessary to enable the appellee to make the first designation. If he designates the whole record

as we did it is easy, but if he designates a part of it, then the appellant ought to have the power to add to it, you see. He really has got to have some machinery for that, and we don't want to take the time now to draft it. May I ask that those matters be referred to the Reporter?

SENATOR PEPPER: I make such a motion.

MR. TOLMAN: I so move.

SENATOR PEPPER: I second it.

THE CHAIRMAN: If there is no exception that will be agreed to.

Mr. Reporter, will you go on with your business.

JUDGE CLARK: (i), printing, I guess not much more has to be said. As I understand it, the Criminal Committee has recommended the Fourth Circuit rule and will make it uniform in all cases in the Federal courts and criminal cases, isn't that correct, Mr. Robinson?

MR. HOLTZOFF: I didn't hear what you said.

JUDGE CLARK: That you are recommending the Fourth Circuit rule as to printing.

MR. HOLTZOFF: Yes, sir.

PROFESSOR SUNDERLAND: How do they get their authority?

THE CHAIRMAN: Their authority is broader than ours. We are not doing it here. This is just a reiteration of the existing law that printing is a matter for the Court of

ought to do that about the notice from the clerk. Personally, I think it is a rather good rule.

THE CHAIRMAN: You are talking about 77(d), aren't you?

JUDGE CLARK: That's correct, 77(d).

THE CHAIRMAN: That was referred to you to hold up until we saw what the court did in the pending case.

JUDGE DOBIE: I think that is best.

THE CHAIRMAN: Is there anything in (a), (b) or (c)?

JUDGE CLARK: No.

THE CHAIRMAN: Rule 78, motion day.

JUDGE CLARK: No changes suggested there.

THE CHAIRMAN: Rule 79, books kept by the clerk and entries therein.

JUDGE CLARK: We have some suggestions from the Administrative Office which is merely the giving of the authority to them. You will notice that in accordance with their suggestions we recommend the addition of the following provision to Rule 79(d):

"Books and Records Required by Administrative Office. The Administrative Office of the United States Courts may require the keeping of any other books or records which it deems necessary, and prescribe the duties of the clerk appertaining thereto."

DEAN MORGAN: I so move, Mr. Chairman.

JUDGE DOBIE: Some of them aren't going to like it but I am in favor of it 100 per cent.

PROFESSOR SUNDERLAND: They ought to have that power.

SENATOR PEPPER: They ought to. I second the motion.

MR. HAMMOND: They have got the authority. Why should we give them the authority?

DEAN MORGAN: I supposed they had the authority.

JUDGE DOBIE: Those inspections they are making are magnificent. What was the query?

JUDGE CLARK: I can't answer the question of whether they have the authority already, but there are two practical answers. We are dealing with that kind of books already and it is a natural thing to put in; and the other thing is that they seem to think that they wanted it.

JUDGE DOBIE: I think that it is desirable to have and if any clerk gets obstreperous we can show him this absolute warrant for it. I move that it be adopted.

THE CHAIRMAN: I think that where we specify that the books shall be kept by the clerks there is a necessary inference.

DEAN MORGAN: If they want it I think they ought to have it.

MR. HAMMOND: So do I.

THE CHAIRMAN: The question is as to the adoption of

that recommendation.

JUDGE DOBIE: I move its adoption.

THE CHAIRMAN: All in favor say "aye". It is agreed to.

JUDGE CLARK: That was an addition to (d). Mr. Shafroth of the Office suggests a small change in (b), civil order book, and he wants to have it made a record instead of a book so as to avoid unnecessary duplication of copying. He suggests that: "The clerk shall also keep a record for civil actions entitled 'civil orders'," instead of keeping a book entitled "civil order book."

THE CHAIRMAN: Is there any objection to that?

JUDGE DOBIE: I move its adoption.

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

We are now up to 80.

JUDGE CLARK: An earlier part of this is a discussion of the position of the official stenographer. A reference to the pending bill on page 217 is Judge Parker's comment in the Harvard Law Review where he discusses the bill and he thinks it is going to pass. On page 218 is this question that the Department of Justice has brought up, and on page 219 is our suggestion for doing something about it.

THE CHAIRMAN: About contract reporters?

JUDGE CLARK: That is it, yes, sir, and our suggestion

is at the very end of 219, and we suggest--

THE CHAIRMAN (Interposing): Let's see, the very end of what?

JUDGE CLARK: Page 219, to add to the first sentence of Rule 80(a), which now reads as follows:

"A court or master may direct that evidence be taken stenographically and may appoint a stenographer for that purpose." We would add to that, "having regard to the expenses involved, the ability of the parties to assume the costs, or in the case of the United States, statutory restrictions on expenditures."

MR. HOLTZOFF: Mr. Chairman, our trouble was with 80(b) rather than with 80(a). The Circuit Judge of the Eastern District of Pennsylvania took the position that 80(b) gave him the authority to exclude the transcript prepared by our contract reporter, and my suggestion is that any amendment ought to be on 80(b) and perhaps it might be a little more clear as to what is intended than the language that has just been suggested.

THE CHAIRMAN: I rather think that is so. This is the official stenographer rule, (b), that is construed to mean as abolishing contract reporters, and the way to bat that in the eye would be to add to subdivision (b) of Rule 80 that nothing herein contained shall operate to prevent the use of Government contract reporters in Government cases. You have

got it there flatly.

JUDGE DONWORTH: I so move.

JUDGE DOBIE: I second it.

