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ADVISORY COMMITTEE ON

FEDERAL RULES OF CIVIL PROCEDURE

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WEDNESDAY AFTERNOON SESSION

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The meeting of the Advisory Committee on Federal Rules of Civil Procedure reconvened at 2:05 o'clock, William D. Mitchell, Chairman of the Committee, presiding.

JUDGE CLARK: I would like to make some suggestions about Rule 50(b). I am not sure that we considered it finally.

I think the general sentiment was that we renew the suggestion that was made before, in substance. Mr. Dodge asked me to consider somewhat the question whether the somewhat long final descriptive passage covering the procedure was necessary. That is this long provision that we recommended last time.

I want to say that it does seem to me that spelling out the procedure has some elements of desirability. On the other hand, the suggestion was somewhat lengthy.

Through the kindness of Professor Morgan, I have the Kentucky rules. They have redone this in Kentucky covering the substance, and I am inclined to think that it would be on the whole desirable to accept the Kentucky version. I am not sure who did it over, but somebody must have worked with some care on it.

DEAN MORGAN: It was the most intelligent piece of work that you can imagine.

JUDGE CLARK: Of course, they have one thing that is very bad, not in connection with this, but still they are going

to have most of the testimony by deposition.

DEAN MORGAN: They had a committee, and the committee worked hard. The secretary of that committee was wonderful. Some of the University of Kentucky law men worked with them.

CHAIRMAN MITCHELL: Charley, I would like to ask you about one thing. I remember Roberts played with this question of joining a motion for new trial with a motion for judgment notwithstanding the verdict. That practice originated in my state. That is, we took the Minnesota practice and tried to put it in this rule. He bollixed it all up. He wrote an opinion on the conclusion he came to about this joinder of two motions and what happened if you succeeded in one and not in the other.

I have always felt that he got very much confused and confused the whole subject. Do you propose to deal with that?

JUDGE CLARK: That is it, yes. In fact, this somewhat lengthy final paragraph is an attempt to spell out the procedure, to clarify what he was doing there.

Partly because of that opinion and partly because there is some possibility of confusion, it does seem to me on the whole, responding particularly to what Mr. Dodge inquired about, it might be well to have something of this kind. I am sorry to say it does look a little complicated, but not having it spelled out was one reason why some of these questions arose.

JUDGE DOBIE: It is better to have it complicated and clear than to have it crystalline and enigmatic and very unclear.

JUDGE CLARK: My immediate suggestion would be to follow the Kentucky version, which is going into effect July 1, which is, so far as I can see, the substance of the amendment which we proposed which the Supreme Court did not accept. I am inclined to think it is in somewhat better and somewhat briefer form. I will read it. It is possible that even that might not be sufficient.

Do you want me to read it, or had we better get Leland to copy it for us? There are two provisions.

MR. PRYOR: Is that in lieu of the present (b) or in addition to it?

JUDGE CLARK: Some parts of it are repeated. Whether we should pick out the parts that are repeated, or not, I don't know. As I give it to you now, I will give it to you as a substitution. You will see that some of it is repetitious, so to speak.

CHAIRMAN MITCHELL: Do you deal in this draft also with the question of whether you can raise the demand for a judgment in the court of appeals without having made a motion for judgment notwithstanding the verdict? Do you deal with that?

JUDGE CLARK: Would you like me to read it?

CHAIRMAN MITCHELL: I think that is the best way to get at it.

JUDGE CLARK: If you want to follow along on either,

you will see that this does pretty much follow, with some shortening and abbreviation of language. The way they have done it now is to call it first Rule 50.02. Rule 50.01 is substantially our 50(a). 50.02, Motion for Judgment Notwithstanding the Verdict:

"Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the moving party may move within 10 days after the receiption of a verdict to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned, such party within 10 days after the jury has been discharged may move for a judgment in accordance with his motion for a directed verdict."

JUDGE DOBIE: That follows us right down to there.

JUDGE CLARK: A good deal, but you see they have gotten away from this "deemed submitted," and so on. In substance it is the same.

"If a verdict was returned, the court may allow the judgment to stand or may reopen the judgment, and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned, the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial."

That is the first provision of the rule, which in

substance covers what we had before. They add as a separate rule this longer paragraph that we had suggested before, the paragraph that the Supreme Court didn't take.

CHAIRMAN MITCHELL: So far as you have gone, you haven't overturned the recent opinion of the Supreme Court that you have to make a motion within 10 days. You let their opinion stand on that.

JUDGE CLARK: No. I am coming to that. We are creeping up on it.

CHAIRMAN MITCHELL: I say so far as you have gone, you haven't done that.

JUDGE CLARK: That is right. They make Rule 50.05, "Joining Motion for Judgment Notwithstanding Verdict with Motion for New Trial: Effect."

"(1) A motion for a new trial may be joined with a motion for judgment, or a new trial may be prayed for in the alternative. If the motion for judgment is granted, the court shall rule on the motion for new trial by determining whether it should be granted if the judgment is thereafter vacated or reversed. If the motion for new trial is thus conditionally granted, the court shall specify the grounds therefor, and such an order does not affect the finality of the judgment. In case the motion for new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court shall have otherwise ordered. In

case the motion for new trial has been conditionally denied and the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court. An appeal to the court of appeals from a judgment granted on a motion for judgment notwithstanding the verdict shall of itself, without the necessity of a cross-appeal, bring up for review the ruling of the trial court on such motion for new trial.

"(2) The party whose verdict has been set aside on motion for judgment notwithstanding the verdict may, not later than 10 days after notice of the order, serve a motion for a new trial, which shall be conditionally granted or denied and which will be treated by the reviewing court in the same manner as provided in Section (1).

"(3) Any party who fails to make a motion for new trial as provided in Sections (1) and (2) shall be deemed to have waived the right to apply for a new trial."

That covers a good deal of ground, but nevertheless it seems to me fairly clear; and I should think, as I look at it, foolproof. It seems to cover the contingencies.

MR. LEMANN: It is longer than your now proposed substitute.

JUDGE CLARK: I don't know, Monte.

MR. LEMANN: I was following the language of the proposed substitute.

JUDGE CLARK: Our proposed substitute was pretty long,

and it seems to me that in some parts of this they have shortened what we said, and then they have added two or three specific things. It seems to me that the general length is about the same.

MR. DODGE: It doesn't, does it, substantially change ours?

JUDGE CLARK: I don't think it intends to change anything. I think it intends to cover everything we cover.

MR. LEMANN: It spells out one or two other situations.

CHAIRMAN MITCHELL: It changes the construction the Supreme Court placed upon our rules, doesn't it?

JUDGE CLARK: That is true, but that is what we have in mind.

MR. LEMANN: As you read it, it seems to me to be designed to accomplish everything that we intended to accomplish by the proposed amendment, and perhaps to add one or two paragraphs to spell out certain situations that we did not cover.

JUDGE CLARK: That is right.

MR. LEMANN: In that respect, it gets a little more long and a little more complicated than our suggestion, but a little more complete.

JUDGE CLARK: That is true. That is just what I have in mind.

JUDGE DOBIE: I move its adoption.

MR. LEMANN: I suggest that we vote in principle to approve the suggestion that we resubmit an amendment to the rule and let the drafting be done by the Reporter.

MR. DODGE: You would call this last part subsection (c), would you?

JUDGE CLARK: On that, whether we should make it a separate subsection or not, perhaps you ought to make some suggestions. It could all be put in (b) as we had done with our original amendment.

MR. DODGE: That makes (b) awfully long and it goes off to another matter, really.

JUDGE CLARK: It does. There is no doubt about that.

CHAIRMAN MITCHELL: I have some doubt about this. I don't believe there is any part of the Minnesota practice for joining a motion for judgment notwithstanding the verdict with a motion for new trial. You provide there that if the trial court grants a motion for judgment notwithstanding the verdict, he nevertheless shall go on and consider the record and make a conditional or tentative order granting or denying the motion for new trial to take effect if the court is overturned on appeal on the judgment notwithstanding the verdict. That requires the trial court to go through the record and consider whether a new trial ought to be granted if the judgment notwithstanding the verdict is not going to stand.

It may be all superfluous. The court above may

affirm the order granting judgment notwithstanding the verdict, and then all this stuff that the lower court had busied himself about, making a conditional grant of new trial, is in the waste basket. We used to do that in Minnesota, and I have the feeling that I would like to look that up and see what they do out there.

I have the feeling that we should put something in the rule that if the upper court sets aside the order for judgment notwithstanding the verdict, he shall remand the case to the district court with leave or direction to consider whether to grant a new trial. Then you don't have to bother with that until the need arises.

DEAN MORGAN: The Montgomery Ward case, though, suggested that the trial court ought to do it. That is exactly what Roberts' opinion was.

CHAIRMAN MITCHELL: Yes. I remember. That is one of the things in which he trampled on the practice I had been accustomed to in Minnesota where alternative motions were made.

DEAN MORGAN: It saves a lot of time and a separate appeal if the motion for new trial is not granted.

CHAIRMAN MITCHELL: What?

DEAN MORGAN: Where the motion for new trial is not granted, then when the judgment is entered the party who moved for a new trial can appeal again. That is what Roberts said. He said this is a very convenient way of getting the whole

thing up in one proceeding. It seems to me that is true. I think that is an improvement over our Minnesota practice.

JUDGE CLARK: Minnesota has now adopted our present Rule 50(b); that is, they show a willingness to go along as far as we go, at least.

MR. LEMANN: The present rule was the basis for this latest five-to-four decision, as I understand it, which we deplore. So if Minnesota has adopted our original and present rule, then Minnesota is inviting the court to follow the construction of that rule just made in this five-to-four decision. Is that a correct recitation?

JUDGE CLARK: I am not quite sure that you have fully stated it. The Supreme Court in this last decision, of course, assumed to follow our rule. They didn't set it aside in any way, except practically. They were going, as they put it, on the very terms of our rule, and they didn't find some mystic words that amounted to a motion, and therefore they wouldn't read anything in.

Therefore, I don't think you can say they have done anything yet except sort of by atmosphere show that they wouldn't take any of this. I think that they wouldn't have been so strict in construing our rule if they hadn't been anxious to preserve jury trial under all conditions, but that has to be a deduction. In form they were simply acting on our rule.

CHAIRMAN MITCHELL: For instance, this phrase that we put in here that if the motion for directed verdict is denied or is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion, is the keystone of the Supreme Court decision.

JUDGE CLARK: Ohio v. Redman.

CHAIRMAN MITCHELL: They stated the old common law practice by virtue of which an appellate court can grant a judgment notwithstanding the verdict. It was on the theory that the lower court has received the verdict subject to a later determination. That is why we put the clause in there.

Do you believe the court refused our revision because they thought we were impairing that Redman case?

JUDGE CLARK: Of course, one can not be sure. I don't think so, but that is just a guess. There has been some discussion of that. There were some comments on our suggested amendment whether that language lifting oneself by one's bootstrap is necessary or not. Who can be sure? I just think the Supreme Court has grown up somewhat.

CHAIRMAN MITCHELL: As far as I am concerned, I suggest you go ahead and adopt any suggestion the Reporter has, and I want to reserve the right to take a look at it in the calm and peace of my own office, to get the Minnesota fellows to straighten me out on what they are doing out there now, and

make myself sure that we are not putting a lot of excess, irrelevant stuff in this rule.

MR. LEMANN: Isn't it sure that every member of the committee will have a corresponding privilege?

CHAIRMAN MITCHELL: Of course. Our draft when it comes back to us, in the first place will be mimeographed and sent to all of you; and after your suggestions are all in and some conclusion is reached about them, the result we arrive at that way is going to be printed and distributed to the bar.

I wouldn't think of having a set of amendments like this go to the Court without our inviting the bar, as we always have, to deal with it. Then after the bar has reported, we will have our final meeting and see how they have reacted to these changes. That is my idea of what we should do.

JUDGE DRIVER. General Mitchell, while this matter is up before the committee, in the matter of the condemnation rule I was criticized personally, unfairly I think, and the committee was severely criticized at conferences of the Ninth Circuit, because they hadn't been sent preliminary drafts of the proposed condemnation rule, and they said it had been slipped over without their knowledge.

Of course, the way the thing developed, I think that was an unfair criticism. At any rate, I make this suggestion: You say drafts will be sent out to the bar. I wonder if it wouldn't be practical to send a preliminary draft to the

chief judge of each of the circuits so they would be available for discussion in the conferences that are held while the rule is pending.

CHAIRMAN MITCHELL: When the drafts have gone out heretofore, they have gone to every federal judge. Not only the bar associations, but every federal judge has had them.

MR. LEMANN: In San Francisco, a corresponding criticism was made to me at the meeting of the Institute Council. I told him it was my impression that every interested party had been given a copy of the rule before we finally voted on it. I don't know what happened to the mail, but I understand that was the vote.

JUDGE DRIVER: I told them down there I thought every judge had gotten it. It had been mailed to them. I said, "I think you folks threw them in the waste basket and didn't look them over." A lot of them said they didn't get them. They did make the criticism that they hadn't had an opportunity to look over and criticize the rule. That is the reason they were going to Congress.

JUDGE DOBIE: I have the sneaking idea that some of these judges and very important people leave a lot of stuff to their secretaries. This stuff comes in there and they say, "I don't think Judge Goofy is going to be interested in this," and into the waste basket it goes, and the judge says he never saw it.

CHAIRMAN MITCHELL: We will see to it that a copy of the proposed amendments we are making now will go to every federal judge in the country. We will have to pick out a lot of bar associations, and all that sort of thing.

My mind is so muddy about this thing I feel I don't want to pursue it any further here. Let us go ahead, and let me chew it over.

MR. LEMANN: Haven't we voted generally to approve the idea of resubmitting an amendment to Rule 50(b)? If not, I think I would want the transcript to show that we have.

JUDGE CLARK: I want to add a little explanation further in the light of the queries that have been raised about the district judge passing conditionally upon the motion for a new trial. That was the main gist of our long final paragraph here.

There is, I think, one difference between this paragraph as we suggested it and the Kentucky rule. It is made quite clear in our original draft that the trial judge did not need to do it. That is, he didn't need to make his optional ruling. As I read the Kentucky rule, he has to make the optional ruling if he is asked to. After he acts, then they make a motion for new trial and they must pass on it conditionally.

As a matter of fact, I think the Kentucky rule is better there, myself. That is, if the parties ask for that safeguard, I don't think it is expecting too much of a trial

judge to do it. He has the record in mind. He is pretty sure, I think, to know what he wants. It seems to me that he can act very easily then; and that, further, it is a very helpful thing. The practice isn't nearly so valuable if, when it comes to the upper court, the upper court can only end it on certain contingencies with a large part of the question unsettled, just as was the situation in the Johnson case.

You see, in the Johnson case they held it wasn't settled and had to go back for the motion for new trial. Since the Johnson case, we have had some cases in our circuit where we have felt that we had to send it back. We had a case a little while ago where we wanted to decide the case. We wanted to reinstate a verdict. The trial judge had set it aside and directed a verdict for the defendant. We wanted to reinstate it. We finally decided we had to send that back to the trial judge for him to rule on a motion for new trial.

You could have that all done, so the decision of the appellate court can be final. That is the result that we were trying to reach.

CHAIRMAN MITCHELL: In the federal courts is there any appeal from an order of the trial court granting a new trial?

JUDGE DOBIE: No.

CHAIRMAN MITCHELL: There never has been.

DEAN MORGAN: No appeal from that.

CHAIRMAN MITCHELL: How is there any complication, then?

DEAN MORGAN: You have to wait until there is a verdict and then appeal from that. If he denies the motion for new trial, then the judgment goes in, and he can go up again.

CHAIRMAN MITCHELL: I know, but what I am getting at is this: If the lower judge doesn't act on the alternative motion for new trial.

DEAN MORGAN: Suppose he denies it, and it isn't on the ground of insufficient evidence but on the grounds of mistakes in rulings, charge to the jury, and so forth. Then judgment is entered on the original verdict, and the person who moved for a new trial appeals from that judgment. You go up to the appellate court the second time.

