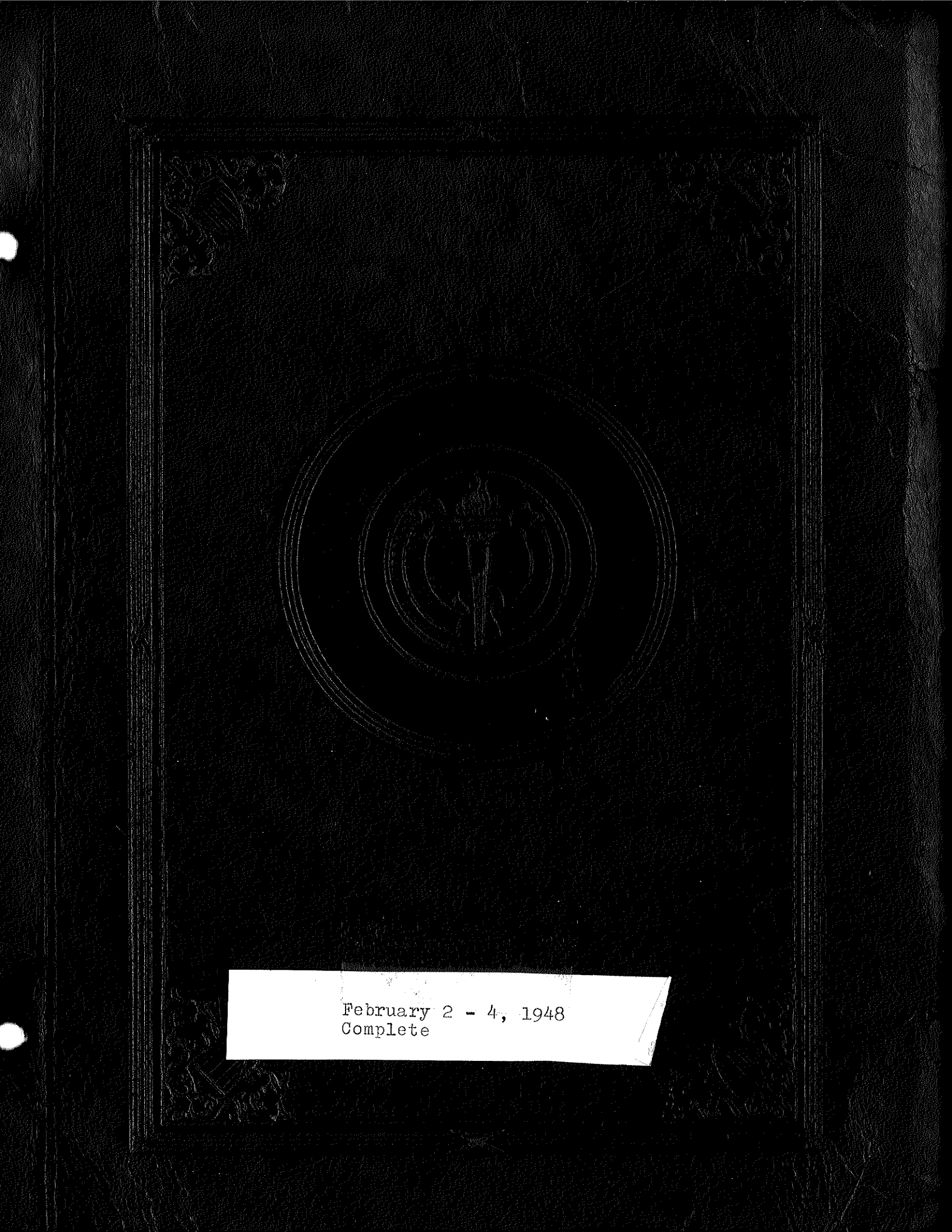

February 2 - 4, 1948
Complete

P R O C E E D I N G S

ADVISORY COMMITTEE ON RULES FOR CIVIL PROCEDURE

Proposed Rule To Govern Condemnation Cases in the District Courts of the United States

---

February 2-4, 1948
United States Supreme Court Building
Washington, D. C.