THE CHAIRMAN: Is there any objection? That is agreed to.

You had something else, Charlie, about trying to induce the judge into an admonition to make a reasonable schedule of the fees. Do you think we can do anything with that really? Isn't that more of an administration matter than anything else?

JUDGE CLARK: I suppose it is.

THE CHAIRMAN: I don't believe it amounts to anything.

SENATOR PEPPER: What was that; a reasonable what?

THE CHAIRMAN: In the provision that he proposed to (a) he had a provision in there that the court will have to have due regard for the fixing of the schedule of fees, the ability of the client to pay, and something like that. What was that?

JUDGE CLARK: Having regard to the expenses involved, the ability of the parties to assume the costs, or in the case of the United States, statutory restrictions on expenditures.

THE CHAIRMAN: You mean to attach that--

PROFESSOR SUNDERLAND (Interposing): You mean attach that to the second sentence, not the first. The first is the

ordering of the stenographer.

JUDGE CLARK: The way I suggested it is to the first sentence of (a), and it would come in there if it was in (a). The suggestion, as I understand it is now approved, is that we put it in (b) which, of course, would mean some rewriting.

THE CHAIRMAN: We didn't put that business in (b). All we put in (b) by the motion that was passed was just to make it a naked statement that covered part of what your amendment was supposed to cover. It stated explicitly that the amendment was "nothing herein contained shall operate to prevent the use of Government contract reporters in Government cases or cases in which the Government is a party."

There is something else in your amendment that relates to that.

JUDGE CLARK: Yes, but I think perhaps we had better let it go, then.

THE CHAIRMAN: All right.

DEAN MORGAN: What about that point that we suggested before, that stenographic reporter meant stenographic reporter of any kind? Did we put that off until this time?

JUDGE CLARK: No, we covered that.

DEAN MORGAN: No, at that time we covered--

THE CHAIRMAN (Interposing): We meant a man hired by the parties.

DEAN MORGAN: We did put that in?

THE CHAIRMAN: We did put that in the record of rules.

DEAN MORGAN: Yes, that was on making a record.

THE CHAIRMAN: Are we up to 81?

JUDGE CLARK: Rule 81. There has definitely been some question as to the applicability of the rules in certain general cases and particularly in reference to Tucker Act cases. The Fifth Circuit held the rules not applicable to Tucker Act cases, and in a case in our circuit (reversing, in fact, an opinion that I wrote), United States v. Sherwood, the Government in that case took the position that the rules did apply to Tucker Act cases although they made reference to the particular matter there involved, which was a matter of jurisdiction of the parties.

THE CHAIRMAN: They said jurisdiction?

JUDGE CLARK: Yes, it was treated as jurisdictional. I wonder if it wouldn't be well to put in what we have suggested here, to add a new clause to Rule 81(a) as follows:

"These rules apply in all civil actions by or against the United States, except as otherwise provided herein."

THE CHAIRMAN: You say that the Fifth Circuit held that it didn't apply to Tucker cases. They said that regardless of whether or not it was dictum, and the Government had up in the Supreme Court a case from your circuit?

JUDGE CLARK: That is right, United States v.

BF
100

Sherwood, that is true.

THE CHAIRMAN: And you became disturbed that the Fifth Circuit had said in dictum that the Tucker Act cases weren't governed at all by the rule. It seemed an absurd position to take and I took the matter up with the Solicitor General and protested against the Government's citing the Fifth Circuit dictum in support of the Second Circuit view that Tucker Act cases didn't apply, and the Government brief acceded to that view, and in the extreme they admitted that they didn't rely on the case, and that the Tucker Act cases were governed by these rules. Of course, no matter of real immunity to suit and no matter of real jurisdiction was involved. So I don't think we have to say anything about it because I think it is obvious from the rules as a whole that they do apply to Tucker Act cases as far as procedure is concerned.

JUDGE CLARK: That may be true, but I think one thing ought to be added and that is this: There was nothing in the Supreme Court's opinion in the Sherwood case that really covered the point nor really gave comfort on this.

THE CHAIRMAN: In all these rules, Charlie, you have provisions time and time again as to what the Government has to do and whether they have to do it and whether they don't, and special rules for the Government, when the United States is a party; they don't have to pay costs and things of that kind. You go through the rules and I can show you fifty

provisions making it fairly plain that the Government of the United States in Government litigation is covered by these rules and you have got nothing but a dictum of one court, through a Circuit Court of Appeals, which has been repudiated by the Department of Justice in a brief. I doubt if they need it.

MR. LEMANN: The only thought that occurred to me was whether the average lawyer who had a suit under the Tucker Act case would know that the Supreme Court (as I understand it) had not passed on it; but the briefs of the Government, which are not available to the average lawyer, contained a repudiation of the decision. Take a man in the Fifth Circuit who has a case against the Government under the Tucker Act; he turns to that decision and he would naturally assume that in the Fifth Circuit, at least, his proceeding wasn't governed by these rules.

THE CHAIRMAN: Maybe you're right. Then the proposal is to add a subdivision to Rule 81(a)--(8) -- which would read:

"These rules apply in all civil actions by or against the United States, except as otherwise provided herein."

JUDGE DOBIE: I move its adoption.

THE CHAIRMAN: Is there any objection? That is agreed to.

JUDGE CLARK: I was going to say, of course, you covered it, but there is a late North California case that

also--

MR. LEMANN (Interposing): That is cited in your material on page 1.

JUDGE CLARK: Yes.