CHAIRMAN MITCHELL: That isn't quite what I am driving at. Suppose the lower court grants judgment notwithstanding the verdict and doesn't pass on the motion for new trial.

DEAN MORGAN: If he doesn't pass on the motion for new trial, then you have to go back and give him a chance to.

CHAIRMAN MITCHELL: The upper court sets it aside.

DEAN MORGAN: Then you have to go back and give him a chance to.

CHAIRMAN MITCHELL: Yes, but what of it?

DEAN MORGAN: Suppose he had done it before. You don't need to go back and have that extra session.

CHAIRMAN MITCHELL: You have to go back. It is just a question whether the lower court grants a new trial conditionally before it goes to the court of appeals or afterwards. In one case he is doing a thing that may never amount to anything, and in the next case he considers the motion for new trial only if the occasion arises that he ought to. That is my point about it. There can't be a second appeal if he grants the motion for new trial.

DEAN MORGAN: Oh, no, there can't be if he grants it; but if he denies it, there can be.

JUDGE CLARK: Of course, in all these matters there may be waste motion somewhere, but the question is where there is saving. There very likely may be waste motion on the part of the district judge here, but the district judge has the record at his command, and the thought is that it isn't very much waste motion for him to take this additional step; whereas, when you take a formal appeal and the formal appeal is not in shape that it can settle the case, that is waste motion. It is a choice of which is the greater saving.

The thesis upon which we have gone has been if you could arrange it so that the appeal in the upper court pretty much settles it, you are saving time that way. I think it is a choice of where you make the most saving of time.

CHAIRMAN MITCHELL: Do we have a motion to do anything here now?

JUDGE DOBIE: I move the adoption of that amendment to conform with the Kentucky rule, subject to any modifications in draftsmanship the Reporter may deem proper.

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

JUDGE CLARK: Shall we go on, then?

CHAIRMAN MITCHELL: What is the next one?

JUDGE CLARK: The next I have is 52, I believe. I think on Rule 51 I had nothing but some report of these pending bills, which I think you know about.

CHAIRMAN MITCHELL: A lot of bills have been pending to compel the court to do certain things, to instruct the jury after the argument, before the argument, at the conclusion of the pleadings, and all that sort of stuff. There is a lawyer down in West Virginia somewhere who, ever since the rules were originally proposed, has wanted the trial court to refrain from making any comments on the evidence and from doing a lot of other things. I don't believe the bills have any chance of passing.

JUDGE DOBIE: That bill before Congress that that fool West Virginian introduced never got anywhere, did it, Charley?

JUDGE CLARK: That is right.

CHAIRMAN MITCHELL: Congressman May -- is that his name?

JUDGE DOBIE: I think that is it. I know he was a Congressman from West Virginia. He practically wants to strip the federal judge of his power to comment on the facts or anything like that, and reduce him to a moderator.

JUDGE CLARK: Congressman Ramsay was the one.

MR. PRYOR: Is that the one that was reported out, and then it was sent back to have hearings?

JUDGE CLARK: That was done last year. I haven't heard any more. Has anything come up this year?

MR. TOLMAN: It has not been reintroduced. Mr. Ramsay was defeated. He is no longer in Congress.

JUDGE DOBIE: That is the best news we have heard yet, Leland.

JUDGE CLARK: He doesn't stay defeated. He has been defeated before.

MR. TOLMAN: He was defeated once before, and came back.

CHAIRMAN MITCHELL: He fought the original rules tooth and nail on this very ground.

JUDGE DOBIE: Can you get the American Bar to do something on that?

MR. TOLMAN: The American Bar Association is on record as opposed to Mr. Ramsay's bill.

JUDGE DOBIE: I am glad to hear that.

JUDGE CLARK: Let's pass on to Rule 52(a). This is

now a very famous and often-cited rule. I think on the whole it has worked very well. Of course, there is always difficulty about getting a standard, and I think this is as good a standard as we could expect.

My suggestion has been that there has been some tendency to get away from the general somewhat questionable standard, and I have suggested a possible addition in order to restore the rule, it seems to me, to its pristine freshness. I would suggest this addition, and then I will explain it a little.

CHAIRMAN MITCHELL: You mean the effect of findings?

JUDGE CLARK: That is correct.

The third sentence, the more famous provision:

"Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

When this was adopted we stated in the footnote as it appears now that this was intended to state a general standard. It is an admonition to the trial judge, but of course it was always taken as an admonition also to the appellate judges, even though they were not expressly included.

The thought is that this is a general standard, somewhat flexible and discretionary, and we said that it should apply whether the evidence was documentary or not.

MR. DODGE: Who said that?

JUDGE CLARK: The note here says that. That is, the general, clearly erroneous, is a general, over-all admonition to the judge something like the charge of reasonable doubt, and so on. In applying that he will naturally think of the nature of the testimony, and so on, but even though findings are made on depositions, they are still not to be set aside unless clearly erroneous.

There has developed a gloss, as several appellate judges have said, that where the evidence is by deposition, it is fully reviewable whether clearly erroneous or not, which seems to me to be a misuse of our rule. The effect of it, as I see it, is an invitation to appeal on this ground. It has gotten so that some of us feel that we can't apply the rule without an apology now where the evidence is documentary. In fact, the usual form of expression seems to be something like this one that I quote.

JUDGE DOBIE: In a deposition the judge didn't see the witness. Isn't that the idea?

JUDGE CLARK: Yes, and therefore it was said by my colleague, Judge Chase, that even though the clearly erroneous rule does not apply because the evidence was documentary, yet nevertheless we are not going to reverse.

CHAIRMAN MITCHELL: There is no basis in the rule at all for saying that it doesn't apply.

JUDGE CLARK: You are quite right.

CHAIRMAN MITCHELL: It is only where it is all written testimony, and the only thing that happens is that the phrase "due regard shall be given to the opportunity of the trial court to judge of the credibility of witnesses" is out, but you still have the "clearly erroneous" rule.

JUDGE CLARK: You are quite right. It seems to be clear, especially when it is backed up by the original note that we had, which says that.

At any rate, what can you do with judges who are persistent in knocking out the activities of the naive procedural reformers?

At any rate, I suggest this for your consideration on this very point: to add this at the end of this famous sentence, with a semicolon:

"; this standard of review shall nevertheless govern the decision of the court, whether the evidence taken at the trial is in oral or in written form."

CHAIRMAN MITCHELL: I am just wondering if we need that.

MR. DODGE: It refers to evidence taken in written form and not to written documents.

JUDGE CLARK: I don't think it should make any difference. I think the "clearly erroneous" rule should apply to everything. I don't mean that we are setting aside rules of

law. For example, the interpretation of a contract is for the court, and that is a question of law, and so on. I am not dealing with that. This is the standard of review. This is the weight that is to be given to the man who is making a defense.

MR. DODGE: I think it should be clearly stated that we don't mean to apply the rule to the cases where all of the evidence is in written contracts or correspondence, where the higher court is in exactly the same position as the trial court.

MR. LEMANN: They are in case of a written deposition. I have had cases where the trial judge never saw the witnesses.

You might say, Bob, that the appellate court is in just as good a position to determine the issue of fact as the trial judge. All he did was to read the record, and that is all he can do, read the record. I think that is often true in these administrative tribunal hearings, probably, also.

MR. DODGE: I don't think this rule should apply where the evidence consists of documents, the construction of which is ordinarily called, perhaps wrongly, a question of law. Our court has said over and over again that in this case we are in the same position as the trial judge was, and are not precluded at all by his findings. We must deal with the matter independently.

DEAN MORGAN: What about by deposition? Suppose it is all by deposition, with reference to extrinsic facts, not the construction of documents. What do you say?

MR. DODGE: That stands between the two cases.

DEAN MORGAN: That is a case that this applies to.

MR. LEMANN: Who originally dissented manfully and now accepts the gloss, at page 82? I take it that is from your circuit. Orvis v. Higgins is the case that makes the trouble, is it? That is the case you cite at page 81. Certiorari denied.

You say on page 82, "the judge who so manfully dissented * * * now accepts the gloss." Who is this gentleman?

JUDGE CLARK: Judge Chase.

MR. LEMANN: He dissented originally?

JUDGE CLARK: Yes.

MR. LEMANN: You think he is right?

JUDGE CLARK: He was clearly right in his original dissent. I said to him when I saw this decision, "How come that now you are giving up the ghost?"

MR. LEMANN: Who wrote the opinion?

JUDGE CLARK: Several of these original opinions were written by Judge Frank, who is great on reviewing on every condition you can; and in the Orvis case, which is one of the worst, I think, he has categories of when you should review and when you should not. The first category is that you don't review if all the witnesses were before the judge. The second one is that you review sort of half-and-half if some of the testimony is written and some of it is documentary. I shouldn't say "documentary" in response to the point Mr. Dodge raises.

I will say to Mr. Dodge parenthetically, I don't think anybody raises any question about that. I certainly didn't intend to do that. That isn't in the question at all. It is a question of depositions.

MR. DODGE: It should be more clearly expressed, because when I read that I thought you were running counter to the well established rule that if the whole case turns on the construction of documents, there is no weight to be given to the judge's ruling on the construction.

MR. PRYOR: I suggest adding after the present sentence, ending with the word "witnesses," "whether their testimony was oral or written."

JUDGE CLARK: Yes, that is the idea.

MR. LEMANN: I would hesitate to change this rule on the basis of this material. I see that Moore commends the majority opinion in Orvis v. Higgins, and he says it is "a natural and proper concomitant of appellate power."

I would not think that we had presented to us a convincing enough case to feel that we can overrule this decision. I don't want to impeach myself before voting on it.

CHAIRMAN MITCHELL: As I understand the situation, the trouble is that some of the courts have been treating this phrase "and due regard shall be given to the opportunity of the trial court to judge of the credibility of witnesses" as qualifying the first part, which says you shall not set the

findings aside unless clearly erroneous.

Why couldn't you do it this way: "Findings of fact shall not be set aside unless clearly erroneous, and where witnesses appeared personally before the court," or something like that, "due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

He hasn't any special opportunity peculiar to himself as distinguished from the court of appeals if the witnesses don't appear personally. That removes the inference that apparently has been drawn from this that the"clearly erroneous" rule is qualified by whether the witness appeared personally or not by the "due regard" provision.

MR. LEMANN: You have only one case.

JUDGE CLARK: That isn't so. I am sorry.

MR. LEMANN: That is all you mentioned here.

JUDGE CLARK: I didn't think it worth while to treat them all, but I will dig them out. The decisions now are very numerous, and I am not sure but I feel a little like Judge Chase that the decisions go so far now that we have almost got to give up the rule itself.

I will write a whole memorandum if you want it, but I am simply citing what I thought was the most striking case, the Orvis case, because that makes separate compartments. Now the appeals come to us on such-and-such a branch of the Orvis case. That kind of gloss has superseded the rule itself.

This is much more than one case. I should say there isn't any question when you talk about the mythical weight of authority. The weight of authority now, I take it, is fairly clear that you should make pretenses of complete review when the testimony is by deposition.

In most of the cases we still don't do it. That is a part of the joke of it. It is a good deal like what Judge Chase did in this very case when he said, "Although the 'clearly erroneous' rule does not apply because of the testimony and depositions, nevertheless we are not going to reverse the trial judge." But this is an invitation to the counsel to bring it up. It is a great talking point now.

CHAIRMAN MITCHELL: Let me ask you this. Suppose you put it this way:

"Findings of fact shall not be set aside unless clearly erroneous. Where the witnesses appeared personally before the court," or however you want to word that, "due regard shall be given to the opportunity of the trial court to judge of their credibility."

In that case you are not qualifying the "clearly erroneous" provision by the inference that it doesn't apply unless the witnesses appear personally. That is the feeling I have about it. You want to get rid of the fact that the "due regard" business is the condition upon which the "clearly erroneous" rule should be applied.

Put a period after "erroneous" and put this "due regard" business in a separate sentence, and qualify it by saying "if the witnesses appeared personally."

MR. PRYOR: You could get that result probably by saying, "Findings of fact shall not be set aside unless clearly erroneous. Due regard shall be given to the opportunity of the trial court to judge of the credibility of witnesses testifying orally."

Isn't that all right?

CHAIRMAN MITCHELL: Do they testify orally if they give a deposition? You mean if they appear before him. That would hit my point exactly.

MR. PRYOR: Put it at the end of that sentence.

CHAIRMAN MITCHELL: In other words, you separate the "due regard" business from the "clearly erroneous," which they are not doing.

MR. PRYOR: Yes.

CHAIRMAN MITCHELL: I think that is a good way to do it, but there is an ambiguity about testifying orally. Every witness testifies orally unless he answers to written interrogatories.

DEAN MORGAN: Then you can have a note to it that the amendment was made for this specific purpose.

CHAIRMAN MITCHELL: Surely.

MR. DODGE: What is the suggestion now?

CHAIRMAN MITCHELL: The suggestion is that the thing read:

"Findings of fact shall not be set aside unless clearly erroneous. Due regard shall be given to the opportunity of the trial court to judge of the credibility of witnesses who appear before him."

JUDGE DRIVER: It seems to me if that is done there should be an explanatory note to indicate clearly why we are doing that, or you will get perhaps more controversy. As I get it, what the committee intends here is that the rule shall always be that the findings shall not be set aside unless clearly erroneous, but if there is a conflict in testimony, one witness testifying one thing and another another thing, that conflict should be left almost exclusively to the trial court if he had the witnesses before him and could judge of their credibility.

CHAIRMAN MITCHELL: You can put a period after "erroneous" and say:

"Where there is a conflict of evidence, due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses who appeared before him," or something like that.

JUDGE DRIVER: I didn't intend to stress that feature. I think if one witness appeared before a judge and testified, and nobody testified to the contrary, you believe the man who

could see him and size him up as to how much weight to give to his testimony. I wouldn't limit it to a conflict. Wherever a witness appears personally, the weight to be given is for the trier of the facts who could see the witness.

MR. LEMANN: Don't you think before we vote to change this rule and make another amendment and perhaps confuse people who are following our rules, we ought to get a memorandum from the Reporter on the number of cases that have arisen? Personally, I don't think we have enough material before us to convince me that I have enough evidence to show that we need a change in the rule.

CHAIRMAN MITCHELL: I am accepting his statement that there are many cases that say the "clearly erroneous" rule doesn't apply.

MR. LEMANN: We would have to have those cases noted, anyhow, I assume, in a note supporting the change in this rule. Because if we are going to abide by the idea that we are not going to make changes unless there is a real and substantial need for them, we would have to cite those cases in the note. Then all these state bodies that have copied our rules have just gone to sleep at the switch on this point.

CHAIRMAN MITCHELL: Suppose we make the change and ask the Reporter to draw up a note in which he refers to all the cases that ignore the "erroneous" part of this thing and have made the wrong interpretation of it. We can find out

then whether there is any formidable problem here.

MR. LEMANN: I have already referred to the fact that Professor Moore agrees with the one case the Reporter cited as being unfortunate. Moore thinks it is O.K. Moore is not here and we can't get him to state why he thinks it is O.K. and why he approves it.

DEAN MORGAN: He changed his mind.

MR. LEMANN: On the next page he changed his mind on another point.

DEAN MORGAN: Read the next sentence.

MR. LEMANN: The Reporter has grave doubts. I don't see anything about changing his mind there. He changed his mind on another point. On page 83 he changed his mind, but we are not on page 83 of the notes. We are on page 81.

CHAIRMAN MITCHELL: I think we could argue until we are blue in the face as to whether this is important or not.

MR. LEMANN: It is the other way, Eddie.

DEAN MORGAN: I see.

JUDGE CLARK: I have here Professor Moore's discussion if you are interested, and I shall be glad to give it to you in full. He speaks of the courts that have ruled that the decision is not binding on the appellate court and will be given slight weight on appeal: Equitable Life Assurance Society of the United States v. Ireland, CCA 9th; Fleming v. Palmer, CCA 1st; Himmel Brothers Company v. Serrick Corporation; Smith v. Royal

Insurance Company, Ltd., CCA 9th; Bannister v. Solomon, CCA 2nd; Wigginton v. Order of United Commercial Travelers of America, CCA 7th; State Farm Mutual Automobile Insurance Company v. Bonacci, CCA 8th; Johnson V. Griffiths, CCA 9th; Tipson v. Bearl Sprott Company, 93 Fed. Supp. 496; and he cites three or four more, and he hasn't even tapped the Second Circuit cases yet.