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

NEW YORK
51 MADISON AVENUE
LExington 2-5588

WASHINGTON
NATIONAL PRESS BUILDING
National 8558

CLEVELAND
STANDARD BUILDING
Main 0894

CHICAGO
105 WEST ADAMS STREET
Franklin 2055

TABLE OF CONTENTS

Page

Monday Morning Session
February 2, 1948

Consideration of Preliminary Draft of Rule 71A, Condemnation of Property for Public Use:

(h) Trial 2

Monday Afternoon Session
February 2, 1948

Consideration of Preliminary Draft of Rule 71A [Continued]:

Discussion with Representatives of Lands Division, Department of Justice, and TVA:

(h) Trial and (l) Condemnation Under a State's Power of Eminent Domain 60

(c) (2) Contents of Complaint 163

Tuesday Morning Session
February 3, 1948

Consideration of Preliminary Draft of Rule 71A [Continued]:

(h) Trial 174

(k) Deposit and Its Distribution 208

(m) Costs 209

Title 210

(a) Applicability of Other Rules, (b) Joinder of Properties, and (c) Complaint 210

TABLE OF CONTENTS

Page

Tuesday Afternoon Session
February 3, 1948

Consideration of Preliminary Draft of Rule 71A [Continued]:

(c) Complaint 279, 366

(d) Process 290

(e) Answer 317

(f) Amendment of Pleadings 322

(g) Substitution of Parties ... 323

Discussion with Representatives of Lands Division, Department of Justice:

(c) (2) Contents of Complaint 327, 343

Acquisition of Personal Property 338, 362

Wednesday Morning Session
February 4, 1948

Consideration of Preliminary Draft of Rule 71A [Continued]:

(g) Substitution of Parties ... 374

(i) Dismissal of Action 381

(j) Assessment for or Deduction of Benefits 403

(k) Deposit and Its Distribution 404

Effective Date 407

Distribution of New Draft of Rule 71A 410

Adjournment 421

MONDAY MORNING SESSION

February 2, 1948

The meeting of the Advisory Committee on Rules for Civil Procedure to consider the Proposed Rule to Govern Condemnation Cases in the District Courts of the United States convened in Room 147-B, Supreme Court of the United States Building, Washington, D. C., at ten-ten o'clock, Mr. William D. Mitchell, Chairman of the Committee, presiding.

The following members of the Committee were present:

William D. Mitchell, Chairman

Charles E. Clark
Armistead M. Dobie
Robert G. Dodge
Sam M. Driver
Monte M. Lemann
James W. Moore
Edmund M. Morgan
John Carlisle Pryor
Edson R. Sunderland

Also present:

Leland L. Tolman, Staff

CHAIRMAN MITCHELL: The meeting will come to order.

My thought is that the real point about this thing is having the question of the tribunal for the award of compensation and the question of what happens in cases of condemnation under a state statute settled first. If we can settle those questions, the rest of it is just a matter of detail, and it will all fit in together.

I asked the TVA and the Department of Justice people

to be here at two o'clock. I thought we would like to discuss this thing ourselves this morning and, if the Committee hasn't any objections, suppose we tackle this question of tribunal and try to get this out of the way and then we will start rule by rule and do the patching that is necessary.

Are there any other suggestions?

I see there is a letter from the TVA that Mr. McCarthy, their Assistant General Counsel, who was here this morning, addressed to me on October 28th, which I never saw. I cannot find it anywhere in my files nor is it mimeographed so far as I know. I had put this thing up to them a month or so before that.

There are a great many provisions in the Federal statutes that call for a specially constituted three-judge court, such as in labor cases and in other types of cases. I asked: Is it competent by a rule of procedure to abolish the three-judge district court and provide that the case might be tried by one?

I raised the question that it was not only a matter of congressional policy established when they did that, certainly as regards labor cases, but it is also a question of jurisdiction. I questioned whether it could be touched by a rule. Certainly we wouldn't ramble around in the rules abolishing the three-judge court in labor injunction cases. We would get promptly spanked by the Court itself probably.

He showed me a copy of this letter this morning, which, as I say, he told me had been written to me in answer to my putting them on the spot about it. They reached the conclusion that this was a matter of jurisdiction and that they believed that it couldn't be altered by rule.

If you remember, the letters that we received from the judges who sat in TVA cases all overwhelmingly concurred in the opinion that the three-judge provision of the TVA situation was bad. There was trouble in getting the three judges together, and that sort of thing.

TVA wanted everything else to stand (their commission system as distinguished from the jury), but they were willing to abolish the three-judge court.

In the article of Walter Armstrong published in the Federal Rules Service he quotes a lot of these TVA judges who are opposed to the TVA system. The point they make against it is the three-judge system. Walter is not accurate in saying they are against the TVA system. Most of them are against the three-judge system.