THE CHAIRMAN: We have adopted it. Be sure to put in your note to the rule that the purpose of that was to make it clear that the Tucker Act cases procedure are governed by this rule.

MR. LEMANN: And say the Government repudiated its contrary expression in the Sherwood case.

JUDGE CLARK: Perhaps we could put it in another way, that the Government concurred with this view.

THE CHAIRMAN: I have only one question to raise, and that is that we state that these rules flatly apply in all cases by or against the United States. The Supreme Court has held that in so far as our rules allow a suit in counterclaim against the United States, it is a jurisdictional matter and the Government hasn't consented to be sued, and that sort of thing, and the counterclaim rules do not apply. What are you going to do about that?

JUDGE DONWORTH: Also that the joinder of defendants doesn't apply to that.

JUDGE DOBIE: We can't touch jurisdictional matters.

THE CHAIRMAN: I know, but you see my point. Their

rules expressly provide for joinder in the assertion of those claims, and now the Supreme Court says that our rules do not apply because there is immunity from suit.

DEAN MORGAN: We also have a rule that says that we don't change jurisdiction or venue by any of these rules. That takes care of that, I think.

JUDGE CLARK: We can put in a note, too, I think that this is also subject to that rule as to not extending jurisdiction.

DEAN MORGAN: Yes.

THE CHAIRMAN: And point to your case from your circuit.

JUDGE CLARK: Yes.

JUDGE DOBIE: I think we can leave the drafting of that to the Reporter.

THE CHAIRMAN: All right. Next in order, Mr. Reporter.

JUDGE CLARK: Next is that there has been some question as to how far the enforcement of administrative subpoenas, which have to go through the District Court, are subject to procedure here. We had a rather interesting case, Perkins v. Endicott Johnson Corp., which finally went to the Supreme Court which upheld the procedure we followed. But the interesting thing was that there the District Court judge ruled that the rules did not apply because those are cases requiring more expeditious treatment, and then he took two years

to decide the case. (Laughter)

MR. LEHMANN: How far do these rules work in these administrative proceedings? I just wondered if the pattern is generally applicable. I don't know. I am just asking for some information. It is like trying to make a square peg fit into a round hole.

JUDGE CLARK: I don't see why everything under them can't work except some particular thing that the statute itself governs. The statute will say that you are to apply it to the District Court so and so; and outside of that all the details would be better covered by this because the main reason for that is that there is nothing else that does cover it and it leaves the District judge quite at large. So, our suggestion, you see, is to provide in accordance with the underlying words here that the rules apply to appeals and to such other matters of procedure as are not provided for in those statutes, and we list particularly the proceedings to compel the giving of testimony in accordance with the subpoena, and so forth.

THE CHAIRMAN: This brings into play motions to enforce subpoenas or motions to compel a man to answer, and something like that.

JUDGE CLARK: Yes.

THE CHAIRMAN: Is there any question about that amendment?

gf
105

JUDGE DORIE: I believe it is a good one.

MR. LEMANN: What are the rules that apply, 26 and those following?

THE CHAIRMAN: The rule would be 81(a)(3).

MR. LEMANN: Yes, but I am just wondering which of the rules would become applicable to the amendment, Rule 81? I am just trying to figure in my mind whether it would be sure to work.

JUDGE CLARK: In general, what it would do would be to use the pleading rules, and those would be the most natural ones to come in, and among others there would be Rule 12 which would be available.

MR. LEMANN: You mean the pleading rule that is applicable to the administrative board to compel the production of documents if they file a petition against the recalcitrant individual or company?

JUDGE CLARK: Yes, as a matter of fact, these things come up very often on affidavits on both sides.

THE CHAIRMAN: When you want to have or get a subpoena out of a court for an administrative officer and you talk about pleadings, do they file a suit asking him or suing him for a writ of mandamus to compel him to answer? Is that where you say our pleading rules come in?

JUDGE CLARK: What they really do is file some sort of a preliminary document which they often call the motion

DF
106

but is practically a complaint, and sometimes they call it a petition, and they ask for an order of the court for the production of documents. You see, it has to be done through a court order. Then, what is to happen next? Well, the defendant will want to object. How is he to object? If you have the rules applicable, why, he starts filing his regular answer to the petition.

MR. LEMANN: Does he have twenty days ordinarily to answer this complaint of the War Labor Board or some other board, or the National Labor Relations Board? He would have twenty days under our rule.

THE CHAIRMAN: Unless the statute authorizing that procedure provides for other procedure, to wit, five days or whatnot.

MR. LEMANN: This is merely a word as to whether we are warranted in seeing this thing through completely, in putting this thing in without a survey of these administrative proceedings.

JUDGE DONWORTH: Wouldn't he apply for an order to show cause and specify the notice in his order?

MR. LEMANN: Ordinarily.

THE CHAIRMAN: That, would you say, is because the statute authorizes those procedures? Are they converting a mere summary proceeding by which the administrative official goes before the court and gets a subpoena, into a

BF
107

lawsuit requiring a summons and service and all that?

MR. LEMANN: That is what I am afraid of.

JUDGE DONWORTH: No.

JUDGE CLARK: It depends really on how you look at it. In the first instance, the cases, as they come up, must really be by petition, and oftentimes they are not, and actually they have every element of a lawsuit because the defendant is up there fighting. Very often it comes up by both sides filing affidavits, so it should be or is practically a motion for summary judgment.

THE CHAIRMAN: Without any complaint?