CHAIRMAN MITCHELL: Tell me, are those cases where there was no witness who appeared before the court? Citations don't mean a thing from our standpoint unless they were cases where the witnesses didn't appear.

JUDGE CLARK: I can't go over them all now. He says those are cases where their testimony was taken on depositions.

The reason I cited the Orvis case was particularly because, as I say, there are about four different categories which fit in the compartment. That is, you go according to the categories of how it works out.

This is a quotation from the Orvis v. Higgins case:

"In the light of the Gypsum case" -- the Supreme Court decision which sustained 52(a) and made none of these gradations, as a matter of fact -- "In the light of the Gypsum case, we make approximate gradations as follows: We must sustain the general or special jury verdict when there is some evidence which the jury might have believed and when a reasonable inference from that evidence will support the verdict,

regardless of whether the evidence is oral or deposition."

That is the jury.

"In the case of findings by an administrative agency the usual rule is substantially the same as that in the case of a jury, the findings being treated like a special verdict. Where a trial judge sits without a jury, the rule varies with the character of the evidence. (a) If he decides the fact issue on written evidence alone, we are as able as he to determine credibility and so we may disregard his finding." Which I suggest isn't true. "(b) Where the evidence is partly oral and the balance is written or deals with undisputed facts, then we may ignore the trial judge's finding and substitute our own (1) if the written evidence on some disputed facts renders the credibility of the oral testimony extremely doubtful or (2) if the trial judge's finding must rest exclusively on the written evidence or the undisputed facts so that an evaluation of credibility has no significance. (c) But where the evidence supporting his findings as to any fact issue is entirely oral, we may disturb that finding only in the most unusual circumstances."

It seems to me that that making of gradations is entirely at variance with our rule, and I think it has had a very evil effect, in that now the appeals are made according to the gradations here stated.

CHAIRMAN MITCHELL: Isn't the fact that the phrase

"due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses" meant that due regard shall be given to the peculiar opportunity or the special opportunity of the trial court to judge of the credibility of witnesses where they appear before him? That is what we meant. He hasn't any special opportunity, it is true, if there is nobody whose demeanor is observed.

JUDGE DRIVER: There are other things than observing witnesses. That is only one. As you say, it gives him that special opportunity because he can see the witness. But if a witness testifies in a deposition and it is altogether incredible and not in accordance with the ordinary human experience, you can discredit the witness without ever seeing him, in many instances. You can say, "I don't believe that."

CHAIRMAN MITCHELL: Has the trial judge any special qualification or advantage over the court of appeals in a case like that?

JUDGE DRIVER: No, I don't think so, not where everything is in writing. Where everything is in the form of deposition or written testimony, you have a situation which is rather unusual.

You have the more usual situation, I think, where on stipulation in a new trial, the trial is conducted entirely on the record made in the first trial before a different judge. I just decided a case of that kind a week ago. The case was

tried before a jury in Idaho, and counsel stipulated that it be tried before me without a jury. All I did was to sit down and look at the record of the trial.

When that goes up to the court of appeals, as I think that case will, do they try it over again, or do they place some importance on my findings?

JUDGE CLARK: What we said in the original note was this: Rule 52(a) "is applicable to all classes of findings in cases tried without a jury, whether the finding is of a fact concerning which there was a conflict of testimony or of a fact adduced or inferred from uncontradicted testimony."

It seems to me that the idea is more than this question of whether you have the same opportunity. It is the whole idea of review. If you review a trial de novo, in effect, in the appellate court, which is now what is more or less being argued, that is, of course, one of the bones of contention of the admiralty bar, because they think it should be. But a review, I should think, ought to be the determination of error. You determine whether the trial judge has really committed error. That is what you should look for, and not have the counsel invited to come to you on the basis that they think they may have a better break with the three appellate judges than they do from the trial judge.

CHAIRMAN MITCHELL: Isn't that taken care of by the clause that findings shall not be set aside, even though they

are on written testimony, unless clearly erroneous?

JUDGE CLARK: Yes, I think it is.

CHAIRMAN MITCHELL: The upper court decides whether, on the written testimony, they are clearly erroneous. If there is an argument about it, they don't set it aside, or shouldn't, if the trial court's judgment has fair support.

I think Bacon said the man who drafted a thing was the man least qualified to interpret it, because he was always thinking about what he meant instead of what he said. That phrase, "findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses," is mine. I drew that. I distinctly remember that. We were hunting for a rule, and I got hold of the equity rule, which is that, and drew those words.

I know in my own mind I had the idea that I was referring to the peculiar or special opportunity of the trial court to pass on credibility, demeanor, and appearance of the witnesses, their shiftiness on the stand, their appearance, which gave him a better opportunity than the appellate court judge.

Still, even if there is no such peculiar opportunity in the trial court because it is all written testimony, I think the phrase "shall not be set aside unless clearly erroneous" ought to be applied to findings based on depositions.

MR. LEMANN: When I look at this case of Orvis v. Higgins, I see that Frank wrote the opinion and August Hand concurred. Hand is a pretty good judge.

JUDGE CLARK: On everything except procedure.

MR. LEMANN: When I read the headnote I find this in the headnote:

"Where the evidence supporting the trial judge's finding as to any fact at issue is entirely oral testimony, the reviewing court may disturb that finding only in the most unusual circumstances."

Anything wrong with that?

JUDGE CLARK: Yes. Quite wrong.

MR. LEMANN: I would never have thought it wrong.

CHAIRMAN MITCHELL: Say that again.

JUDGE CLARK: It is an attempt to substitute for carefully worked out language a new rule which has got to develop its own interpretive clauses. It seems to me it is a very unfortunate thing to have the courts rewriting and substituting new rules for a rule which has worked very well.

JUDGE DOBIE: "Most unusual circumstances" means mighty little to me.

CHAIRMAN MITCHELL: Will you read that again?

JUDGE DOBIE: I don't like it at all.

MR. LEMANN: I want to read another sentence after it, too.

CHAIRMAN MITCHELL: All right, but read again what you read, won't you please, so I can get it.

MR. LEMANN: This is the middle of the headnote:

"Where the evidence supporting the trial judge's finding as to any fact issue is entirely oral testimony, the reviewing court may disturb that finding only in the most unusual circumstances."

I would have thought that the correct application of our rule.

CHAIRMAN MITCHELL: "Partially oral" would do it.

MR. LEMANN: Then they go on to show what the basis for disregarding it was:

"Evidence sufficient to support a jury verdict or an administrative finding may not suffice to support a trial judge's finding. Where the only question was as to inferences to be drawn from evidence assumed to be proven, the appellate court reversed on the grounds (a) a clear mistake had been made."

I don't see anything wrong with it, quickly reading it.

JUDGE CLARK: Yes, I think that is all wrong, because it is an attempt to restate a new rule that you don't know the meaning of. I take it, Monte, your point is that that probably means the same as what we wrote.

MR. LEMANN: No.

JUDGE CLARK: I think the first time it is written probably it does. Then you get to reconstruing that, and then that gets filed away, and pretty soon you have forgotten the original rule, which is now what happens. You have gotten away from a carefully worked out standard, and you are making a new standard.

Even if it meant the same thing, I think it would be a mistake to keep talking about it. That is not the rule.

MR. LEMANN: Personally, I don't think he misapplied the rule, but that is just the way it strikes me. I should think we ought to have a clear case of misapplication of the rule to justify us in changing this language.

JUDGE CLARK: I think we have a very clear case here, because the original rule is now lost. Because I feel so confident Mr. Mitchell's present statement is the same as his original statement, and because I think that is the really desirable course, I hate to see it covered up now so that now the lawyers come to us and say, "You are going to review completely when you have evidence on depositions."

The trouble with this, as with so much of procedural matters anyway, is that it is only when the appellate court is going to act that it starts writing about this. When we apply the "clearly erroneous" rule and apply it in accordance with the Chairman's interpretation, either we say nothing or we say that under Rule 52(a) nothing is to be done. When the court

decides that it wants to step in and reverse, then it starts writing all this stuff about "We will act in (a) but not in (b), but we will act in (c)," and so on. It is because I think that is an undesirable thing which has developed because of the tendency of the explanatory precedent to drive out the ordinary rule, that I raise the question.

It seems to me that you can't get any hold on the hundreds of cases where the rule is applied without any question because nothing is written up about them. It is these unusual cases that get to be written up, and then pretty soon they seem to be establishing the rule.

That is what is done here, and I think what they establish is not in accordance with what we intended.

CHAIRMAN MITCHELL: It seems to me that the provision that the findings shall not be set aside unless clearly erroneous, period, properly applies and was intended to apply where the testimony was all written, on the theory that even if there was ground for difference of opinion as to what conclusion was going to be drawn from a deposition, written testimony, the upper court isn't going to set aside the judgment of the lower court if his interpretation of the written evidence is reasonable. In other words, it isn't "clearly erroneous." If one of two conclusions may fairly be drawn from the written testimony and the trial court follows one, I don't construe that rule to entitle the appellate court to set aside its finding as

"clearly erroneous" because they accept the alternative interpretation. That is my idea about it.

MR. DODGE: We are proposing to overrule this decision in Orvis v. Higgins because in the opinion it is said, before a trial judge without a jury, "if he decides a fact issue on written evidence alone, we are as able as he to determine credibility, and so we may disregard the finding," citing six or eight federal cases. "Where the evidence is partly oral and the balance is written or deals with undisputed facts, then we may ignore the trial judge's finding and substitute our own. If the written evidence or some undisputed fact renders the credibility of the oral testimony extremely doubtful or if the trial judge's finding must rest exclusively on the written evidence or the undisputed facts, his evaluation of credibility has no significance."

On all those points he cites federal cases.

Then he goes on to say:

"Where the evidence supporting the finding as to any fact issue is entirely oral, you may disturb that finding only in the most unusual circumstances."

That is, where he has seen and heard the witnesses, it would be a very unusual case.

CHAIRMAN MITCHELL: He is wrong about that, because it is partially oral. Who wrote that opinion?

MR. DODGE: He says:

"Where the evidence is partly oral and the balance is written or deals with undisputed facts, then we may --"

CHAIRMAN MITCHELL: I think he is trying to chop it up too fine, and my idea is that I think Mr. Pryor's suggestion is absolutely sound. Mr. Pryor suggests that we say: "Findings of fact shall not be set aside unless clearly erroneous -- period" and then go on in a separate sentence: "Due regard shall be given to the special opportunity of the trial court to judge of the credibility of the witnesses who appear before him."

I think we have hit the nail on the head and made it clear that this qualification about "due regard for the trial court's opportunity" applies only where he has a special opportunity.

JUDGE DRIVER: To get this before the committee, Mr. Mitchell, I move that Rule 52(a) be amended by separating the two clauses of that sentence beginning, "Findings of fact shall not be set aside," and so forth, separated into a separate sentence so it will be clear that the first clause is not qualified by the second and that the exact verbiage be framed by the Reporter.

... The motion was seconded, put to a vote, and carried ...

MR. LEMANN: I talked against it on the ground there is not sufficient showing of necessity to warrant a change of

this degree of unimportance.

CHAIRMAN MITCHELL: I suggest that we ask the Reporter to draw a note and refer to the cases that are going haywire on that point, and then after he has done that you can make up your mind whether it is important or not. I don't think we are in a position to do it here today because we haven't had a chance to study all these cases and find out how bad they are or how numerous they are. If we stop to argue whether there is a good reason in each case, or not, we will never get through here. I think we ought to have the material before us to form a judgment on that.

JUDGE DOBIE: May I ask a question there.

"The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court."

Suppose the court overrules the findings of the master.

JUDGE CLARK: I think there it is the "clearly erroneous" rule.

JUDGE DOBIE: Have there been cases that you have had suggesting that a different rule applies there? We have had several.

JUDGE CLARK: I know there are cases that say the "clearly erroneous" rule applies to the findings of a master, and I think that is true.

JUDGE DOBIE: The court overturns those findings and makes its own findings, and the findings of the court come to us on appeal. Do we give to them the same weight that we would give if they had followed the master?

JUDGE CLARK: No, I don't think so. I don't think there that the overturning gets the benefit of the "clearly erroneous" rule. It is the original findings of the master that get the benefit of the "clearly erroneous" rule.

Do you want to go on now?

CHAIRMAN MITCHELL: Yes.

JUDGE CLARK: Next we come to the highly important question of Rule 54(b). I think it only fair to say the matter we have been considering and Rule 54(b) involve some questions of policy, and I am frank to say that I have felt quite differently from Judge Learned Hand, my great chief, for whom I have great admiration, but nevertheless I don't agree with him on all procedural matters, nor with Judge Frank, and it is fair to add, too, that Professor Moore has associated himself with them, and they all feel that an appellate court should -- I am afraid I put in what might be termed a motive urge, but I think it is fair to say -- interfere in or supervise to a much greater extent than I believe in or than I think our rules have contemplated or the general theory of review contemplates, in the activities of the trial court.

It seems to me that it is a sound policy in general

that the trial court is to carry the brunt of responsibility, and the function of the appellate court is to be there -- I am not sure but that the chief function of the appellate court is to give assurance to the litigants that they are not going to be unfairly treated and that there is a tribunal there to rectify mistakes.

CHAIRMAN MITCHELL: Does this relate to Judgment Upon Multiple Claims?

JUDGE CLARK: It does.

MR. DODGE: We adopted the old equity rule. Aren't there a lot of cases under that rule dealing with cases on depositions?

CHAIRMAN MITCHELL: He has passed on to Rule 54 now.

JUDGE CLARK: I am talking particularly about 54(b), and I want to go into the background because that is a very extensively discussed matter, and the background in which Rule 54(b) comes up again is this:

Judge Frank suggested new legislation which would give a discretionary appeal as to any interlocutory order, unspecified, just as broad as that. That was supported by both Professor Moore and Judge Learned Hand. It went to the Judicial Conference. The Judicial Conference referred that to a committee of which Judge Parker was the head, which was also considering and has considered the question of the jury trial and eminent domain. That is a separate matter, but it

was the same committee that considered it.

That committee, of which Leland Tolman is the secretary, is composed of federal judges, a committee of the Conference. It has been working now for two years. They first made a report which condemned the original Frank proposal, and that was accepted by the Conference. So I really think that that very broad proposal can be considered substantially out.

Judge Parker's own Fourth Circuit Conference then suggested new legislation which took up the idea of our amended Rule 54(b) which, as you may remember, provides for the trial judge making a finding in multiple claims, substantially separating a claim so that it can be reviewed. The Fourth Circuit Conference suggested legislation which would generalize the principle of Rule 54(b), which only applies, in the stated case of multiple claims, to the whole interlocutory appeals matter.

That was put out to the federal judges for discussion and is being discussed. At Judge Parker's request, every circuit conference this year is considering the matter as to whether there should be any recommended legislation. Judge Parker wrote to the Chairman asking us along with this to consider whether, by possible expansion of Rule 54(b), we could not cover the entire question so as to make legislation impossible.

It seems to me that the question before us is probably

not the broader one as to legislation. The literature is enormous. Leland has all sorts of mimeographed statements. A great many federal judges have reported one way or another.

CHAIRMAN MITCHELL: How does the question arise under (b)? I don't understand it. I think you are right in suggesting that we don't want to spend our time going into the question of what statute should be passed enlarging the right of interlocutory appeal. That is none of our particular business. We may be interested in it and may have ideas about it, but what is the point about (b)?

JUDGE DOBIE: It is a question of appellate jurisdiction, not a question of procedure in the district court, isn't it, generally?

JUDGE CLARK: I wanted to give you a little of the background. It is pretty hard to cover this because, as a matter of fact, there has been so much material.

MR. DODGE: What does 54(b) have to do with this question?

JUDGE CLARK: Rule 54(b), if you will turn to it, as now drawn provides for judgment in what we call multiple claims.