I received a letter from every judge who sat in TVA cases. The consensus of opinion among them was that the three-judge courts were not very good, but they do believe in the commission system not only for the TVA but for all condemnation cases.

JUDGE DOBIE: We have had a number of cases before

our Court from western North Carolina. I think the TVA system has worked very well. I think the best thing to do is leave it alone but abolish the requirement for the three judges.

CHAIRMAN MITCHELL: I am in a frame of mind where I think I would be willing to join in a report that the three-judge system ought to be abolished, but it ought to be done by Congress. I am afraid to try it by a rule. There are so many implications that would follow if we tampered with the three-judge clause.

JUDGE DOBIE: There are a good number of those cases that came before us with questions of whether this land had any value for hydroelectric purposes before the Government stepped in. I must confess that on a lot of the questions involved those commissioners, if they appoint good men, and they usually do, can grapple better with it than the ordinary run-of-the-mill jury.

JUDGE CLARK: The Judicial Council has been working on abolishing the three-judge system as a whole. They had quite extensive committee reports and, as a matter of fact, most judges would agree. Wouldn't you agree that it is just something we should not do anything on now? It wouldn't do any good now?

JUDGE DOBIE: I am on that committee and we are anxious to abolish the three-judge system in connection with the review of orders of the ICC. About four-fifths of them

are motor cases. The Commission grants certificates of convenience and necessity and the rivals try to fight it out. There is no question of law involved; it is just a question of facilities and what is best for the community. We cannot touch the orders of the Commission. I sat in ten of those cases and I don't think in one of them did we reverse. We want them to go to the Circuit Court of Appeals. You must remember that we have only three judges in the whole circuit and that ties things up.

JUDGE CLARK: We had a long trial in New York on the Sherman Antitrust Act which required three judges. Judge Hand presided. It took them quite a while to work it out. That is on its way to the Supreme Court.

CHAIRMAN MITCHELL: What was the title of the case?

JUDGE CLARK: It was United States v. Paramount Pictures, I think, with a lot of companies involved in it. It just disrupts our business tremendously. We had to have three judges listening to long testimony. In the ICC cases they put in the record before them.

JUDGE DOBIE: I heard evidence in one case. That was a question of estoppel. The problem was that the motor bus people had waited too long and had not done anything, while these people had obtained their buses and had spent a lot of money.

JUDGE CLARK: Then there was another case over which

Judge Gus Hand presided which required three judges, the Peoria Railroad reorganization.

MR. DODGE: If they reduce the three-judge court to a single-judge court, what do they make the function of the single judge? He certainly isn't going to try the case de novo, is he?

JUDGE CLARK: Judge Dobie would know more about it. Is a review such as is made in the ICC cases comparable to that made with respect to other agencies like the Federal Trade Commission which go directly from the agency to the Circuit Court of Appeals?

MR. DODGE: Why not make it like a master's report?

JUDGE CLARK: You don't need to do it that way. You can proceed on the basis of the record that they put before you.

MR. LEMANN: How does the Labor Board go?

JUDGE CLARK: That goes to the CCA. Cases from the Labor Board, the Tax Court, the Federal Trade Commission, the Civil Aeronautics Board, the Federal Power Commission and all those go directly to the CCA.

MR. LEMANN: That is quite analogous to this very problem.

JUDGE CLARK: I might add that the case involving the Sherman Antitrust Act was part of an expedited procedure.

Why shouldn't it go like any other trial in the

District Court?

MR. LEMANN: Are suits for treble damages tried by a jury very often? I was surprised to hear you say it was tried by three judges. Caffey sat in the Aluminum case for years alone. Then it was appealed to the CCA from him.

JUDGE CLARK: It was appealed to the Supreme Court.

MR. LEMANN: They transferred it because they could not get a quorum.

The Sherman Antitrust Act cases have nothing to do with us here. Are they heard by three judges?

JUDGE DOBIE: Some are heard by three-judge courts. The dissolution cases are heard by the three-judge courts.

JUDGE CLARK: That was an expediting court, because the appeal went directly to the Supreme Court. The case over which Judge Gus Hand presided, that I mentioned before, goes directly to the Supreme Court.

The reason I brought it up was that, if the three-judge court was abolished here, it would fit in with a wider movement that the three-judge court, whatever usefulness it had as an expediting matter, has outlived it now.