JUDGE CLARK: There is a complaint, whether you call it a petition or something else.

THE CHAIRMAN: I would like to see or have you bring back at our next meeting an extract from each one of these administrative texts that specify what the proceeding is and just what the practice is which is prescribed by the statute.

MR. LEMANN: I would like to serve an order to show cause on some of these more important administrative boards before we favor such a rule, and ask them how this works. These fellows work on it all the time.

THE CHAIRMAN: It would go to them. When we distribute a draft we ought to see that they all get it.

MR. LEMANN: I was wondering, whether before we stultify ourselves or do something, whether we ought to get some

preliminary account of how it works.

THE CHAIRMAN: From some of them. We ought to know what we are doing and we ought to see these statutes and see to what extent they do prescribe procedure of their own and whether we may not be converting a very informal and summary proceeding into a long-winded lawsuit.

JUDGE DOBIE: What do you think of referring it back to the Reporter for further investigation and report?

THE CHAIRMAN: I think that is the best thing to do. It is a matter that can be brought up anew at the next meeting and if it is the sense of the meeting, we will refer it back to the reporter to look into these administrative statutes and inform us and himself a little more fully at the next meeting.

MR. LEMANN: If he hasn't given us a list of all the cases (perhaps he has) he should give us a memorandum of all these cases and see whether anything is needed.

THE CHAIRMAN: Is there any objection to referring it back to the Reporter? Does the Reporter object to referring back to him the proposed amendment to Rule 81(a)(3) which adds to things covered by the proceedings by administrative boards to tell people to answer questions?

SENATOR PEPPER: Oh, yes.

THE CHAIRMAN: Except to the extent that the statutues themselves prescribe the procedure. It is found on page 220 of the Reporter's document.

SENATOR PEPPER: I see.

JUDGE CLARK: I don't know how much of a job we can do in three weeks, but I think we can give you something. There have been several cases; there has been a comment on it in the Federal Rules Service which discussed it, and there has been some literature. I might say that I certainly have no intention of slowing this thing up, and I think if we get an orderly procedure we will be able to get it faster.

THE CHAIRMAN: Shan't we refer it to the Reporter? Our time is getting very short.

JUDGE CLARK: Yes, that is right. Here is a comment, if anybody wants to read it, on enforcement by administrative rules of Federal subpoenas.

THE CHAIRMAN: Is there anything else on Rule 81?

JUDGE CLARK: Let's see--Admiralty rules--well, I guess there is nothing to be said there. Comment IV.

THE CHAIRMAN: Bottom of the page, 221. That relates to Rule 81(a)(6).

JUDGE CLARK: That has been repealed and another statute has taken its place, and so we ought to bring that up to date.

THE CHAIRMAN: And your proposed amendment is?

JUDGE CLARK: To substitute the new section, which is Title 8, s738, which contains a provision for service by

publication and for answer in proceedings to cancel certificates of citizenship under the Act of June 29, 1906, as amended, U.S.C., Title 8, s738, to remain in effect.

THE CHAIRMAN: You simply change the reference to the statute and refer to the present one instead of the repealed one, is that right?

JUDGE CLARK: Yes.

THE CHAIRMAN: Is there any objection to that?

JUDGE DOBIE: I move its adoption.

THE CHAIRMAN: If there are no objections it is accepted.

JUDGE CLARK: Comment V is with regard to condemnation rules. We have nothing there.

Under (b), Scire facias, we don't make any recommendation as to that. An attorney wishes more clarity as to the procedure, but I doubt if that is necessary.

JUDGE DONWORTH: I would like to make a remark here in regard to Major Tolman's present draft of the condemnation rule. He proposes that a new rule be inserted just before that part of these rules that relate to appeals and in order not to change the numbers of the other rules, Major Tolman's suggestion is that the new rule be 71-A, so that it will go in after our provision for original jurisdiction and before we get to appeals. If that is adopted, then the final clause, I think, of the new Rule 71-A would be that the

subdivision 7 of the other rule that says that it does not apply to condemnation--we would say that is amended accordingly or something.

JUDGE DOBIE: You don't think that any scire facias or mandamus procedure or substituted procedure is vital, do you?

JUDGE CLARK: I don't think we need to specify that, no. The motion may be desirable.

THE CHAIRMAN: We have said by appropriate motion. That doesn't seem to be working very badly. Do you have anything on removed actions?

JUDGE CLARK: We had a comment from Judge Deaver who said that under the local practice in view of the third sentence of this section, which is Rule 81(c), which provides for the filing in a removed action in which the defendant has not answered, of an answer within the time allowed for answer by the law of the state, or within five days after the filing of the transcript of the record, whichever period is longer, that under the Georgia rules and under certain circumstances that may mean six months, and he suggested that there be added after the word "longer" the phrase "but in any event within 20 days after the filing of the transcript".

THE CHAIRMAN: I corresponded with him about that. I think the amendment is a good one as a result of the peculiarity of the local law.

JUDGE DOBIE: I wish we could change that other mess about the state law, but I don't think we can. That isn't within our purview, is it, Charlie?

JUDGE DONWORTH: What state law are you referring to?

JUDGE DOBIE: I am talking about the time of removing cases, and all that.

THE CHAIRMAN: That is a statute.

JUDGE DOBIE: Yes, that is a Federal statute. I guess we had better not mess with that.

THE CHAIRMAN: But that is cut down now, so that if we adopt this amendment the answer would have to come in within twenty days after the filing of the transcript, which would be plenty of time as an outside limit.