CHAIRMAN MITCHELL: The effect of Rule 54(b) -- I never thought it was a very apt expression, but I thought what we meant to provide for in subsection (b) was that the trial court could say whether or not he was reserving jurisdiction to tamper with the question again. If he reserved it, then

it wasn't final, but if he didn't reserve further jurisdiction to recall the judgment or to do something, then it was final.

JUDGE DOBIE: And could be appealed.

CHAIRMAN MITCHELL: And could be appealed. It was really a question of whether he reserved jurisdiction to act further. We put it in the form of saying, "upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment." That is just another way of saying he was reserving jurisdiction or wasn't.

JUDGE DOBIE: Judge Parker wants to open all interlocutory appeals to appellate jurisdiction of the courts where the district court judge certifies he thinks it is important enough and so integrally related to the determination of the court, and so on.

CHAIRMAN MITCHELL: We can't do that by rule.

JUDGE DOBIE: I don't think we can, either.

CHAIRMAN MITCHELL: I don't understand what we can do in subdivision (b) that would change the situation any. Any judge has a right at the foot of the decree to reserve jurisdiction to act further, and the moment he does that the judgment ceases to be final. That is what we really intended to do, although we didn't express it that way.

JUDGE CLARK: I haven't expressed the point yet. I am sorry, I haven't got to the point yet.

CHAIRMAN MITCHELL: I would like to know just what we are asked to consider on subdivision (b).

JUDGE CLARK: If I may, I want to try to state it.

Let me say that the Chairman's somewhat informal description of Rule 54(b) is a statement of our general intent. What we are doing is making a clear and obvious way of seeing what the trial judge's intent was. We say that if he has not shown what he intends, if he has left it vague, then he hasn't decided it. If he makes it specific, that shows that he intended to separate it.

It is, I think, one of the most useful things we have done. It has been applied in many, many cases, and I think has been a grand rule. It seems to me it has been one of the best things. It has been applied over and over.

It is a useful, workable thing because, you see, so much of this may happen without your knowing what the trial judge intended because he is looking for appeals, and therefore he hasn't taken specific action. This requires that he take certain specific action.

I say, therefore, that the rule is a good, workable rule, but the rule was only intended to apply and does only apply in the case of multiple claims.

That has turned out to be a question possibly of a little weakness in the rule. In the specific cases where it applies, it works beautifully. Query: as to whether it will cover all the cases we intended it to.

Let me indicate the kind of questions that may come

up. The courts have applied it pretty generally, so what I have suggested here as a possible clarification is, I think, in line with judicial decisions. Commentators, which have included Professor Moore, have suggested, however, that the courts are applying it somewhat beyond the language.

There are two main situations where the courts have applied the rule which may raise a question. The first case is the case of multiple parties, or it is the case that in the federal law is known as the Hohorst principle. The question may come up in all cases of multiple parties, but let's take the simple case of tort-feasors, whether you want to call them joint or not. Actually they are all now several by definition. But suppose there are two people involved in the same automobile accident. As a matter of fact, in several cases, one in the First Circuit, one in the Second Circuit which I wrote myself, we applied Rule 54(b) to that very situation.

This is the type of case that we had: We had the case in that Lopinsky v. Hertz Drive-Ur-Self case. That was a case of an automobile accident in Connecticut, and an attempt to serve upon these Hertz people who rented the car. The trial judge in that case held that that corporation was not doing business sufficient to be sued, and therefore ruled that that party should be dismissed, and made a finding that there should be a final judgment as to it.

The appeal was made and we considered it. The

suggestion is made that we were extending the rule beyond its terms, and that suggestion involves this analysis: The analysis is that our matter of claim means the ancient and old friend, cause of action, no more, no less, and that a cause of action does not involve different people or different rights, but merely means the same factual situation. And this was the same automobile accident, and therefore on that basis it is being suggested that the application, as I say, made in these cases is erroneous.

I don't think it is erroneous, but you can see the argument. I don't think it is erroneous because I think that one thing we were trying to get away from is any particularized definition of cause of action. Therefore, I don't think "claim" should be held to mean any technical cause of action.

In the second place, I don't think there was any complete agreement that "cause of action" meant this single thing.

Therefore, I think that our decisions were correct, but you can see the analysis there; and if the analysis is made, then this rule is not applicable in one of the great cases where it would be most useful, namely, the case of multiple parties. It would be useful only in the case of multiple claims against the same party.

That is one question as to the extent of the rule.

The other question involves perhaps the opposite side,

as to what has come to be termed collateral orders. There are suggestions that there may be fringe cases, so to speak, such as that Cohen v. Beneficial Industrial Loan Corp., where the question was the one of the shareholders' derivative action, the stockholders' suit. The suggestion is made that our rule does not apply to the collateral order situation, whereas it seems to me that is another case where it ought to apply.

As a matter of fact, Judge Learned Hand in a decision did apply it. The question is made that perhaps that application was erroneous. The case that he applied it in was Lyman v. Remington Rand Co. Lyman was a master appointed in a suit against Remington Rand. The judge fixed the master's fee, and he wanted to appeal before the main appeal was coming up. The judge separated it under this 54(b) and the upper court considered it.

No, I am wrong about that. The judge had not separated it and the upper court said they would not consider it until he did separate it.

It seems to me that that is a sound application of our principle. But if you say that this does not reach the question of collateral claim, you see, the rule would not apply in that kind of case.

So what I have suggested on page 8 is that we make certain additions, making the rule clearly applicable to these cases of the kind I am discussing. If you will look at the

foot of page 8 you will see my suggestions in the underlined material. Those are the only changes. I say this:

"When more than one claim for or right to relief" -- in other words, I am now getting away from this mere technical version of cause of action. "When more than one claim for or right to relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim or right to relief, the court may direct the entry of a final judgment upon one or more but less than all the claims or rights, and whether collateral to or directly connected with each other," -- that language is to meet the so-called collateral order case -- "only upon an express determination that there is no just reason for delay" and so on. The rest of the rule follows along that same way.

JUDGE DOBIE: There is nothing in the rule as originally drawn that said anything about whether they are collateral or connected. There is nothing in the rule as drawn that depends upon whether they are collateral or directly connected, is there?

JUDGE CLARK: There is nothing in the original rule that makes any of these limitations. It seems to me the limitations are undesirable, and I don't believe they are in line with the original intent. The argument is made that our rule as originally drawn was not broad enough to cover.

MR. PRYOR: I thought I understood this before I came

here and when I read your commentary. In your commentary you say, on page 88, the Reporter is disposed to recommend the insertion of the words "or right of action" after "claim for relief," but instead of inserting the words "right of action" you inserted the word "right."

I can't see that it is entirely appropriate language to speak of presenting a right. You can present a claim to a right. I was in favor of the comment.

JUDGE CLARK: I will tell you my process of thought on that. I had to do this rather hurriedly and under a little stress. When I wrote the commentary I thought that the best expression was "right of action." When I came to work on it, I thought that the words "right to relief" would be better as more in line with the claim. Maybe my first thought was the better. I don't know.

At any rate, when I came to write the particular amendment, at that time it seemed to me that "right to relief" was better than "right of action." I have no pride or opinion either way.

MR. PRYOR: I like the suggestion in your comment better.

JUDGE CLARK: What I wanted to do, as I put it, was to make the rule just as broad as I thought it was when I drew it originally.

CHAIRMAN MITCHELL: I am not clear about this. I would

like to ask a question.

Your first point, as I understand it, is a case where there is a claim made against two parties. It is the same transaction, but you are trying to hold two parties liable instead of one. You find when you get into the case that one of them isn't doing business in the state and you haven't jurisdiction over him. So you want to make an order dismissing the claim as to him. You haven't disposed of the claim against the other party because he is in your jurisdiction.

That is the first point, is it not?

JUDGE CLARK: That is it.

CHAIRMAN MITCHELL: You want to provide that we make an amendment which makes it clear that where you are dismissing one party because of want of jurisdiction, your rule doesn't come into play because you haven't decided the claim against the other party. Or does it come into play? Is that what you want to do?

JUDGE CLARK: I want to make sure that the rule may be availed of so that the district judge may separate this issue and it may be appealed immediately. Yes, I want to make clear --

CHAIRMAN MITCHELL: You want to make a final judgment dismissing one party --

JUDGE CLARK: That is right.

CHAIRMAN MITCHELL: -- who is sued on account of this

transaction, and allow the question of his being subject to jurisdiction to be taken up and decided by the court of appeals without having disposed of the claim as to another party over whom you have admitted jurisdiction. Is that what you are driving at?

JUDGE CLARK: That is it.

MR. LEMANN: Can't you do that under the present rule in that particular case that the Chairman mentioned?

JUDGE CLARK: We did it, yes, and it has been done in several cases. If you will look on page 87 of the summary, the three cases at the foot of the page are cases where it has been done.

CHAIRMAN MITCHELL: Your difficulty, you say, is that this rule is so drawn now that you can't separate the claims as between two parties. You have to have an independent claim and you have to decide the merits of that and decide that you are reserving no jurisdiction to deal with it further before the rule comes into play.

You want to fix it so that if you merely dismiss the claim as to one party for want of jurisdiction, you can make that a final judgment by saying as to that you don't reserve jurisdiction, and you are determining the thing finally. That gives you an appeal from the order dismissing the claim as to the Hertz Company, for instance. Is that what you are trying to do?

JUDGE CLARK: Yes.

CHAIRMAN MITCHELL: Where is the proposal you make to cover that?

JUDGE CLARK: Before I answer your second question, let me say: Again I say that so far as I know, every case where it has come up has done just what I think the rule should do. They have done it in the main without any discussion, and the reason I bring it up is that the distinguished commentators, of whom I suppose Professor Moore is the most distinguished, say that that is not a proper construction of the rule.

CHAIRMAN MITCHELL: No court has so held?

JUDGE CLARK: No court has so held.

MR. PRYOR: Is it their thought, Judge, that the present rule applies only where there are multiple claims against the same party?

JUDGE CLARK: It would practically be that. No, it is not quite that. The argument is that multiple claims means multiple causes of action, and therefore the rule applies only when you have multiple causes of action; and you haven't a multiple cause of action just because you have separate tort-feasors. If you had a claim against party "X" and an entirely separate claim against party "Y," they would apply it. But in this very practical situation of the two parties that I speak of, the argument is based on the premise that there is only a single cause of action, and that is what the "claims" means, and

therefore there are no multiple claims.

MR. DODGE: Would "right to relief" mean something different?

JUDGE DOBIE: I was going to ask that same question. You say where there is more than one claim for or right to relief. Does that broaden it at all?

Frankly, of course, "right" is one of the slipperiest words in the law. Does that broaden it, Charley? It wouldn't cover a case where a man had two remedies, would it, one equitable and one legal? No. You can't have your equitable remedy and say nothing about the legal. You couldn't go up on that, could you? That wouldn't be final.

JUDGE CLARK: This is the old question of making words do what you want them to do. If you ask me, can I assure you that some court may not say "They never intended to change anything and therefore they haven't changed anything," I can't, of course. But it seems to me that this ought to do some good, because we would be on the face of it trying to broaden the rule, and our notes would say that we were trying to broaden it.

I should think some effect ought to be given to that. I thought, myself, that naturally it would be a broadening, because it seems to me that you can have several rights to relief out of the same factual situation. You have a right against the Drive-Ur-Self Company and you have a right against the driver of the car, and so on. So all I can say is that I

should think the natural interpretation of the word was to make it broader, and I should hope that the circumstances of our obviously trying to add something would make that natural interpretation the more reasonable one.

CHAIRMAN MITCHELL: Getting onto Monte Lemann's platform, we have a problem here where no court has construed this rule contrary to what you think it ought to be. Wherever the question has arisen, even though there is only one claim but two defendants, and you dismiss one defendant because he is not within the jurisdiction, the courts have nevertheless held that this rule applies.

I note that Minnesota adopted this rule verbatim, and Nevada has. We are getting into the old question of whether we are going to tamper with the text of rules and destroy this effort at uniformity.

I am wondering whether we can't handle this thing, instead of trying to redraft the rule, by making it clear that when we say "multiple claims" we mean a case where the same claim is made against two parties; whether we can't put in a note saying that that is what we mean and cite the cases that have so applied it, and say we think that is the way it should be, instead of tampering with the text.

JUDGE CLARK: Of course, it is possible to do it by a note, and that might be helpful. Frankly, you can see that the reason I am making the suggestion I do is that I think

that Professor Moore is worth three courts any time, including two decisions from the Second Circuit, particularly when it must be admitted that the decisions do not make this extended analysis and Professor Moore does.

There it is. I would make an extended analysis just as I have indicated, if I had, as I probably will now because of the questions.

JUDGE DOBIE: Did Moore suggest this terminology? I am a little afraid of that "claim for or right to," whether there is any addition or you are just saying the same thing. In other words, there is always an alternative. The law is alternative, not copulative.

CHAIRMAN MITCHELL: If I were changing it I would say, "Where more than one claim is presented or where the same claim is presented against more than one person * * *."

JUDGE CLARK: Yes, that is another way of doing it. That would simplify it. Why not say that in a note and refer to the decisions that have applied it that way, and say "having held so, we don't feel there is any occasion to amend the text."

JUDGE DRIVER: I move we pass it and leave it to an explanatory note as you have suggested.

MR. PRYOR: I second the motion.

CHAIRMAN MITCHELL: Any further discussion?

JUDGE CLARK: I want to say this is quite all right with me. I am just wondering how I can get an explanatory note

by Professor Moore.

All right, I will try. He is now on record that the rule does not mean what the cases are saying it means.

CHAIRMAN MITCHELL: Refer in the note to what he says and what the cases say, and say we agree with the cases so we don't think it is necessary to amend the rule.

MR. PRYOR: The courts are applying the rule all right. I have had cases where the court applied it. Where there were claims against two different people, it dismissed the case against one and continued with the other pending determination.

CHAIRMAN MITCHELL: All in favor of the note system say "aye." That is agreed to.

JUDGE CLARK: The other one is the other side of the same discussion, which has come to be called collateral orders arising out of the same situation.

I think one would say that certain collateral orders, before we came into the picture, have been held appealable. I think it is awfully hard to say what collateral orders were appealable. There are various cases on that.

CHAIRMAN MITCHELL: Does this section as drawn have anything to do with so-called collateral orders?

JUDGE CLARK: I think it has everything to do with it. Professor Moore says it does not.

CHAIRMAN MITCHELL: What is a collateral order?

JUDGE CLARK: I don't think that you can really tell to be sure in every case what is a collateral order until after the court has called it a collateral order. That is one of the objections I have to this thing, because you don't know what a collateral order is until the court has said so.

I want to give you the example which was the case Professor Moore criticizes as not having applied this idea, Lyman v. Remington Rand, the master's fee case, the idea being that the order as to the master's fee is only collateral to the main litigation.

Our court said that is the kind of thing that is within the rule, and therefore where the court gives the statement provided in this rule it is appealable, and where it doesn't give it, it is not. I think that is right.

The suggestion is made, and it is only fair to say, too, that there is another fellow who wrote an article in the Virginia Law Review who said he didn't think this rule covered collateral orders. The reason they say that is that the rule is general. That is why I think it should apply. It is so general in words that it should apply to everything covered by it.

The suggestion is that since it did not refer specifically to the situation, it did not change the existing rule. Or it is part of the old way that you have to change an existing rule unless you have done it so clearly that nobody can say

that you were going to stop short of it.

CHAIRMAN MITCHELL: Why should an order fixing a master's fee be especially appealed when the litigation is still going on? How can you say that is a multiple claim within the terms of the rule?

JUDGE CLARK: Of course, that is the argument made. The question is whether it is a multiple claim within the rule. I don't see why not. Why isn't it just that?

A multiple claim, whether including counterclaim, cross-claim, and the whole series of things.

CHAIRMAN MITCHELL: Would you say this master's fee was a claim for relief presented in the action?

JUDGE CLARK: Yes, I would.

CHAIRMAN MITCHELL: I wouldn't, at all. I think that means a claim which is the basis of the suit, not a collateral order fixing the compensation of the master.

MR. PRYOR: He isn't a party of any kind.