MR. LEMANN: It hasn't a usefulness as an expediting matter in condemnation cases because you still go to the CCA and they start out, in effect, all over again.

JUDGE DOBIE: Under the TVA Act, when a case comes to the Circuit Court of Appeals from the three-judge court, we

go into the whole thing de novo.

MR. LEMANN: That is what the statute provides.

CHAIRMAN MITCHELL: What power has the Supreme Court in this enabling act to pass a rule governing District Courts of the United States to subscribe that hereafter the CCA cannot hear them de novo but must decide the case on the record below. We would then have a rule that hits the powers of the Circuit Court of Appeals. We hit that sidewise in a way, because in prescribing rules for the District Court we have said the District Court shall not set aside the findings that have been made unless they are clearly erroneous, and of course that is carried up to the CCA. But, when we come to pass a rule in which we assume to say that the CCA shall do this and not do that, we are going beyond anything we have ever done before. We haven't purported to pass a rule that directed to regulate the practice in the CCA. We have sidestepped that.

I remember years ago the Reporter dug up some statutes which seemed to give some kind of an authority to the Court to regulate the practice in the CCA, providing it didn't set aside a statute; but I don't think we ought to pass any rule, or try to prescribe a rule, that sets aside an act of Congress that says the CCA can hear the case de novo. I doubt if the Supreme Court would approve it.

MR. PRYOR: Do I understand the question to be, Mr. Mitchell, whether or not the Supreme Court under this enabling

legislation can change the jurisdiction from where Congress has placed it, whether they can do it by rule?

CHAIRMAN MITCHELL: That is the point and the question is whether this business of requiring a three-judge district court in the TVA condemnation cases is not a question of jurisdiction.

The TVA, in response to my putting them on the spot about it, came back with an opinion in which they say that it is a question of jurisdiction. My instinct is to put in our report the objections that are so general to this three-judge business in the TVA situation and say that, as a matter of caution, we have not dealt with that, but we recommend that an act of Congress be passed that at least knocks out the three-judge requirement in any condemnation case, and let Congress have a whack at it. If you reach that conclusion, of course you have dealt with the only serious objection to the TVA system that has been raised by the TVA lawyers and the TVA judges and you will have gone far enough.

PROFESSOR MORGAN: If it works well there, why wouldn't it work well with one judge everywhere?

CHAIRMAN MITCHELL: There is one judge everywhere.

PROFESSOR MORGAN: I know, but suppose we recommend that for the TVA, reduce the trial tribunal to one judge, why shouldn't that same process be used again in condemnation cases to avoid all this waste of jury trials?

CHAIRMAN MITCHELL: Of course, I have had a great deal of trouble in reaching my own conclusion as to what the right system is, because I have had so little experience in condemnation cases. I never had trouble in reaching a conclusion about cases I have fought through the courts. But that is the thing I am relying on, other people's judgments about it, and the consensus of opinion seems to be, the overwhelming weight of opinion, that a commission instead of a jury is a better system.

The TVA wants it and I think they have convinced me that a commission system, with appeal to a judge instead of a jury, is the thing in those classes of condemnation cases where great areas of similar classes of property are being condemned.

They stress the need for uniformity. If you have juries in those cases, the Coulee Dam cases, you get one owner getting twice as much as another. If you have a commission that takes in the whole area, there is some uniformity about it. If he once reaches a decision as to what the fellow is entitled to for that plot of land, all the owners are apt to accept it and feel that it is not worth litigating.

That three-judge provision in the TVA Act was intended to fortify that view, because, if you got three judges from an area confirming a general standard, it was pretty hard to upset it.

I think myself if what was involved was only a single city block to be used for a post office building, I wouldn't object to the jury system; but it is impossible for us by rule to try to divide condemnation cases into classes, one class where there are big areas and another class where there is one piece of property, and say commission in one case and jury in the other.

Seth Richardson was my assistant attorney general in the Lands Division and you have seen his letter. He got out of the service in 1933 when the TVA Act was passed and he was very close to Norris and Borah and those fellows, a group of progressive Republicans, who were in favor of these big government irrigation and water power projects. They went to him and he drew the TVA Act and incorporated that provision.

Seth worked under me for four years in the Lands Division and he had charge of all the condemnations that the Government had for one thing or another--not any big projects but individual tracts that they condemned.