SENATOR PEPPER: Mr. Chairman, something was said a moment ago about scire facias and mandamus.

THE CHAIRMAN: Shall we dispose of this removed action business?

JUDGE DOBIE: I move its adoption.

THE CHAIRMAN: If there is no objection, we shall insert in the rule after the word "longer" the phrase "but in any event within 20 days after the filing of the transcript".

SENATOR PEPPER: What I was going to suggest was this. Somebody is said to have written in saying that we ought to be more precise or elaborate in our statement of scire facias and mandamus. Do we not mean by the language "may be

obtained by appropriate action or by appropriate motion under the practice," simply that the relief heretofore available by mandamus or scire facias may be obtained in a civil action under these rules?

DEAN MORGAN: Yes.

SENATOR PEPPER: Why?

THE CHAIRMAN: It can be done by motion under our rules.

DEAN MORGAN: You don't have to bring an action.

THE CHAIRMAN: Take, for instance, a motion on a bond--a surety on an appeal bond, or something.

SENATOR PEPPER: Yes, but I was just wondering how it would be to those unfamiliar with the rules as to the suggestion that you can accomplish the result of a mandamus by an appropriate action.

JUDGE CLARK: You mean civil action.

SENATOR PEPPER: I think if we just said civil action or by motion. I hate those circumlocutions. It seems to leave the practitioner in some doubt as to what is the appropriate action or whether we have some mysterious way of accomplishing the results heretofore accomplished through scire facias and mandamus, and I would think that it was desirable just to say that it may be obtained by civil action or by motion in accordance with these rules.

DEAN MORGAN: That is right. I should think so.

JUDGE DONWORTH: As I recall the proceedings at the Institute here, attention was called to the fact that there is a statute of the United States regulating scire facias in the District Courts, and the question was just how that statute would fit into these proceedings. My suggestion was that if there was any real doubt about that, that the provision allowing the District Courts to make local rules would enable them to adapt one to the other.

JUDGE CLARK: May I explain a little more with reference to what Senator Pepper says? Of course, to a considerable extent what he says is well founded. The only thing is that if we should start I think we would have to do a little explaining. One reason that it is in this form is that we are trying to avoid explaining. I take it here that you can start mandamus by civil action probably only in the District of Columbia because mandamus is not generally a separate action in the Federal court. It is an auxiliary remedy, and we were trying to get some general expression. I take it, therefore, in most places in the country you do your mandamusing by motion in an already existing action. Down here in the District of Columbia you would start it by a new civil action.

SENATOR PEPPER: I see. If a non-resident came into the District Court for the Eastern District of Pennsylvania and wanted to mandamus an official--

JUDGE CLARK (Interposing): I take it that the answer would be no.

SENATOR PEPPER: The reason being?

JUDGE CLARK: I take it that you can't do it unless you use mandamus as an auxiliary remedy.

THE CHAIRMAN: You mean that there is a Federal statute which forbids mandamus suits in Federal courts?

MR. TOLMAN: In a civil action in Illinois it is permissible.

THE CHAIRMAN: I have a hazy idea that it is within the jurisdiction of the Federal courts.

SENATOR PEPPER: I think they usually refer to mandamus, prohibition and quo warranto as extraordinary remedies but I should have supposed that the relief obtainable by any of those extraordinary common law writs would not be obtainable in a civil action under these rules.

MR. TOLMAN: That is what I think.

JUDGE DONWORTH: It would be my guess that the five years during which these rules have been in effect must have resulted in local adjustments made because these mandamus proceedings against cabinet officers, and so forth, I think, are rather common here in the District, so I think before we make a positive change we ought to learn what they are doing to adapt themselves to the situation.

SENATOR PEPPER: I brought the matter up not with a

EF 116

view to making any motion but with a view to expressing the hope that we might possibly make the thing a little less mysterious than it seems to be now.

THE CHAIRMAN: The word "appropriate" is used as a means to sort of enable them to adjust themselves. I think that is the idea.

SENATOR PEPPER: I think that is the best way.

JUDGE CLARK: The main point here would be, you see, if we start spelling out why, it is going to be quite a little spelling.

SENATOR PEPPER: I see.

JUDGE CLARK: Maybe we should have done it.

THE CHAIRMAN: We are down now to subdivision (e) of Rule 81.

JUDGE CLARK: Yes, Rule 81(e).

THE CHAIRMAN: Have you any suggestions?

JUDGE CLARK: A Washington lawyer said that under the Tompkins case the words "construing them" in the last sentence, that is, construing the state judicial decisions, should be dropped because he thought that under the Tompkins case they no longer applied. We say his reason is erroneous. Wherever the Federal rules refer to state laws they refer to state procedural and not state substantive law.

THE CHAIRMAN: Let's pass that then.

Rule 82.

JUDGE CLARK: We propose a modification of that language which appears back on page 13.

THE CHAIRMAN: Of volume 1 of your report?

JUDGE CLARK: Yes, in the middle of the page:

"These rules shall not be construed to extend or limit the jurisdiction of the district courts of the United States over the subject matter of actions therein or the venue thereof."

THE CHAIRMAN: What is the purpose of the amendment? Suppose we do extend the jurisdiction of the District Courts over the person--is that it?

PROFESSOR MOORE: Yes, sir.

THE CHAIRMAN: By the extended service section within the state by summons.

JUDGE CLARK: It comes up in connection with 4(f).

THE CHAIRMAN: I hate to admit that we are extending jurisdiction in any particular.