JUDGE DOBIE: It might lead to multiple appeals. Suppose you had an expert witness in this as costs, his fee, the master's fee, and all like that, each one of them separate. You would have five or six appeals in one case before the main thing comes up, Charley.

JUDGE CLARK: This cuts down the appeals. The beauty of this is that it cuts down on the five or six appeals so that you don't have any appeal unless the trial judge is

convinced that it is a good case to have an appeal. If you take it out of the rule you are going to have parties attempting to appeal in every one of these cases, and you are going to have then the rulings of the appellate court quite diverse, because there isn't too clear an idea of what a collateral order is.

In theory, if this rule does not cover the situation when the order is collateral, the appellate court should review, and when it is not collateral it should not review.

The discussion here, I would say, indicates all the more reason why we ought to clarify it and make it apply. It seems to me this is another case where it should apply.

Here is another case that has come up on this question of whether it is collateral or not. That is a right to attachment.

DEAN MORGAN: May I suggest, Charley, that the way to do that is not to try to throw it in with claim to relief, but put a separate sentence in covering this kind of thing, and saying that that kind of order can be appealed only if the judge certifies that it should be separate.

CHAIRMAN MITCHELL: It seems to me to be clearly within the scope of the rule. It is as plain as the nose on your face that we are talking about claims here, and when we are talking about claims we are talking about the basis of the suit.

DEAN MORGAN: Yes, I agree with your statement. I think it awfully hard to say that a master's claim for fees is one of these that is mentioned here -- counterclaim or cross-claim.

JUDGE CLARK: What do you think of the question I just put, Eddie, about the right to attachment?

DEAN MORGAN: It is the same sort of thing. About an attachment you could say it was a part of the claim which the party makes because it is a claim of a party; but a master's claim, for example, isn't a claim of a party at all. It seems to me you should cover that sort of thing in a separate sentence instead of trying to put it in here.

JUDGE CLARK: I don't object to the way of doing it. I just want to make sure I have the point before you.

Let me ask you again: Was your answer that you think the right to attachment was not collateral?

DEAN MORGAN: I should think an attachment is collateral to the suit, but it is a claim by a party. I should think it would be better if you put the whole business in a separate sentence.

CHAIRMAN MITCHELL: Suppose you have an application by a master for allowance of his fee during the course of a litigation where a master is used. It comes up and the parties are heard on it. He gets an award from the court for his fee and one of the parties who has to foot the bill doesn't like it.

Under normal practice, has the court of appeals power under the statute to entertain an appeal from an order of that kind; and if not, at what stage of the litigation can it reach the court of appeals? Do you have to wait until the final judgment is entered and take the question of the master's fee up along with the final judgment, or how do you do it?

JUDGE DOBIE: I know we have a good many cases when, after final judgment, the only question to come before us -- nobody objects to the judgment -- is the question of fees, the master's and attorneys' and so on.

CHAIRMAN MITCHELL: It comes to you at the close of the litigation?

JUDGE DOBIE: After the litigation is all over. Nobody objects to the big judgment. It is just a question of fees.

CHAIRMAN MITCHELL: They have a row over how much the master is going to get?

JUDGE DOBIE: Yes.

JUDGE CLARK: We have a great many cases of that kind. We do have to review them.

JUDGE DOBIE: Lawyers' fees in reorganizations, too. I know we had one the other day. A North Carolina lawyer claimed that, while he was a small town lawyer and had never been inside a textile mill until this reorganization came up, his services were worth $150,000. We disagreed with him.

MR. LEMANN: I am a little confused, from a quick

reading of your material, as to what it is that Moore thought the rule was defective. We had an earlier discussion a few minutes ago and agreed that you would write a note showing that the committee thought the courts were right and Moore was wrong, but on looking over your material I am getting the impression that what Moore was really writing about was the second point that we are now talking about and not the earlier point that we discussed.

Am I wrong about that?

JUDGE CLARK: Of course, there is a difference between the two points. I feel, personally, that I can make a much stronger case out of the first point that he is wrong, than on the second, yes. I agree with that.

CHAIRMAN MITCHELL: His question is, what Moore was dealing with.

JUDGE CLARK: Moore deals with them both.

MR. LEMANN: He does? I didn't get that impression.

CHAIRMAN MITCHELL: He says that under this rule a master's fees are not within the rule, doesn't he?

MR. LEMANN: That is right.

JUDGE CLARK: By the way, you can't get it yet in his volume there. You have to get it in this one (indicating). He hasn't published his sixth.

MR. LEMANN: I was just looking at your material, not Moore's itself.

JUDGE CLARK: He covers it in this commentary on the rules here. There are several different paragraphs. This is quite long.

For example, he puts a heading on page 253 of this book, his edition of the rules. He says: "Does not apply to collateral orders appealable under offshoot rule." He gives this discussion. Then he says about this Lyman case that I have talked about:

"Although such a construction seems not to have occurred to the court in Lyman v. Remington Rand" -- he is talking there about Learned Hand -- "practical reasons support that construction."

So that is the place where he discusses the collateral order thing.

CHAIRMAN MITCHELL: Does he hold, for instance, that an order fixing a master's fee is not within this rule?

JUDGE CLARK: Yes, and that is why he says the Lyman case is wrong, that is, the master's fee case.

CHAIRMAN MITCHELL: What did they hold there, that they could or could not?

JUDGE CLARK: That the rule did apply, and that you couldn't consider the appeal.

CHAIRMAN MITCHELL: Unless the court had made a special determination.

MR. LEMANN: They said, per curiam, by the two Hands,

"Except for the rule it would have been appealable," answering your question a while ago. They said under the prior law it was appealable, but under the rule it wasn't appealable.

CHAIRMAN MITCHELL: I don't see why we should make any change about that.

JUDGE CLARK: I suggest that is a case where there ought not to be an appeal unless the trial court thinks it will hasten things to a conclusion.

MR. LEMANN: That is what they held, isn't it?

JUDGE CLARK: That is what they held.

MR. LEMANN: You agree with them. So we ought to write a note on this, also, "Moore is wrong, and the court is right."

JUDGE CLARK: I agree with the two Hands, but as I understood it, the Chairman and Professor Morgan and maybe some others were saying that Moore was right and the Hands were wrong.

MR. LEMANN: I didn't follow what they said closely enough to know.

DEAN MORGAN: I haven't written about it, though.

CHAIRMAN MITCHELL: Did Morgan say the rule applies or did he say it doesn't?

JUDGE CLARK: Eddie, I don't want to misquote you. The Chairman wants to know whether you think the rule does apply.

DEAN MORGAN: I think it does not apply.

JUDGE CLARK: You see.

CHAIRMAN MITCHELL: Is that what Moore says?

JUDGE CLARK: Exactly, yes.

CHAIRMAN MITCHELL: They are both right, I think.

MR. LEMANN: The Hands are wrong.

CHAIRMAN MITCHELL: Hand says the rule applies; that you can force the upper court to hear an appeal by putting this determination in the order, is that it?

JUDGE CLARK: Yes. I say that I believe an argument can be made that the Hands are right; but if they are not right, they ought to be made right, they ought to be made legitimate, because it seems to me that that is the very kind of case that ought to be covered.

CHAIRMAN MITCHELL: Why on earth should not the trial court say that "my decision on the master's fees, although I haven't disposed of the rest of the litigation, is final and the parties ought to have a right of appeal, to go up." Why should they wait until the body of the case gets up?

JUDGE CLARK: If you are going to apply that rule -- and I think there is much to be said for it -- unquestionably you probably have to change the existing law, because if you rule that this rule does not apply, then the answer is that they can appeal whenever they feel like it.

CHAIRMAN MITCHELL: Why not? Why do we care about

that?

JUDGE CLARK: It seems to me that is a case of duplication of effort, really. That is one of these cases where you pile up these appeals. The trial judge has much more knowledge than the upper court can have until the upper court has heard the case. That is the trouble with all this discretionary appeal to the upper court. You have to have a full-dress hearing to find out whether you should grant the appeal or not.

The trial judge is familiar with the case. I think he can do substantial justice to this case because this isn't a question of finality. This is a question of when it is best to consider it. He can't say, "My judgment shall never be reviewable." He can say, in effect, "It seems to me that the better time to review this is all as a unit instead of separately."

You take that very Lyman case, for example. The master felt the judge had done him wrong and had a strong sense of feeling that he had been mistreated. The defendant, who hadn't paid his charge, said, "No, I don't want it considered now. I want it considered on the basis of the whole record, when the court can see everything that was done, instead of trying to build an entirely separate record on this issue."

It seems to me that practically that was sound. Even though the master had this sense of grievance, that sense of grievance could be taken care of ultimately just as well as at

the time.

DEAN MORGAN: But you wouldn't say that an order dissolving an attachment or allowing an attachment was a final order, would you? You wouldn't say that was appealable?

JUDGE CLARK: Yes.

DEAN MORGAN: How could you?

JUDGE CLARK: Unfortunately, that is being held. I want to get away from its being appealable.

MR. LEMANN: Why "unfortunately"? It depends on what side of the case you are on whether it is unfortunate.

JUDGE CLARK: Or perhaps it depends a little on whether you are on an appellate court. It may depend on which side of the case you are on. We are getting that question right along.

Felix ruled in the Caribe case that a judgment on an attachment matter was final and appealable, and that is one of the cases that I have cited here -- Swift & Co. Packers v. Compania Colombiana Del Caribe, 339 U.S. 684 -- at the top of page 87.

MR. LEMANN: Was that governed by our rule, Charley?

JUDGE CLARK: No.

MR. LEMANN: Was that prior to the rule?

JUDGE CLARK: There is no discussion of that. It was not governed by the rule, I think for two reasons.

JUDGE DOBIE: That was an admiralty case, wasn't it?

JUDGE CLARK: Yes.

The first reason was that it was an admiralty case, where the rules are different. I might say Justice Frankfurter did not refer to that fact. A good many of these things are not discussed.

The second was that it came up in the lower court before our rules went into effect.

MR. LEMANN: Wouldn't that result now be accomplished under our rule in the attachment case by going to the district judge and getting him to sign an order?

JUDGE CLARK: That is the way I think it should be.

MR. LEMANN: It would be today, wouldn't it?

JUDGE CLARK: That is what I am trying to propose. If there is any question about it, it should be made that way.

Don't you see, Monte, the argument that is made to the contrary is that that is a final order being collateral, and therefore immediately appealable.

MR. LEMANN: It seems to me the attachment case is different from the master case, because the master is not a part of the suit and he has an original claim. I would think that might be more open to argument as to the applicability of the rule than the attachment case.

Of course, I realize that we are now discussing to some extent questions of appellate jurisdiction and interlocutory orders where irreparable damage is threatened, as to which

I believe there is a statute, or was a statute if it hasn't been repealed, governing appeals from interlocutory orders where irreparable damage is threatened. Isn't that right?

CHAIRMAN MITCHELL: As I understand it, your objective here is to amend this rule so as to make it clearly apply to what you call an order fixing the master's fee, to prevent the appeal. That is what you are driving at?

JUDGE CLARK: To prevent the appeal unless the judge gives the finding here.

CHAIRMAN MITCHELL: What theory will he act on? The master says, "I need the money. I have worked hard for several years. Now I have to wait until the parties have finished this case before I can have my fees passed on." Why should we care?

JUDGE CLARK: I think the trial judge will hear both sides there, and he knows what the case is all about. It is a case where he has to exercise judicial judgment. Why not? If it is a case under the rule, he makes an express determination that there is no just reason for delay, and then expressly directs the entry of final judgment.

CHAIRMAN MITCHELL: You want him to have that power so he can prevent an appeal?

JUDGE CLARK: That is it.

JUDGE DOBIE: Unless the judge gives that certificate.

JUDGE CLARK: Yes.

CHAIRMAN MITCHELL: He can prevent an appeal by not

making that determination. In other words, he is doing this: He is saying, "I have made an order fixing the master's fee, but I reserve jurisdiction to change it." Therefore, it is not a final order. That is equivalent to what this rule does.

JUDGE CLARK: That is right.

CHAIRMAN MITCHELL: I think the rule is badly expressed here because I think the idea back of it, that the lower court reserves jurisdiction at the foot of the order to give it further consideration and alter, is the basis for his action to determine whether it is final or not. It isn't final, it isn't appealable, if he still has control over it.

The only justification for the rule is the theory that the court has reserved jurisdiction to dabble with the subject further. Otherwise, he hasn't any authority to do this. No decree is final if the court reserves jurisdiction to change it before the litigation ends.

JUDGE CLARK: You see, this now ties up with the broader picture somewhat. Judge Parker is considering the question whether the idea of permitting wider interlocutory appeals when the trial judge feels that the immediate appeal would terminate the litigation, is perhaps a desirable thing. There is a great division of view as appears among the federal judges.

Of course, Judge Frank and Judge Learned Hand and Professor Moore all think that a fairly wide interlocutory

appeal is desirable. There are quite a few of us -- and I think Judge Parker agrees with the idea, as I certainly do -- who think that wide and free interlocutory appeals would be perfectly ridiculous to a good deal of our practice.

For example, I don't see how our discovery provisions can really operate if, every time you can't get the district judge to do what you want on discovery, you immediately can take a formal appeal to the upper court. I haven't seen that answered anywhere, really.

I went through the calendar provisions in New York, for example, where they have a long calendar, about 30 to 50 discovery matters twice a week when they have their discovery calendar. Suppose on each one of those discovery orders we provide a very wide basis for protective orders. That is what we were discussing yesterday. Suppose each one of those is immediately appealable. How are you ever going to get anywhere?

It is an attempt to shut that off. At the same time, to give a little opportunity in the rare case so that you can go up, Judge Parker has been working on this intermediate situation of an appeal where the trial judge makes this kind of finding.

Even that has raised a great deal of question. For example, Judge Harold Stephens, for his entire court, has filed a very complete and detailed memorandum saying that they had

the situation and know what it means. They had the situation of free interlocutory appeals, and they have said it is wholly undesirable.

I am not at all sure on a poll of federal judges whether a majority of the federal judges would want any change from the present. I have more or less gone along with Judge Parker's idea, although I am not thoroughly sold on the advantage of many of these appeals.

The main reason I have thought of going along is that I think a good rule will operate both ways and will stop some of the interlocutory appeals that we now have. I think in some regards we have too many interlocutory appeals and in some regards we may not have enough. I think there is a great area of uncertainty. I think that the suggestion that Judge Parker has been working on will add a great deal of certainty. Counsel can look for what the order provides, and if certain things are there they can, and if certain things are not there they cannot, whereas, I think now you can't tell what a collateral order is. I am glad if some of you can, but I don't think I can tell or be sure until the Supreme Court finally tells me in a particular case that this is a collateral order and something else is not.

So I have been willing to go along on that general proposition.

That is the background of the legislation.

MR. LEMANN: Haven't we a preliminary inquiry here

in connection with Judge Parker's suggestion, which I understand is also Judge Learned Hand's and Frank's suggestion?

JUDGE CLARK: No.

MR. LEMANN: It started with that and then Parker made a modification of it. It has been before the Conference of Senior Circuit Judges and they have referred it to a committee, and that committee has taken a poll of the district and circuit judges on the subject. Meanwhile -- I am basing this on my understanding of what the secretary of our committee tells me -- we have been asked whether we feel we can do anything in the matter by amending the rule we are talking about.

It seems to me before we discuss the merits of any of the many proposals that have been made, we have the preliminary question of whether we have any power to do anything in a matter that directly concerns appellate jurisdiction. If we haven't, then we don't need to discuss the merits of the various suggestions. If we have, then I guess we do have to consider it.

CHAIRMAN MITCHELL: I have always had the impression that this whole business of allowing a lower court to do something which makes the judgment final or not final, and thus control the right of appeal, is going quite a ways. The only way he has any power over it, as I understand it -- he can't just sit and say this is appealable and that isn't -- is by doing the equivalent of reserving jurisdiction to reconsider.

How far do we want to go with that?

JUDGE CLARK: It seems to me the question of power has pretty much been settled.

CHAIRMAN MITCHELL: How do you mean settled?