According to his point of view, those four years resulted in many bitter experiences with the jury system, and I can remember that he used to come into my office time and again and yell his head off because some jury had gotten together with some witnesses and soaked the Government three or four times more than the land was worth. He didn't like it. So he cut out the jury and made it a commission in the TVA Act

which he drew at Norris' request. Then he wanted to get a uniform evaluation for big areas and he therefore put in the three judges instead of one.

The TVA crowd are quite willing to abolish the three-judge district court, if we get out a system that preserves the commission system for them, with appeal to a one-judge district court instead of a three. They would be quite satisfied with that arrangement. They would welcome a procedural rule establishing the system which they are living under now and under which they have little or no trouble.

That simplifies the procedure in other respects and makes it general throughout the United States, and they like it.

Now they come back with an opinion stating that it is a jurisdictional provision which calls for the three-judge court and they don't think a procedural rule can change it.

PROFESSOR MORGAN: Are there cases where a single judge had tried a case that ought to be tried by three judges where it was held that the single judge did not have jurisdiction?

CHAIRMAN MITCHELL: There are in the other three-judge cases although not in the TVA cases because they never have tried any before a single judge.

PROFESSOR MORGAN: I mean in these other cases.

CHAIRMAN MITCHELL: Oh, yes.

PROFESSOR MORGAN: Do they put it on the basis of jurisdiction or irregularity?

CHAIRMAN MITCHELL: They do it on the basis of jurisdiction and it works both ways. If a three-judge sits in a case where there isn't any jurisdiction for a three-judge court, they vacate the judgment. I had one experience of that kind myself involving the regulations on Scotch whiskey, whether the custom authorities were right in barring imported Scotch whiskey with a label on it of 100 per cent Scotch whiskey, which you have seen so often, where it is a blend, as most Scotch whiskey is, of pure grain alcohol and Scotch whiskey. The British, you know, call alcohol whiskey, so when a Scotch distiller distills Scotch whiskey in Scotland and has some barley malt and mixes it with pure grain alcohol in a patented still, they are both Scotch whiskey and the label reads 100 per cent Scotch whiskey. The custom authorities pass it, although our statutes say that the regulation about blends applies to both domestic and imported whiskey. If you put pure grain alcohol into it, you have to state the neutral spirits, as they call it. You will notice that all American whiskies that are not straight whiskey (if they have alcohol poured into them, if they are blended, as it is called) have to have a 65 per cent grain neutral spirits label on the bottle.

The people in the lower District Court who had the case tried to raise a constitutional question about this.

There wasn't any true constitutional question involved in the case. However, they asked for a three-judge court to hear it below. The action was for enjoining a Federal agency and they claimed it had to have a three-judge court because there was a constitutional question involved. The three-judge court thought there was enough of an argument about the constitutional question to make a plausible question and they took jurisdiction.

It went to the Supreme Court and they asked me to argue it. I said the constitutional question was so flimsy that I didn't think the Supreme Court was going to say there was a substantial constitutional question involved. I said that I would do the best I could for them.

We got into the Supreme Court and the question of constitutionality came up. I hadn't argued the constitutional question in my brief. I stated to the Court that I thought they were wrong about the constitutional question, but I said the three-judge lower court thought that it was at least substantial enough to give them jurisdiction as a three-judge court and it wasn't for me to say that it was flimsy and everything else. We got into quite an argument about it.

The solicitor general against me in the case pleaded with the Court to take jurisdiction and that they should not throw us out on the ground of the absence of a constitutional question. I was frank in expressing my opinion on it.

Justice McReynolds looked at me after a while and

said, "Now, Mr. Mitchell, if there isn't any substantial Federal constitutional question in this case, what shall we do with this thing?"

I said, "Mr. Justice, if that is the view, you should vacate the judgment below and remand the case with instructions to have it heard before a one-judge district court with appeal to the CCA."

I sat down. There wasn't any use talking any more.

That was what they did. They treated it as a jurisdictional question. They treated this three-judge court as a jurisdictional matter and said the district court had no jurisdiction to have a three-judge court and no jurisdiction to appeal to the Supreme Court.

I can't get quite away from the thought in my own mind that establishing a three-judge court to hear a particular type of case is a jurisdictional problem and that we cannot monkey with it.

PROFESSOR MORGAN: The only case I ran into they dodged that point as to whether it was a jurisdictional question or not.

CHAIRMAN MITCHELL: How did that come up?

PROFESSOR MORGAN: Where they claimed they should have a three-judge court instead of a one-judge court, that it would lack jurisdiction, and the court worked it around that it was a case for a one-judge court anyhow.