JUDGE DOBIE: What is the object of the change? What is its object, Charlie, just for information?

THE CHAIRMAN: He admits that we have extended the jurisdiction of the United States courts over persons by a provision that a writ of summons telling a man to appear in a case under our rules can go through the whole state, where heretofore by statute it has been limited in ordinary private litigation to the district, so he wants to amend this rule so

as to say that the only thing we don't do is to extend jurisdiction over the subject matter, but we do in that other rule extend jurisdiction over persons, and that is just what I have said we do--I have always said that. It gives the case away.

MR. LEMANN: Does he admit that? My own notion was that 4(f) did not extend jurisdiction; it is just a matter of process and you would still be subject to ordinary rules of jurisdiction and venue. I know you made that contention when we discussed this before.

THE CHAIRMAN: I have always contended that that other rule is a real extension of jurisdiction--maybe jurisdiction of the person and not of the subject matter--but it is jurisdiction, and now the Reporter comes back and says that is so and he wants to have our last rule, Rule 82, recognize that fact by merely saying that we don't extend jurisdiction over the subject matter; but he does not say that we do not extend jurisdiction over the person. I think we are giving away our case as to whether it is procedural jurisdiction.

MR. LEMANN: I certainly don't think he ought to concede that.

THE CHAIRMAN: I think he is right, as I have said before; but I don't think we ought to admit that it is a procedural matter and not a jurisdictional matter by Rule 82.

MR. LEMANN: If he thinks that is so, that would be a powerful argument to eliminate that 4(f) which has been

applied.

SENATOR PEPPER: He stands mute.

JUDGE CLARK: Rule 63.

THE CHAIRMAN: I am sorry I didn't take a confession by adopting the provision.

The next is Rule 63.

JUDGE CLARK: We bring up the matter of counsel fees on deposition matters. What did we do with that? Nothing was done.

PROFESSOR SUNDERLAND: We out this out.

JUDGE DONWORTH: What do you mean by cutting it out?

PROFESSOR SUNDERLAND: We refused to put in a limitation on counsel fees.

JUDGE CLARK: We refused to put in a limitation on local rules or to suggest that there was anything wrong with it.

JUDGE DONWORTH: I think we just left it alone.

THE CHAIRMAN: We chewed it all over and intended or decided that we would not interfere with the discretion about it.

JUDGE CLARK: I don't think there are any other things on local rules on which questions can be raised.

JUDGE DONWORTH: Are we going to change Mr. Morgan's forms any?

JUDGE CLARK: There are two suggestions about forms in Rule 84, one of them being, that while in most cases the courts have made use--good use--of the forms, they have been approved, I think perhaps best in the Circuit Courts of Appeals and a good deal in the District Courts, too. There are a few, of course, that have chosen to disregard the forms where it suits their purposes, and it seems to us that it would be a good thing to make this rule a little stronger now. It has done good service so far, and I think with a process of education it has done very well. So, we suggest adding at the end of our rule:

"They shall be observed and used with such alterations as may be necessary to suit the circumstances of any particular case."

I might add that after we sent out this suggestion, Mr. Holtzoff wrote and said that this wasn't strong enough and he thought there should be something still more like the bankruptcy rule. You may remember that the bankruptcy rule is pretty direct. His suggestion appears in my supplemental statement on page 48, and he suggests that the rule ought to read:

"The forms contained in the appendix of forms are deemed sufficient and are intended to indicate . . . ."

THE CHAIRMAN: That wipes out your motion for a more definite statement and a whole lot of other things. I stick to my original thought that we ought not to take the risk of having

any form prescribed obliterate some rule of pleading or objection as to sufficiency as the safest course. I never studied them myself in this form, and they were put in explicitly without superseding any rule. Now, you make them compulsory and I would never vote for that unless I spent a week or two going over and examining the forms and checking against the forms and seeing how many rules we have repealed by a form.

JUDGE CLARK: I shouldn't think that there were any rules repealed. There are only a few courts that do not want to follow the spirit of the rules, I think.

DEAN MORGAN: I should think, Mr. Mitchell, if they are not sufficient they ought not be here.

THE CHAIRMAN: The question isn't whether they are sufficient.

DEAN MORGAN: As against attack for sufficiency. We have cut out the bill of particulars, and if they are so indefinite that you can't frame an answer to them, why then, they are no good. We ought to fish or cut bait on them.

MR. LEMANN: What he hesitates to do, and what I hesitate and would hesitate to do, is to say that they must be used.

DEAN MORGAN: That isn't what they say; they just say that they are sufficient.

BF
122

MR. LEMANN: He wants to say in here that they shall be observed and used.

DEAN MORGAN: I don't want that.

JUDGE DOBIE: Why not change "shall" to "may"?

MR. LEMANN: Then you will have an argument in every case where the circumstances require you to depart from those forms.

JUDGE CLARK: If you take Mr. Holtzoff's suggestion that would be sufficient.

THE CHAIRMAN: That seems to me to do the same thing.

DEAN MORGAN: No, I don't think so.

MR. LEMANN: Where is the language of Mr. Holtzoff's suggestion?

JUDGE CLARK: In the supplemental statement that I sent out.

MR. LEMANN: Page what?

JUDGE CLARK: Page 45.

DEAN MORGAN: That they "are deemed sufficient". I say if they aren't, why have them in there?

JUDGE CLARK: I think he makes a pretty good statement here.