JUDGE CLARK: I think the question is settled by the Reeves v. Beardall case in the Supreme Court, which upheld our original form of 54(b). The Supreme Court unanimously upheld it in the Reeves v. Beardall decision, written by Justice Douglas. When this case came along, there was a single case in which question was raised about the validity of Rule 54(b), but there have been now a whole succession of cases which have upheld it. It seems to me that there is no question but that it is valid when you consider other analogies, too.

For example, the question of time of appeal, which seems much more important, has been upheld. We cut down the time of appeal from three months to 30 days in the general cases, 60 days in the government cases. There are several analogies of that kind.

You will find that, if you are at all interested, discussed at some length in my opinion in the Lopinsky case, which was expressly adopted in several other circuits. It has been adopted in the Third Circuit in an opinion by Judge Maris. It has been adopted by Judge Magruder. It has been followed, without necessarily discussion, in several other circuits which I cite here.

It seems to me the question of power is now thoroughly settled.

CHAIRMAN MITCHELL: I am not arguing against it. It seems to me that this subject of the extent to which interlocutory appeals may be taken to the court of appeals is being bruited around, and the judges are all busy on it. There is strong disagreement among some of them. Some think the power ought to be enlarged, and others feel it ought to be restricted.

Why don't we pass over enlarging the power of the district court to control the subject by reserving jurisdiction in cases like masters' fees, until the judges get together and in conference decide how many more interlocutory appeals are going to be permitted and until they pass a statute on it, instead of butting in on it here.

JUDGE DRIVER: Isn't it true there is not only disagreement as to whether there should be a collateral appeal allowed in interlocutory orders, but also who should govern the taking of the appeal, whether the district judge or the appellate court? I think some of your colleagues are in favor of taking it out of the trial courts' hands entirely and letting the appellate court say when there should be an appeal from an interlocutory order.

JUDGE DOBIE: I think Judge Parker's present view, as I remember it, is that it should be only where the district judge so certifies. The appeal, even then, is discretionary with

the appellate court, if I remember it.

JUDGE DRIVER: That isn't generally the universal view.

MR. LEMANN: Judge Learned Hand, as I understand, is not willing to give any controlling effect to the district court. My recollection is that they first proposed, as Judge Driver said, that it be entirely in the hands of the appellate court. Then the opposing point of view was that it be entirely in the hands of the district court. Then some modification was suggested, that you must get the district court's certificate, but it must also be approved by the appellate court.

JUDGE DRIVER: You get the trial judge's view and recommendation, but the appellate court doesn't have to follow it.

JUDGE CLARK: That is why, Monte, I was trying to make some exception when you were linking Judge Parker along with Judge Learned Hand and Judge Frank. They are at the opposite poles on that.

Since I am aligned with Judge Parker, I want to make that clear. Judge Parker and I and some others are advocating this limited power in the district judge. There isn't any question that Judge Learned Hand and Judge Frank want the power completely in the appellate court.

There are really three pending things being voted on. One is to leave it as it is now. While theoretically there is

no right of interlocutory appeal, although practically there are a good many cases, it works out that there is one, and frankly, I think that is where the vote is going to end, so far as this is in the hands of the federal judges. Of course, they are not the final people to say, but they are having a questionnaire.

There is then the position of Judge Parker, with which I have associated myself, which is applying in effect the thesis of Rule 54(b). That is where it started from, of course, but generalizing that and applying it as a statute to the entire situation.

CHAIRMAN MITCHELL: I would prefer to leave it to the parties who are scrapping over this thing to handle this question of interlocutory appeals, and not amend our rule by definitely taking a position that it ought to be determined by the trial court by a certificate determination. Why should we commit ourselves on that?

MR. LEMANN: I agree, because I think it very doubtful whether we have that authority. I think we did have the authority to adopt the rule in the present form, but in the Reeves case, which I just looked at, we applied that not to any interlocutory appeal, but where there were two claims, which is the normal thing. One is finally disposed of. There is nothing interlocutory about it. Under the operation of our rule you can now take an appeal, although the other claim is not disposed of. But that doesn't touch this interlocutory

situation at all.

CHAIRMAN MITCHELL: The rule makes it interlocutory by giving the court power to say, "I reserve jurisdiction for further consideration." That is the effect of our rule.

MR. LEMANN: It puts it the other way, I thought.

CHAIRMAN MITCHELL: What I mean is that I don't see any reason why we should come to the conclusion here that we ought to allow the district judge to decide whether an appeal ought to be taken and fly in the face of those who have the opposite view. Let them wrestle that thing out before we tamper with it.

MR. LEMANN: I agree, not only from the point of whether we ought to do it, but whether we have the power to do anything.

CHAIRMAN MITCHELL: If the law or a rule equivalent to statute allows the district judge to say, "I am not through with this point; this is a temporary decision; I reserve jurisdiction to reconsider," I can't see where there is any doubt about our power to adopt a rule of that kind.

My point is that there is a controversial problem as to where the discretion for leave to appeal should originate, and I don't like to be dipping in and making a rule that accepts one view or the other on that any more than we already have.

JUDGE CLARK: I might say that at breakfast this

morning Judge Parker said, "I hope you fix this all up," and so on.

I said, "I will do the best I can, but I am pretty sure the committee is going to say it is Judge Parker's problem."

MR. TOLMAN: I was going to say, I think it was Judge Parker's purpose in referring this to you to have you think about it a little and tell him whether you thought that the committee was interested at all in trying to arrive at a solution to this problem. I think that is all he had in mind.

JUDGE DOBIE: The so-called Parker rule allows appeals in all interlocutory cases where the district judge certifies it is highly important and desirable and would practically end the controversy. We couldn't do that.

MR. TOLMAN: Rule 54(b) was a good deal talked about in the comments of the judges on these various suggestions. Some of them said they thought 54(b) would probably take care of any really urgent question.

JUDGE DOBIE: It can't when there is only one claim.

MR. TOLMAN: Others said they thought 54(b) could possibly be changed to take care of the urgent problems of interlocutory appeal. I think it was Judge Parker's idea that since 54(b) was within the jurisdiction of the committee, he would like to have the committee see whether anything could be done about it.

CHAIRMAN MITCHELL: I can't see any rule of procedure

that we could adopt to regulate the right of appeal, except the device which we substantially did, although it didn't work that way, to make an order of a certain kind subject to further action of the district court. By its very nature that destroys itself finally.

There already is a law that wherever a judge reserves jurisdiction at the foot of his decree to reconsider it, it isn't a final order.

MR. DODGE: We have a right, haven't we, to make what would otherwise be an interlocutory order a final judgment?

CHAIRMAN MITCHELL: Yes, the court can relinquish any jurisdiction he has to reconsider. If we make a rule that forbids him to change his mind on that thing during the rest of the litigation, a rule that is good, we are destroying the appealability of it as a final order.

MR. DODGE: Would these orders in 54(b), apart from this rule, have been interlocutory?

JUDGE CLARK: You have to separate. I understand we have finished with the question of the joint tort-feasors. Those would have been interlocutory.

On the so-called collateral orders, whatever is a collateral order when you have succeeded in defining it, those orders are considered final.

MR. DODGE: Now, under the rule?

JUDGE CLARK: No, without respect to the rule, before

the rule.

CHAIRMAN MITCHELL: Now we want to destroy their finality by saying this judge can put a clause in his order in effect reserving jurisdiction to tamper with the decision. They want us to restrict that right.

MR. DODGE: They would have been final judgments and appealable under the old law.

JUDGE CLARK: That is right.

CHAIRMAN MITCHELL: He wants to destroy that.

MR. DODGE: You would give the district judge the right to change the situation and make them interlocutory.

DEAN MORGAN: To hold them in abeyance.

MR. LEMANN: Moore, in his last text on 54(b), says:

"Amended Rule 54(b), like its predecessor, deals only with finality when orders entered in an action involving multiple claims are final. Both the Advisory Committee and the court were attempting to devise a workable formula as to finality where multiple claims were involved for purposes of statutes that require final judgment as a prerequisite to an appeal.

"The history of Rule 54(b) and a fair construction of the language in both the original and amended rule clearly shows the committee and the court did not intend to change the statutory bases of appellate jurisdiction. Hence, any statutory right to appeal from an interlocutory order remains unaffected."

Then he goes on to say that:

"To take away a statutory right of appeal by rule of court would be without precedent in federal practice and the rule would probably be invalid."

That is what I had in mind.

CHAIRMAN MITCHELL: He says that by making it interlocutory by reserving jurisdiction where the statute says the order is appealable is valid. That is his theory, isn't it?

JUDGE CLARK: Not in the multiple claims case.

MR. LEMANN: He says in multiple claims, if you sue A and B, he thinks it is O.K. As we thought, if you let A out, that is final. But he says that wouldn't permit you to make final what ordinarily would be considered interlocutory, to make it final by fiat of the district judge.

JUDGE CLARK: What we did was to suggest that the question of the multiple parties thing be covered by a note. You obviously don't want to do anything on the collateral orders, so we will let it go or let it stand at that.

MR. PRYOR: If it is within our power to do it, I would be in favor of giving the district judge the "yes" or "no" on the proposition of appeal in those cases.

JUDGE CLARK: Of course, that is what I wanted to do. But I didn't think I would get much support for it.

CHAIRMAN MITCHELL: These circuit judges are all in disagreement about this thing. Don't you think we would be

sticking our nose in unnecessarily if we took one point of view and tried to revise the rule, when they are all het up over what the law should be on the subject, especially where we are restricting the right of appeal?

JUDGE DRIVER: It seems to me the matter ofinterlocutory appeals is a matter for legislation rather than rule-making, and our appeal obviously can be limited under this rule, as I see it, to multiple claims.

Since there is a commiteee considering the whole problem, I think we should leave it to them until they reach some determination or quit, one or the other.

JUDGE CLARK: I will admit, and I have tried to do it right along, that I think we should direct our attention only to multiple claims. I think the collateral order case can come under multiple claims. If you disagree with me on that -- I mean if you are sound in your disagreement, too -- I would freely admit I think our function is in the multiple claims situation. I wouldn't urge you to go beyond it. I don't see why that other isn't well encompassed within that idea.

CHAIRMAN MITCHELL: This rule was put up to the court originally on the theory that there was uncertainty whether certain orders were appealable or not. The courts of appeal were troubled about it. This device was suggested to us, which embodied the multiple claims, not because they thought the district judges ought to do it or the circuit judges ought to

do it, but to remove the uncertainty at the time an order got up there as to whether it was final or whether it wasn't.

We weren't taking any stand on who should settle it. We weren't getting into that field. We thought we were just removing an uncertainty that confronted the court of appeals when an order went up there. Is it final; is the lower court through with it, or isn't it?

We thought we made it clear whether he was or wasn't, and that would remove the doubt. Now we are asked to get into this controversy over who ought to settle the right, and that makes me feel that it would be better to let it rest at present and let the rule stand as it is.

MR. DODGE: The Reporter says the rule seems to be a boon to the profession, and in his judgment is one of the most practically successful of all our 1948 improvements.

JUDGE CLARK: I say that, and I believe it is.

MR. DODGE: I move that it stand as it is.

JUDGE DOBIE: I second that.

DEAN MORGAN: You are going to have the amendment that we suggested before?

JUDGE CLARK: It was suggested that I write a note on the multiple party situation. That was to be covered by a note.

MR. LEMANN: You could throw collateral claims in that note, too, couldn't you?

DEAN MORGAN: Yes, I should think so.

JUDGE CLARK: I will throw it in if I get a chance to throw it in, yes.

CHAIRMAN MITCHELL: What is your next one?

JUDGE CLARK: Rule 56 is the Summary Judgment rule. I have two suggestions on that which are not quite the same.

In Rule 56(c), I suggest now, in effect, that the court considering summary judgment should be entitled to give judgment either way without separate motions. That is, when a party moves for summary judgment, it should bring up the issue before the judge, and if the judge then is convinced that a summary judgment should go against the movant, he should have the power to grant it.

That is the rule in various places, of which New York is perhaps the chief example. In New York, a motion for summary judgment brings the matter on. Under our Federal Rules, I think there have been several decisions on that; I think more decisions that held that that power exists than have held to the contrary, but there are decisions against it, so it is a disputed matter.

It seems to me it is desirable to have it. I suggest on page 9 of my suggestions, one to put it in by a sentence at the end. Professor Wright has given me a suggestion which is somewhat shorter, to put it in the third sentence. The third sentence reads:

"The judgment sought shall be rendered forthwith," and so on. Change that to read this way:

"The judgment shall be rendered forthwith if the pleadings, depositions," and so on, "together with the affidavits, if any, show there is no genuine issue as to any material fact, and that either party is entitled to a judgment as a matter of law."

I put both of these before you. First, the idea, if you think the idea sound, according to my recommendation, that bringing on a motion for judgment presents the whole issue to the court. If you think that sound, then which of these would you prefer?

My suggestion was to spell it out in a separate sentence at the end by saying:

"When a motion is made by any party, the court may render a summary judgment, when appropriate under this rule, for or against any other party in addition to the moving party."

JUDGE DOBIE: I think that is clearer. The other is a little shorter, but in this way you call attention to it. In other words, the defendant moves for summary judgment in his favor. The court would have power, under the new rule, to say, "No, I won't give it in your favor. I will give it in favor of the plaintiff." Isn't that right?

CHAIRMAN MITCHELL: That is the idea.

MR. PRYOR: I would be in favor of that proposition, but I just wonder about those words "any other party."

DEAN MORGAN: " * * * for or against any party to the action."

MR. PRYOR: There might be another party against whom the summary judgment isn't directed at all.

JUDGE CLARK: I say "when appropriate under this rule," which I intended to cover that. By the rule itself you must have a finding that there is no genuine issue of material fact, and so on.

MR. PRYOR: That takes care of it.

JUDGE CLARK: That is why I wanted to make the emphasis that you must be entitled to the judgment.

DEAN MORGAN: I don't like the "in addition to the moving party." "The moving party or any other party."

MR. PRYOR: I think it is all right to have the judgment against the moving party or against his opponent, but as against any other party, I don't know.

JUDGE CLARK: It may be a fault of undue specification there. Of course, I didn't want to say the judgment could be entered for or against any other party, because of course, you ought to be able to enter it for the moving party at least.

DEAN MORGAN: Why not just say "for or against any party to the action."

MR. PRYOR: There may be parties to the action not

affected by that particular motion for summary judgment.

JUDGE DOBIE: Would it be better if you said "not only for the moving party, but for or against any other party."

JUDGE CLARK: That is it.

JUDGE DOBIE: I think that is better.

CHAIRMAN MITCHELL: What is your pleasure with that?

JUDGE DOBIE: I move its adoption.

DEAN MORGAN: I second.

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

JUDGE CLARK: I have suggested the addition of (h), Summary Judgment As Discovery, a new section (h). I think this brings up the same sort of question that Judge Hall and his associates were trying to bring up. It is whether you can not legitimately help out in some decision action where there is not much involved. I think this is in line with what the authorities are now doing, although there is some doubt about it.

Particularly in the Third Circuit, they have ruled that where the pleadings make an issue of fact, that ends it. So I suggest this:

"(h) Summary Judgment As Discovery. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon merely formal denials set forth in a pleading, but must answer in detail as specific as that of the moving papers, setting forth the material facts

as he believes and intends to prove them to be. If he does not so answer under oath, summary judgment shall be entered against him."

PROFESSOR SUNDERLAND: What would the "formal denials" be? You mean denials in general, don't you?

JUDGE CLARK: Yes.

CHAIRMAN MITCHELL: Of course, the pleading doesn't have to be verified. Put it in an answer and deny that a certain fact is so. This provides that that won't do; that you have to answer under oath as to whether or not it is in fact so.

JUDGE CLARK: I didn't mean that. Maybe I should strike out the word "formal." Is "formal" the same as "general"? "Upon merely denials set forth in a pleading."

I think that is right. I think probably we should strike out "formal" as setting up other sorts that we don't want. So I will take out "formal."

JUDGE DOBIE: I think it is all right when you have a thing like a formal party. It has a crisp, clean-cut meaning.

MR. PRYOR: Make it "mere denials" instead of "merely."