CHAIRMAN MITCHELL: I think they have held two judges won't do even if they both agree.

PROFESSOR MORGAN: I hadn't looked the thing up.

JUDGE DOBIE: There are quite a number of questions, and Moore will bear me out, which have been brought to the Supreme Court as to what one judge can do. I presided over a three-judge court in the Pere Marquette case. When they wanted a stay one judge could not grant that. The whole court had to act on it, and at least two judges had to concur in it.

I have sent for my book. I know there are a number of cases that have gone into that problem. The statute is not clear as to what one judge can do and what the whole court can do. They treat it as a question of jurisdiction. In the case of the granting of a stay they threw it out for lack of jurisdiction.

CHAIRMAN MITCHELL: Ought we not reach the conclusion that the safe course for us is to assume that it is a jurisdictional question and, as far as the three-judge feature of the condemnations by TVA are concerned, state that we won't tamper with it and that the prevailing opinion of the judges who tried the TVA cases is in favor of one judge.

JUDGE DOBIE: Some of them are very long cases. We had one case where the judges sat for six weeks and that is pretty hard in a smaller community where you do not have very many judges. If you take three district judges out of commission

for six weeks, it is quite a hardship. And they don't want to sit on them generally either. It is hard to get them to sit.

CHAIRMAN MITCHELL: The TVA crowd who have experience with that work feel that, if it is cut from a three-judge court to a one-judge court, it won't substantially injure their operations. If they feel that way and the judges are all against it and it is the main cause of delay in the TVA system, why shouldn't we recommend that Congress do that and drop it as far as a rule is concerned on the ground that it is probably a jurisdictional matter and we don't think it is safe to try it by rule?

JUDGE DOBIE: We had a great deal of experience with condemnation cases in this war, because the Government put a great many of these camps in Virginia and North Carolina on account of climate. We had a great number of condemnation cases as a result. A great number did not go up on appeal, but still we had quite a few.

When we disposed of them, we found it made a great deal of difference who the judge was. Judge Chestnut in Baltimore disposed of them very efficiently. Some of the younger judges in the lower part of the circuit, because they did not have Chestnut's experience, had quite a time.

CHAIRMAN MITCHELL: We better not pass any resolution right now because we have to hear the TVA people at two o'clock

and in deference to the fact that we haven't heard from them on that point, let's lay it over until two.

However, now we have the question of whether we should try to impose a jury instead of a commissioner.

JUDGE DOBIE: If you keep the commissioner, how would you express the function of the single district judge? Certainly not in the same manner as prescribed by statute now for the three judges.

CHAIRMAN MITCHELL: If we did that, it would be done by saying nothing about it with respect to the specific TVA situation. We would say that wherever Congress has established and provided a tribunal to hear condemnation cases, that sort of tribunal should be used. That leaves the TVA with a commission to start with and then, if Congress wants to cut down the court from the three-judge court to the one-judge court, they can do it.

That would preserve the system in the District of Columbia where they have a five-man jury. It is really a commission although they call it a jury. That jury fixes the award, with appeal to a judge. They are really commissioners. They can look at the property and do things that a commission can do and resort to their own knowledge about land values.

That would leave everything as it is as far as the Federal statutes are concerned.

JUDGE DOBIE: I understand in the District of Columbia a great many of them are really local situations. They do not

so much apply to the United States as much as they do to the District of Columbia.

CHAIRMAN MITCHELL: That is right. It would preserve the District of Columbia system, both for condemnation by the Federal Government directly and also municipal condemnations.

The next question you have to decide is whether or not, where Congress hasn't passed a statute and has not prescribed the tribunal, our rules should say that in such cases the tribunal shall be that established by the constitutional laws of the state, which is the present system. Or shall we state the rule to be, where Congress has not prescribed the tribunal, that in all cases there be a commission or jury, a commission with appeal to a jury or a commission with an appeal to a judge, or a jury trial at the beginning.

There is where the Department of Justice steps in and says they want jury trials all the time. All these Federal judges from whom I heard in the TVA cases, a great majority of them, went out of their way to answer questions that I did not ask with reference to: Where Congress had not prescribed the system, do you prefer a jury or commission? They volunteered by a great margin that they felt the commission system was better than the jury system. They didn't like juries.

Judge Learned Hand came in just a few days ago with an opinion in which he states he doesn't like commissions and wants juries.