"This question came to my mind particularly because I served as a member of the Subcommittee on Forms of the Advisory Committee on Rules of Criminal Procedure and the same problem arose. It seems to me that a party who uses a

form contained in the appendix to the Rules should have an assurance that he runs no risk in doing so.

"I have observed that disputes have arisen especially in connection with Form 8 in actions on implied contracts. According to some of the decisions, Form 8 would seem to be insufficient, as they appear to hold that the facts out of which the contract is implied, must be stated in full."

He not only has a District Court case, but there is an intimation from the Fifth Circuit.

"When we bear in mind the fact that the forms attached to the English Annual Practice are even simpler than the forms contained in the appendix to the Civil Rules, this tendency, it seems to me, is regrettable."

DEAN MORGAN: What is his form?

JUDGE CLARK: What is his what?

DEAN MORGAN: His proposed statement.

JUDGE CLARK: He would just insert in the present rule, "The forms contained in the appendix of forms are deemed sufficient and are intended to indicate ....." whatever the rest of the rule is.

JUDGE DONWORTH: To indicate?

JUDGE CLARK: Yes, that is, he would just insert "are deemed sufficient," and then leave the rest of the rule as it is.

THE CHAIRMAN: I wouldn't seriously object to that.

I think it leaves it to the court, for instance, to allow a more definite statement, because it shows that the complaint is not bad as against a motion under 12(b)(6); that it does that much. You can't dismiss for failure to state a claim upon which relief can be granted. But I think it would still leave those other rules applicable, whatever they may be; it would allow the court to allow an amendment or further clarification.

JUDGE DOBIE: Suppose you put those words in "are deemed sufficient". Would that apply to, say, a motion to make more definite and certain in every instance?

THE CHAIRMAN: No, I wouldn't vote for it if I thought that.

JUDGE DOBIE: Neither would I.

THE CHAIRMAN: No, I thought he meant is sufficient as against attack under 12(b)(6), a motion to dismiss because the complaint failed to state a good claim. But I am willing to make it sufficient as against that. I wouldn't be willing to vote for a thing that nullified the court's power to make or require him to make more elaborate and certain his statement than was intended in the pleading.

DEAN MORGAN: If you will follow the language in the proposed rule, Rule 12, that Mr. Moore has drawn, what are they so indefinite and ambiguous about? What does that language mean? If they are that bad, why then, they ought not to be forms. That is the answer. If they aren't going to be

deemed sufficient, why then, they ought not to be in there in the forms; that is my point.

MR. LEMANN: You speak there about ambiguity.

DEAN MORGAN: Of course, that has got to come back to us anyhow in this new 12 because we have abolished the bills of particulars, and we have provided as to indefiniteness and uncertainty.

PROFESSOR MOORE: "The motion shall not be granted except where the pleading is so vague or ambiguous or contains such broad generalizations that the defendant cannot frame an answer thereto."

SENATOR PEPPER: We ought to be at least willing to say that "The following forms are not violations of Rule 12," to the extent that they could be stricken for those reasons.

THE CHAIRMAN: 12(b)(6).

JUDGE CLARK: In the Washburn case stated here (one of the cases cited) it was held that it was insufficient and the motion to dismiss was sustained.

THE CHAIRMAN: That is why I would accept Mr. Holtzoff's suggestion that they be deemed sufficient. I would construe that rule to mean that they are sufficient as against the equivalent of a demurrer, but I wouldn't construe the rule as some amendment to hamper a trial court in a particular case.

JUDGE DOBIE: That is my idea.

THE CHAIRMAN: There might be cases arising in which

there was a general statement made; cases where they really ought to be more definite. That is what they are getting after.

DEAN MORGAN: I should say that any form that is so bad that it ought to be made more definite and certain has no business being a model form. There is just no question about that in my mind. I don't care what you say about that--whether the forms all have to be redrafted or not. If you are going to put them in as samples of what they ought to follow, I think it is absolutely absurd to suppose that they are not sufficient against attack as against the rules under which they are drawn. It seems to me that you couldn't have any greater inconsistency than to give as a guide forms which are attackable under the very rules under which they are drawn. That seems to me just about as absurd a proposition as one could make.

THE CHAIRMAN: I confess my attitude is one of being lazy, that is to say, I feel uncomfortable until I have studied each form. I have never done that, and I don't want to take the risk of blindly voting for them. I confess that is my position.

DEAN MORGAN: My position is that we have no business putting out forms unless we are willing to enforce them.

PROFESSOR SUNDERLAND: I think by putting them out we either enforce them or make a trap to catch counsel.

DEAN MORGAN: I don't think that any one of them are

so indefinite that you can't take the trouble of finding out what the pleader or the one making the answer means by asking what he means by discovery and so forth.

MR. LEMANN: Are these cases on page 230 the only two cases that are known where the courts have disregarded the forms?

JUDGE CLARK: There aren't such a great number, I will say, but in addition to this there is the other case which we put on page 48 of the supplement, which is a Fifth Circuit case, and is the Foley-Carter Insurance Company case.

MR. LEMANN: Page 48, you say?

JUDGE CLARK: Page 48.

MR. LEMANN: I think, Mr. Mitchell, before we meet again that we could look at the cases in which the forms have been held insufficient.

THE CHAIRMAN: I will say that I shouldn't balk on this because I am too lazy. I don't think I ought to object to these amendments because I am too lazy to study the forms, but I would like to have you suggest what amendment you propose.

DEAN MORGAN: I don't like "are deemed sufficient." You should just say the forms are sufficient and are examples.