CHAIRMAN MITCHELL: Leave "merely" in and strike out "formal."

JUDGE DRIVER: Make it an adjective instead of an adverb.

JUDGE DOBIE: An adverg is all right qualifying "formal," but not qualifying "denials."

MR. PRYOR: I was wondering about the caption of that, Judge. "Summary Judgment As Discovery." This is just a suggestion. I am wondering if "Requirements of Resistance to Motion," since we are dealing with a motion for summary judgment, might not be better than "Summary Judgment As Discovery."

JUDGE CLARK: I think that is all right.

MR. PRYOR: You are out of the field of discovery here.

JUDGE CLARK: The reason I put that in is that some of the cases talk about summary judgment as corollary to discovery, and so on.

MR. PRYOR: I appreciate that, but it just seems to me that you are dealing with the requirements of the resistance that is to be made to the motion, are you not?

JUDGE CLARK: I think the general idea you have in mind is a good one. I wonder if "resistance" is the best word.

MR. PRYOR: You wouldn't say "answer."

JUDGE DOBIE: "Opposition"?

CHAIRMAN MITCHELL: "Contesting motions for summary judgment"?

MR. DODGE: You have a section (e) already in there, subdivision (e), on the form of affidavits. Wouldn't this naturally come in there?

MR. PRYOR: Why not add that to subdivision (e)?

JUDGE CLARK: I think that is a good idea. It doesn't need any title.

Yes, I think that is probably a good idea.

CHAIRMAN MITCHELL: All right. That is agreed to.

JUDGE CLARK: This provision, therefore, is added at the end of section (3) of Rule 56.

JUDGE DOBIE: All the others have titles, Charley. Don't you think you ought to have some kind of title there to call attention to it? I will be glad to leave that to the Reporter.

JUDGE CLARK: You mean you should add something to the title at the top?

JUDGE DOBIE: You see, (a), (b), (c), (d), (e), (f), and (g) have capitalized titles.

JUDGE CLARK: I can add something.

JUDGE DOBIE: We will leave that to the Reporter.

JUDGE CLARK: I will add something to the title to cover this. "Further Testimony; Resistance To."

JUDGE DOBIE: You have them on all the others. We will leave that to you.

JUDGE CLARK: The next that I have to suggest -- I don't think there is anything until we get to 60(b). I don't think there is anything by way of suggestions on my part. I think there is some interesting material which I hope you

will all read. I don't make that suggestion to Professor Morgan, because he has read them.

At any rate, we will turn to 60(b). Question has come up as to this matter of time. I think it is a little misleading. We have put in a time limitation, and actually, when you read the rule, I don't think there is any time limitation. Actually, I don't believe in the law there is any.

I started out looking at this thing with the idea that you could pretty much state conditions upon which a judgment would be final. You may remember that Professor Moore wrote a long article in which he pretty well showed that the courts are going to relieve against judgment in a considerable variety of cases.

So when we drew the rule we put in what might be termed a catch-all at the end, "any other reason justifying relief from the operation of the judgment."

We then tried to make it appear formidable by putting in a time limit as to provisions (1), (2), and (3). Then we have this catch-all where there is no time limit.

I should think it would be more straightforward, as well as more accurate, to make the change that I have suggested here on page 9. Substitute for the second sentence the following -- that is this about the time, the simple statement:

"The motion shall be made within a reasonable time, and without undue delay as soon as the grounds therefor are

known to the moving party."

The main thing that does is to take out the presupposed limitation of one year in cases (1), (2), and (3).

PROFESSOR SUNDERLAND: Shouldn't "as soon as" be "after" -- "after the grounds therefor are known," instead of "as soon as"?

JUDGE CLARK: I guess probably it should be.

JUDGE DOBIE: There might be cases very well, particularly under inadvertence, and so on, newly discovered evidence, and certainly as to fraud, where the one-year rule might work a hardship, don't you think so, Charley?

JUDGE CLARK: Yes.

CHAIRMAN MITCHELL: I always thought that that rule was badly framed, because it is susceptible of the interpretation that we are trying to specify the substantive grounds on which judgment may be vacated, when all we have power to do is to regulate the procedure. It ought to be framed in such a way that in case an application is made on such-and-such ground, it shall be made by motion within such-and-such length of time, and all that.

I don't think we need to reconstruct it now.

JUDGE DOBIE: I don't think so.

CHAIRMAN MITCHELL: As you read this rule, it looks as if we were fixing the substantive law as to the grounds on which judgments may be vacated. We say they may be vacated for

this, that, and the other reason. What we are really doing is to specify the practice if and when this or that ground is asserted.

JUDGE DOBIE: I move the adoption of the rule with "after" instead of "as soon as."

JUDGE CLARK: This suggestion makes the rule more in line with your idea, which I think is correct.

CHAIRMAN MITCHELL: How would you change it? I want to be sure we have that straight.

JUDGE CLARK: "The motion shall be made within a reasonable time, and without undue delay after the grounds therefor are known to the moving party."

CHAIRMAN MITCHELL: I am wondering about that. He has an independent right of action, and this is merely specification that the procedure may be by motion in the court in which the judgment was rendered. We are dealing with a question of finality of judgments, too; how long the thing is open.

MR. DODGE: Don't you have to have an ultimate limit? You are striking out that ultimate limit of one year.

JUDGE CLARK: Yes.

CHAIRMAN MITCHELL: It knocks out the finality of federal judgments, because there is no finality to those types until after it is known he is aware of his grounds or his rights. You see, we have knocked out the rule that the end of the term affects the finality, and we had to substitute

something else for it. When we adopted this rule we had a lot of notes and stuff, showing that as long as the end of the term didn't have any effect on the finality of the judgment any more, we had to have another system. We adopted a definite limit of finality as far as motion is concerned. That let the party bring an independent suit, subject to the statute of limitations and whatever other restrictions there are by law on suits.

I am wondering whether you are not getting into a dangerous field here.

JUDGE DOBIE: It means leaving the judgment open forever, practically.

CHAIRMAN MITCHELL: Yes. There is no finality in time. The rule says you can do it by motion any time the facts come to your attention. It makes a definite limitation on motion practice.

JUDGE CLARK: I suggested it in part because I don't think the limitation is real now. I don't think that limitation means anything, really.

CHAIRMAN MITCHELL: It certainly is a limitation on the power to make an attack by motion.

JUDGE CLARK: Conceivably.

CHAIRMAN MITCHELL: This is establishing the practice for attacking judgments on certain grounds by motion.

MR. PRYOR: In the same action.

CHAIRMAN MITCHELL: In the same action under (1),

(2), and (3) -- (1) mistake, inadvertence, surprise; (2) newly discovered evidence. You can attack a judgment by motion on newly discovered evidence discovered ten years after the judgment.

JUDGE DOBIE: Of course, it is conditioned first by "a reasonable time and without undue delay."

JUDGE CLARK: You see, you can move now under (4), (5), and (6). There is no limitation, and (4), (5), and (6) are pretty inclusive.

JUDGE DOBIE: Any other reason justifying relief.

CHAIRMAN MITCHELL: That is a case where the judgment has been satisfied or where the judgment is void.

MR. PRYOR: Any other reason justifying relief from the operation of the judgment.

CHAIRMAN MITCHELL: Maybe it isn't tight enough as it is. I am trembling in my shoes about what you are doing to the finality of judgment when you can get into court by motion.

MR. LEMANN: In this proposal for Rule 60(b), what do the words "without undue delay" add to the words "within a reasonable time"?

JUDGE CLARK: They add very little, possibly nothing, but there being a feeling that we ought to push or prod these people, I am just giving another admonition.

MR. PRYOR: I think they mean two different things.

"Within a reasonable time" might mean within a reasonable time after the entry of judgment. You say "without undue delay after the grounds have become known" to them. You may not have known of the grounds for a long time after the judgment.

JUDGE DOBIE: But it might come within six months.

MR. PRYOR: But it might not be for six years.

JUDGE DOBIE: I think they mean different things. Reasonable time on the whole facts in the case. I think in connection with that, you might consider possibly intervening rights and things of that kind.

CHAIRMAN MITCHELL: There are a good many statutes where you provide for attacking a judgment on motion in the court in which it was rendered, and almost all of them have specific time limits.

MR. PRYOR: Two years in Iowa.

JUDGE DOBIE: After two years you can't attack it on any ground?

MR. PRYOR: In the same action, by bringing a motion in the same action. You are limited to two years.

JUDGE DOBIE: But you can bring an independent action?

MR. PRYOR: Oh, yes.

CHAIRMAN MITCHELL: That depends on the ordinary statute of limitations.

MR. PRYOR: Laches, and things of that kind.

DEAN PIRSIG: As I understood it, Mr. Chairman, the

difficulty was essentially with subdivision (6), which deals with "for any other reason" than those specified. Would it serve the purpose if language were added to (6) so as to read:

"The motion shall be made under subdivision (6) within a reasonable time and without undue delay after the grounds therefor are known to the moving party, and for other reasons," and so on.

CHAIRMAN MITCHELL: Would you strike out the limitation as to (1), (2), and (3)?

DEAN PIRSIG: I would leave that in.

CHAIRMAN MITCHELL: You didn't read that, did you?

MR. PRYOR: You would make the language suggested here applicable only to (6)?

DEAN PIRSIG: That would meet the point you are making.

CHAIRMAN MITCHELL: Would you please tell me again, Dean, I don't have that clearly in mind.

DEAN PIRSIG: I would suggest the second sentence read as follows:

"The motion shall be made under (6) within a reasonable time and without undue delay after the grounds therefor are known to the moving party, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken."

JUDGE CLARK: My objection to this is that I think

that the rule as now written, and with the change perhaps a little more so, would state what will not be held to be the law. I agree that this is a procedural rule, and it is partly because I think it is a procedural rule that I feel we ought not to state things which the court is not going to follow.

In Klapprott v. U. S., 335 U.S. 601, an opinion by Justice Black, it is said:

"Furthermore, 60(b) strongly indicates on its face that courts no longer are to be hemmed in by the uncertain boundaries of these and other common law remedial tools. In simple English, the language of the 'other reason' clause, for all reasons except the five particular paragraphs specified, vests power in the courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice."

As I look at it, the court is disposed to do just that whenever it thinks it will accomplish justice. If you state seeming limitations on that power, you are trying to state substantive limitations that the court is not going to follow.

All the statutes, state and federal, that I know anything about, authorizing motions to set aside judgments in the court in which they were rendered, have time limits on them.

MR. LEMANN: In the criminal rules there is a two-

year limitation.

MR. TOLMAN: This is the criminal new trial rule: "The court may --"

JUDGE DOBIE: On coram nobis there is no time limit.

MR. TOLMAN: There is no time limit on coram nobis. But motions based on the ground of newly discovered evidence may be made only within two years after final judgment. If an appeal is pending the court may grant the motion only on remand of the case. That is the criminal rule on new trial motion.

CHAIRMAN MITCHELL: The coram nobis and all that are set aside, but substituted for them is an independent action, and we prescribe no limits on an independent action. Our theory was that that would be governed by the applicable statute of limitations.

I am not at all reconciled to the idea that we should have these practice rule motions without limit as to time. We certainly have power to say if you are going to do it by motion, you should do it just the way we have it a hundred other places. As long as we leave the cause of action or the right to be asserted by independent action, this rule simply means if you are going to attack the judgment on this ground in the court in which it is rendered, by motion, you have to do it within such-and-such length of time. If you don't do that, then your only remedy is an independent suit.

I remember we said this section construction of 60(b) reduced the finality of a federal judgment which it otherwise would have. As long as we were operating under the old rule that all proceedings expire with the term of court, we didn't need it; but when we wiped that rule out there was no time limit for an attack on a judgment in the court in which it was rendered. I don't know what our note was on that. I don't have our report with the amendment of December 27, 1946, and of 1948. Those are the ones I think we had notes on, establishing the finality of federal judgments.

JUDGE CLARK: Here is a resume of it.

CHAIRMAN MITCHELL: Did we adopt your suggestion?

JUDGE CLARK: No. No action has been taken.

Did you dictate a proposal, Mr. Pryor?

MR. PRYOR: No. I was just talking.

CHAIRMAN MITCHELL: Will you dictate the form of change to Rule 60(b)?

DEAN PIRSIG: I merely suggest that the substance of this apply only to (6), and that the existing rule remain as it is as to the other categories. I am not too strong in my view about it, though.

CHAIRMAN MITCHELL: I think the reporter has your proposal recorded.

All those in favor say "aye." That seems to be agreed to.

Charley, we are through with 60(b).

JUDGE CLARK: Rule 62(a). With reference to that, the suggestion has been made that there ought not to be an automatic stay in certain classes of cases. The suggestion was made that our word "order" was too broad. The suggestion was made by a lawyer that we ought to restrict the meaning of "order."

I don't think that is desirable. I think the use of the word "order" as meaning judgment, and so on, is a very useful thing.

I do think that there are cases where a judgment should take effect immediately. The example given was an order for contempt of court in the presence of the court. I should think there ought to be a broader power than stated here, and therefore I suggest at the end of 62(a) the addition of this sentence:

"The court, for cause shown, may order that a judgment shall not be stayed after its entry or that an existing stay shall terminate."

MR. PRYOR: A self-executing judgment.

JUDGE DOBIE: You mean it ties his hands. He couldn't stay it afterwards.

JUDGE CLARK: Of course, as we all know, a judge wouldn't feel stayed in a contempt case, but I would feel the wording of this would do it.

MR. LEMANN: Why do we have to change this rule, just

because Mr. Cleveland made a suggestion for it?

JUDGE DOBIE: The judge has that power anyhow.

MR. LEMANN: I don't think we should change rules just to polish them up. If we are going to make polishing changes, I think there could be no limit to the number we would make, Charley. Every time a guy writes a Law Review article, he could make a helpful suggestion.

JUDGE CLARK: I should think the conception of a continuing rules committee was to exercise some supervision, and that a part of it was to correct holes in the rules. If we are convinced there is a hole, we should do it.

In each case it would be a question of judgment whether there is a hole, whether it is important, and so forth.

I simply suggest here that you have a suggestion where, in form, a court can not order a judgment in contempt at once.

CHAIRMAN MITCHELL: What does it mean when you say, "The court, for cause shown, may order that a judgment shall not be stayed after its entry"? How can he stay it unless he orders it, anyway?

JUDGE CLARK: It is stayed in this rule automatically. Note what it says at the beginning:

"Except as stated herein, no execution shall issue upon a judgment nor shall proceedings be taken for its enforcement until the expiration of 10 days after its entry."

The heading, the title: "Automatic Stay."

CHAIRMAN MITCHELL: I see. What is wrong with that?

JUDGE DOBIE: This gives him the power to do it without ten days.

JUDGE CLARK: That is it.

JUDGE DOBIE: In other words, he can say it shall not be stayed, and that sets aside sentence 1.

You think without this he hasn't got that power; that it is automatically stayed in all events for ten days, is that right, Charley?

JUDGE CLARK: That is right.

MR. LEMANN: I thought that first sentence was to let you take an appeal supersedeas for ten days, and that the execution is delayed.

Suppose the judge says don't stay it. That cuts you out of your ten days. If you want to stay it, you have to take an appeal in five minutes or one hour? Is that desirable? It seems to me that would be the result of putting this in. The plaintiff gets a judgment and he says, "Judge, I don't want a stay on this judgment. I want to go out and seize the defendant's property immediately. I am afraid he will get away with or secrete the property."

The judge says, "I think you are correct, and there will be no stay in this case."

Then what becomes of your statutory provision that

you can take an appeal within ten days? It doesn't do you any good.

If you wait ten days, the plaintiff has taken your property and maybe he has absconded. I thought the purpose of this first sentence in Rule 62(a) was to preserve your right of appeal in supersedeas for ten days. If you adopt this amendment, what happens to that?

CHAIRMAN MITCHELL: It gives you ten days to hustle up a surety bond.

MR. LEMANN: Yes. I thought so. But what happens under this amendment?

JUDGE CLARK: I think there is no doubt that what Monte says is correct. This is the idea that a man should have ten days to trot around after judgment. That is true. But is he entitled to do that in every case?