THE CHAIRMAN: That is what I agreed to; that is Holtzoff's.

DEAN MORGAN: That is all I want. I don't want

"shall be used" or anything of that kind. I just want it to appear that they are sufficient.

JUDGE DONWORTH: My difference arises in the fact that in the complexities of modern life you can't draw forms no matter how able counsel is that will fit any situation that comes into a court.

DEAN MORGAN: Then you have no business putting them out as model forms under these rules.

JUDGE CLARK: Can't we fix it in some way such as "The forms contained in the appendix of forms are sufficient under the rules"? Is that what you want, and are intended to indicate--

DEAN MORGAN (Interposing): That is all.

JUDGE CLARK: And are intended to indicate the simplicity and brevity of forms which are contemplated.

MR. LEMANN: Most cases will not be cases like these cases, and, therefore, I should think it wouldn't often happen that you would use this particular form where somebody could say that that form covers this case precisely. Most cases in the Federal courts are not that simple.

JUDGE DOBIE: Not in a case like that.

MR. LEMANN: But I would like to see just what was found wrong with them in the particular cases where the courts have found that they were not adequate.

JUDGE DOBIE: You may say "On a public highway called

Boylston Street." I may substitute Massachusetts Avenue for that, which is twenty miles long.

DEAN MORGAN: I think that is enough. He could get it by inquiry. You don't have to locate the particular place.

JUDGE CLARK: Suppose that you are required to pin him down. What difference does it make; it has been a rule of the common law. The place wouldn't be important.

THE CHAIRMAN: The only reason for making more definite and certain would be if there were two accidents on Massachusetts Avenue and he didn't know which one the fellow was referring to.

DEAN MORGAN: You can find that out by questions.

MR. LEMANN: And he doesn't tell you what hour he did it or when.

JUDGE DOBIE: Do you think you can get it by interrogatories?

SENATOR PEPPER: Will you excuse me, Mr. Chairman? I have to meet Mrs. Pepper and catch the train for home.

DEAN MORGAN: We will have a bobtailed decision on this.

SENATOR PEPPER: Now, let us take a ceremonious leave and farewell of several of our friends.

JUDGE DONWORTH: I don't like ironclad commitments in a free country.

THE CHAIRMAN: Is there any action you want to take

by vote now on the question of Rule 84? If somebody will put up a proposition we will vote on it.

JUDGE CLARK: I second Mr. Morgan's suggestion.

JUDGE DOBIE: What is his suggestion?

JUDGE CLARK: That the forms contained in the appendix of forms are sufficient under the rules and are indicated as to the simplicity and brevity which the rules contemplate.

THE CHAIRMAN: All in favor of that raise their hands; opposed? The motion is carried.

Is there anything in 85?

JUDGE CLARK: There is a slight question of a form under 84.

THE CHAIRMAN: Bring it back to us at the next meeting. If I don't see the Chief Justice before dinner time I have got to stay over another day.

JUDGE CLARK: We've covered practically everything now.

THE CHAIRMAN: There is one other thing that you want to consider at our next meeting, and that is the provision as to when these amendments become effective, and whether they apply to pending actions or something like that.

JUDGE DONWORTH: Mr. Chairman, there is one important matter. Major Tolman, I and the Reporter (to the extent at least that he has the time available) are working on the eminent domain rule. I do not think that I will be able to agree with

the recommendations of the Department of Justice, and I don't know what Major Tolman's attitude will be. Now, suppose there are two or three forms suggested? They can all go to the Reporter, can they not?

THE CHAIRMAN: Disseminate them even if you are not in agreement. Put in what you agree on and point out what your disagreement is and let us study it over before the next meeting.

JUDGE CLARK: Do you want to settle approximately the time of the meeting?

THE CHAIRMAN: No, you will have to tell us when you will get the stuff out; fix that now, and when you will distribute it.

JUDGE CLARK: I was just going to express the hope that it wouldn't be required too early in June. I think that toward the latter part of June we could arrange to do it.

JUDGE DOBIE: I couldn't come the first part of June because my court meets the 7th of June, and with only three active judges we can't spare one for any extended time. That is no reason for not having a meeting, however.

THE CHAIRMAN: Don't ask me when a meeting is going to be held. The question is, when are you going to have a report ready, because we want to have a report on it to chew it over so that we won't waste too much time. But we should have at least a month before the meeting to get a chance to study it or at least to study it on the train coming here.

BF
131

JUDGE CLARK: I understand the reporter is going to deliver parts of the transcript as it is done, and all of it in ten days. Assuming that he has it all within ten days, we should be through in three weeks.

THE CHAIRMAN: That means we can't have a meeting until sometime in July.

JUDGE CLARK: I think you could arrange for the last week in June, if you wish.

THE CHAIRMAN: Would the last week in June be agreeable to you gentlemen provided the Reporter has got his report out a week or so ahead of that time?

JUDGE DOBIE: That is about four weeks from now.

JUDGE CLARK: It is a little more; it is five weeks, I think.

THE CHAIRMAN: What I propose to do is to wait until you get it out, and then I will wire every member of the Committee right then and there, and we will have some facts to go on and not speculation. I don't see how we can settle this thing right here. I will consult every one of you by wire just as soon as the Reporter gets his job done, and each one of you can then wire me back. I hate to go into July.

PROFESSOR SUNDERLAND: I would much rather have it the last week in June than the first week in July.

(The Committee adjourned at 5:35 o'clock p. m.)