MR. LEMANN: In my practice and in every practice that I know anything about, you give the defendant a little chance to get out and get his appeal bond and to take his appeal. You don't say that the court can take it away from him. That is what this would propose.

JUDGE CLARK: I have the feeling that a court wouldn't consider itself bound by this in a case where it thought it shouldn't be bound, and the suggestion was made here that in a contempt case, for example, if a court wanted to act immediately, it would. I shouldn't think it could under this

present provision.

CHAIRMAN MITCHELL: The first sentence of this rule states the last sentence of U.S.C. Title 28, Section 874, Supersedeas. That is taken from a federal statute which allows an automatic stay of ten days.

JUDGE DOBIE: Is that applicable to a contempt case?

JUDGE CLARK: I think so, yes.

CHAIRMAN MITCHELL: As long as this is a mere recitation of a federal statute giving a temporary stay --

MR. LEMANN: The present rule.

CHAIRMAN MITCHELL: -- the rule is a reenactment of a federal statute.

MR. LEMANN: But not this change. This change would take it away.

CHAIRMAN MITCHELL: Yes. I don't see any reason why we should take away the temporary right which the statute gives.

MR. TOLMAN: Mr. Fiddler is an admiralty lawyer. Is the practice different in admiralty because of the seizure of ships, or something of that sort?

JUDGE CLARK: All right, let's go on. Time flies.

Rule 63 --

MR. LEMANN: What did we do about 60(b)? Did we adopt Dean Pirsig's suggestion or the Reporter's suggestion?

CHAIRMAN MITCHELL: We adopted Dean Pirsig's

suggestion.

JUDGE DOBIE: Limiting it to (6).

CHAIRMAN MITCHELL: Now we are down to Rule 63.

JUDGE CLARK: Rule 63, Disability of a Judge.

The suggestion was made here that it ought to be provided that the judge taking over after disability of a judge "may receive in evidence a transcript of evidence theretofore taken in the case and may accept the testimony therein transcribed except so far as he shall find it necessary to hear witnesses whose credibility must be determined as a step in the adjudication."

Mr. Pryor, before he left, suggested that he thought this could be covered more narrowly and more handily by merely adding at the end of the present section, which says "he may in his discretion grant a new trial," the words "as to all matters or as to only one or more issues involved."

The lawyer who wrote in urging that this be done might not think that was sufficient.

CHAIRMAN MITCHELL: I remember some two or three years ago a patent lawyer came to me and said, "We have just got through trying a long patent case, and now the judge who heard it has died, and he hasn't made any decision."

There seems to be no statute or rule under which any other judge can take over on the typewritten record and decide the case. We came to the conclusion that under the existing

rule, the only way a judge could take up a case which has been tried by another judge but he hasn't decided it, is by stipulation. I mean on the old record.

They did succeed in getting a stipulation from their adversaries that another judge could hear it on the transcript. It was thrown out under this rule because there was nothing said about it.

JUDGE CLARK: That was Mr. Oscar W. Jeffery, in a letter to you.

CHAIRMAN MITCHELL: Right. This only relates to cases where the judge who tried it has died after making findings of fact and conclusions of law. It gives another judge power to hear motions for a new trial and things of that kind.

Here is a case where the trial judge died and you have had a long transcript of testimony taken. He is dead, and there is no law or rule that allows another judge to take over the case on a transcript made by the preceding judge who is now dead. The only way it can be done now is by stipulation. If your adversary won't consent to that, you have to start your case all over again before another judge.

You have made no suggestion about that.

JUDGE CLARK: Yes, I have made a suggestion.

JUDGE DOBIE: I think it is a good rule.

JUDGE CLARK: It is a good suggestion. It appears at the foot of page 9.

CHAIRMAN MITCHELL: It says:

"A judge so acting may receive in evidence a transcript of evidence theretofore taken in the case and may accept the testimony therein transcribed except so far as he shall find it necessary to hear witnesses whose credibility must be determined as a step in the adjudication."

JUDGE DOBIE: It merely gives him discretion, doesn't it, Charley?

JUDGE CLARK: Yes.

JUDGE DOBIE: I move we adopt it.

CHAIRMAN MITCHELL: But it doesn't cover the point that I had, because this rule in the first clause only relates to cases where there has been a verdict or findings of fact and conclusions of law have been filed. Then any other judge regularly sitting may perform the duties.

JUDGE CLARK: Then it would be necessary to repeat that. Maybe that would be wiser.

"A judge acting by reason of the death, sickness or other disability of another judge, may receive in evidence * * *"

CHAIRMAN MITCHELL: No. The whole rule is limited in its application to cases where there is a verdict or findings of fact and conclusions of law. So your addition doesn't cover my point, that the judge hasn't made any findings.

MR. LEMANN: Apparently it never occurred to us that we ought to permit another judge to come in and act at all if

the case had not reached the point of decision by the first judge.

CHAIRMAN MITCHELL: That is it.

JUDGE CLARK: I am contemplating that this new sentence would carry new powers.

CHAIRMAN MITCHELL: It says "A judge so acting." That is a judge acting in a case where the dead judge had made findings and conclusions.

MR. LEMANN: The notes show that we adopted the statute, and that is the only reason we put it in, that there was a statute. We copied the statute. It didn't occur to anybody, and hadn't for fifteen years except the one guy, that it isn't enough.

I wouldn't change the rule just because one guy writes a letter in and says this might happen and counsel might not stipulate. You can make a hundred changes if you want to do that. I am sure I could write a hundred changes to these rules, Mr. Mitchell, that I would consider an improvement in the language.

JUDGE CLARK: I guess there is only one federal judge who has died.

MR. TOLMAN: We have talked about this in the Judicial Conference several times. This problem has come up. A judge has died, with several cases pending. It does create a problem in a busy court, trying to find someone to take the case and

retry it all over again. It causes a lot of delay.

CHAIRMAN MITCHELL: Think of what it does to the litigants.

MR. TOLMAN: Yes. It is a problem, and I know that the Judicial Conference has discussed this rule several times.

MR. LEMANN: They never have recommended a change, though.

MR. TOLMAN: That is quite true.

CHAIRMAN MITCHELL: Your point, Monte, is that we ought not to enlarge the authority of the judge?

MR. LEMANN: If you are going to do anything, I think, as you pointed out, we have to go considerably beyond the suggestion proposed. If we were going to do anything to this rule, we would change it materially, I would say.

I simply revert to my general proposition that we have had no request from the Conference of Senior Circuit Judges to change it, and so far as we know we have not a single instance of hardship. All we can say to the profession when we send out this change, another change departing from our model which we have set up for the states, is that this looks like a good change and we think it will improve it.

If we are going to take that point of view, Mr. Chairman, we can make a great many changes.

CHAIRMAN MITCHELL: As I say, I have had a concrete case where the lawyers were very much distressed. They had

gone through a long trial and a long record. The judge had died, and there was no relief under the statutes or rules which enabled a new judge to decide the case on the basis of the testimony taken by the dead judge.

I suggested they had better try getting a stipulation, and they succeeded in it.

MR. LEMANN: That covers it. Let me ask you --

CHAIRMAN MITCHELL: But what happens when the plaintiff has made out a case and has gone through a long trial and then the judge dies, and he asks the defendant to consent to have another judge decide it on the basis of the old record, and the other side says no?

MR. LEMANN: It wouldn't break my heart. I can think of other things that would break my heart sooner than that.

Besides, suppose the other fellow says, "I want the judge to hear the witnesses, and that is why I won't stipulate it. I am not willing to have the new man just read the transcript."

JUDGE DOBIE: Yes, but give the judge discretion.

MR. LEMANN: That is true, but if you had that kind of case, he probably wouldn't exercise discretion against the objecting party. If there wasn't any substantial ground for the objection, the objection wouldn't be made.

It comes back, really, to a question of how important it is.

JUDGE DOBIE: In a complicated patent case where you have a lot of experts and you have the qualifications in the evidence, it would cost a great deal of money to try it again.

MR. LEMANN: It breaks my heart by imagining a sufficiently hard case, but I don't think it is likely to happen. If I had one case in 15 or 20 years, it would have to be very hard to make me change the rule, I think.

JUDGE DRIVER: It seems to me we almost have to limit it to cases in which all or substantially all the testimony had been received. Otherwise, we would be compelling the plaintiff to go on the record of witnesses, and the defendant would have flesh-and-blood witnesses in the court ready to testify. If I were the defendant, I wouldn't consent to that arrangement unless I had to.

JUDGE DOBIE: The judge there would know. If the defendant wants to put his witnesses on and the court is going to hear them, I think he ought to give the defendant the same chance. It seems to me it is a good rule, because there will be some case that hasn't gotten a verdict in which the judge ought to have the power to say, "I think there is no substantial right of the parties damaged by taking this transcript as far as it goes."

MR. LEMANN: Then we would have to rewrite Rule 63, because if you leave it as it is, as Mr. Mitchell pointed out, it restricts it to cases where a verdict has been returned

or findings of fact and conclusions of law have been filed by the judge who had died. That is the way it reads now, and that is the way the statute from which it was copied read.

CHAIRMAN MITCHELL: That is right.

MR. LEMANN: So if you want to cover these terrible cases, you are talking about where the judge dies before he has decided the case -- I just had a case decided by a judge who had it for two years and hadn't decided it. Suppose he died a week before he finally decided it. Suppose he had died a week before he had handed down his opinion. This rule would not have applied, and this rule would not have applied with the amendment that is proposed.

CHAIRMAN MITCHELL: I think the amendment proposed is inadequate because it leaves in the provision that the rules don't apply at all unless the judge has made findings. That is aside from the mark. I have the feeling that maybe we had better leave it alone.

JUDGE DOBIE: I don't think it is vital. Let's pass it.

JUDGE CLARK: All right.

I have only one more suggestion. This comes from the admiralty people. They suggest in Rule 81(a), a substitute for the first sentence, which says it does not apply to procedures in admiralty:

"These rules do not apply to proceedings in admiralty

except insofar as they may be made applicable thereto by rules promulgated by the Supreme Court of the United States, pursuant to Title 28 U.S.C., Section 2073."

JUDGE DOBIE: And if they had any rules, they would prescribe the applicability. Don't you think that follows as a matter absolute? At this time the Supreme Court hasn't made any rule making these applicable. When it does later, of course, that rule will be in the later rules which supersede this.

CHAIRMAN MITCHELL: We don't need to fool with that.

JUDGE DOBIE: I don't think so.

JUDGE CLARK: All right.

I have suggested that forms of judgment might be inserted in the appendix. Do you have some of them, Leland?

MR. TOLMAN: I don't have them here. I couldn't get them.

CHAIRMAN MITCHELL: I have a pencil note here, Charley. I am not sure that I know just what it means. It relates to the dismissal under Rule 41(a)(1), and the case is Harvey Aluminum Company.

Tell me what it is. All I have is a note that I can't read.

JUDGE CLARK: We discussed it, you remember, in connection with Rule 41(a). The question was whether you add to the restriction on voluntary dismissal, private parties who

come in and oppose.

The Harvey Aluminum case was a case of a preliminary injunction that they fought out pretty thoroughly, and after the court decided for the defendant, the plaintiff up and withdrew.

The Second Circuit held that he could not withdraw, because the spirit of our rule was that when controversial proceedings had been had, you couldn't withdraw.

CHAIRMAN MITCHELL: What did the Supreme Court rule?

JUDGE CLARK: It hasn't considered it.

CHAIRMAN MITCHELL: It is before the court on certiorari now?

JUDGE CLARK: Yes.

CHAIRMAN MITCHELL: On petition for certiorari?

JUDGE CLARK: Was that denied or granted?

CHAIRMAN MITCHELL: I don't know. I think I found merely a reference to it in the Law Digest.

JUDGE CLARK: I will look that up.

CHAIRMAN MITCHELL: Look it up.

JUDGE CLARK: It has not been acted on. This is Justice Reed's law clerk, my former law clerk, Mr. Rogers. Petition was filed but not granted.

CHAIRMAN MITCHELL: Is that the way it stands?

JUDGE CLARK: Yes. We discussed the case in our court.

CHAIRMAN MITCHELL: We certainly want to wait until the Supreme Court has disposed of it before we do anything, anyway.

JUDGE DOBIE: I think so.

JUDGE CLARK: On this last point, the administrative office has some simple forms of judgment, and don't you think it would be desirable to put one or two of the simplest in the appendix of forms? That is one thing I think the New York lawyers do dreadfully. They follow the state practice in the form of judgment. They usually do take the state forms.

Those have the recital "Upon the complaint and the affidavit of X, Y and Z, and upon the answer of X, Y, P, Q, and I," and I have seen those things go on for two or three pages.

The great difficulty, it seems to me, is what happens if they have misstated one of those, put in one that didn't happen or left out one that did.

It is our Rule 54(a), isn't it, that says that there shall be only a simple form of judgment.

The suggestion is that the administrative office, having a simple form of judgment, we put in a form.

CHAIRMAN MITCHELL: Stick them in, and we will look at them when we get the draft.

JUDGE DRIVER: I think it would be helpful, because the lawyers, as I have said, have more practice in the state

than they have in the federal court, and usually they submit a state form of judgment when they write one.

JUDGE CLARK: As I understand it, Mr. Wright and I will go ahead and get up a mimeographed draft as soon as we can, and then we will have that distributed.

JUDGE DOBIE: Everybody will write to you any suggestions they have, is that right?

JUDGE CLARK: Yes.

CHAIRMAN MITCHELL: We will write to you and see what happens, and then after we go through that process, I think we ought to have a draft printed to go to all the federal judges.

MR. LEMANN: Do you think it would add too much to the clerical labors and the labors of the committee if every member who had anything to suggest would send a copy of his letter to Judge Clark, the Reporter, and then the secretary would distribute all those, so I would have the benefit of Judge Dobie's comments, and so on?

CHAIRMAN MITCHELL: Leland will attend to that. If every member sends not only his criticism or suggestions to Judge Clark, but a copy of it to Leland Tolman, he will have it mimeographed and distributed to all the members. He will receive every suggestion that everyone makes.

Is that all right?

MR. TOLMAN: I will be glad to do that.

JUDGE CLARK: Wouldn't it be a good idea for our new secretary to put some sort of statement in the ABA Journal that the committee is considering amendments, and they will be shown to the bar, something of that general nature? Don't you think it would be a good idea to let it be known that the bar will have a shot at this?

CHAIRMAN MITCHELL: It won't do any harm. Of course they will get a shot at it.

JUDGE CLARK: All this talk of these Ninth Circuit people and others, that they didn't have a chance, I really think is quite upsetting, because I think everybody did have a chance at the condemnation rule.

JUDGE DOBIE: Of course they did.

JUDGE CLARK: Nevertheless, it is partly to make sure that we do our part in giving everybody a chance.

MR. TOLMAN: I can simply ask Mr. Gregory to put out a news item that the committee had met and was reconsidering and looking the rules over, something like that.

JUDGE DRIVER: I think what misled them in the Ninth Circuit was that so many things happened and so much time elapsed from the time we got our draft out in circulation until it was finally approved by the Supreme Court and sent to Congress. They reconsidered the tribunal feature. Quite a lot of time went on.

I think the judges overlooked the fact that they had

had copies at the proper time of the proposed draft.

MR. LEMANN: I suggest when Mr. Tolman arranges for this news article, he preface the statement by a note saying that we have always done it, that we distributed the original rules, that we distributed the amendments to the rules, that we distributed Rule 71A, and that we are going to do the same thing with any amendments that are now proposed. He can put that in as a matter of record.

JUDGE DRIVER: Judge Fee took me very severely to task in a conference, that I had been derelict in my duties, that I had been a party to slipping over the condemnation rule when their backs were turned.

It didn't bother me very much, but I think we should be careful to see that they get copies.

JUDGE DOBIE: If there is nothing further, Mr. Chairman, I move we adjourn.

JUDGE DRIVER: I second the motion.

CHAIRMAN MITCHELL: If there is no objection, we are adjourned, sine die.

JUDGE DOBIE: Subject to call by our great Chairman.

end aj ... The meeting was adjourned at 5:25 o'clock p.m. ...