Take a case like these great operations of the Federal Government which it is now conducting in condemning great areas for water power and irrigation and one thing or another. In some of those cases Congress has not prescribed a system. That is a conformity proposition that would force the Federal Government to have every single owner get a jury trial in a great water power project that covers two or three states. And you are back to the same thing that the TVA has in its situation.

JUDGE CLARK: There is one thing that ought to be added, namely, that Judge Hand's opinion is not primarily for the jury. In fact, he talked to me and I think he puts it into his letter. He thinks the district judge ought to do it.

CHAIRMAN MITCHELL: In the first instance?

JUDGE CLARK: Yes, but not the commission.

CHAIRMAN MITCHELL: He doesn't want a master or referee to hear it.

JUDGE CLARK: That is right.

CHAIRMAN MITCHELL: He is unique in asking that a condemnation case be heard by a district judge in the first instance.

JUDGE CLARK: The district judge is likely to have masters appointed anyway in the cases they don't like. That is obvious.

CHAIRMAN MITCHELL: There you are. You have to abolish the master rule in the condemnation case to carry out

his idea.

JUDGE CLARK: The master rule does carry the provision that the master is to be discouraged. I don't know how effective it is. Our rule provides that a master shall be appointed in an extraordinary case. Some Supreme Court cases have upset cases where a master was appointed.

CHAIRMAN MITCHELL: With all due great respect for Judge Hand, I should feel very dubious about our taking a slant in establishing a rule for district judges to be the only trial person in condemnation cases, which, as far as I know, is not done in any jurisdiction. I don't know of any jurisdiction in which in condemnation cases the district judge or a lower court judge sits in the first instance.

In all state laws about condemnation that I have any knowledge of at all there is provision for a jury trial or a commission in the first instance. It is a commission with appeal to the jury. Sometimes it is a commission with appeal to the judge. Sometimes it is a jury without a commission.

Do any of you know any area in which they have ever had condemnation practices by which a trial judge is the original and only tribunal to pass on value? I don't know of any.

MR. PRYOR: I tried such a case, but it was by waiver of the jury by the Government and the landowners.

CHAIRMAN MITCHELL: What is your system in Iowa?

MR. PRYOR: It is rather a cumbersome system. With

the exception of a few railroad condemnation cases that I have handled for the railroads, most of my experience has been for waterways in which we represented landowners, particularly the Burlington Land and Timber Company which owned quite a number of islands that would be flooded as a consequence of this work on channelizing the Mississippi River.

The cases were tried in Iowa or in Illinois, depending on the location of the island in the river. This is an illustration of the desirability of uniformity with respect to condemnation rules.

In Iowa we have set up what we call a sheriff's jury of six men. They view the property and make an award. Then there is an appeal to the district court. Of course the Federal court has to follow the state procedure. There is then a trial to a jury.

CHAIRMAN MITCHELL: A regular jury?

MR. PRYOR: A regular jury in the Federal court.

In Illinois, of course there is no sheriff's jury. You go right into the district court and try the case before the judge and jury.

CHAIRMAN MITCHELL: You have brought up a situation in which the Department of Justice has a pretty good case. As far as the conformity system is concerned, if there is no Federal statute, we should say in that case the tribunal should be that fixed by the state law. There are so many state laws

that have a commission and then trial by jury, and they are dead set against two trials of that kind. They say it is expensive and unnecessary. There should be either a commission in the first instance or a jury in the first instance.

MR. PRYOR: I agree with that.

CHAIRMAN MITCHELL: I think their case is good on that.

MR. PRYOR: I am rather strongly of the opinion that there should be a jury trial, but it should be in the district court, not one following an award by a commission.

JUDGE CLARK: There is a difficulty about the commission that may be inherent in that system. We have had it in New York. This is what Judge Hand had in mind.

The New York State system is to appoint commissions and it is a matter of patronage. We have had that in the Federal cases. We have had the greatest records we ever saw. They met as many times as they could. They would meet to lay out a procedure and then adjourn. They would just pile up the stuff. And under the state practice the commission's findings are pretty final.

Judge Hand was sitting in a case just recently involving the Brooklyn Navy Yard and they wanted to make certain changes. They found certain errors that one of the commissions in the district court had done. The question was whether they should reconstitute this tribunal. One of the commissioners had

died. They remanded it and directed the district court to hear it anew.

The Connecticut experience is perhaps interesting, because they had a bad scandal involving the Highway Department. That wasn't the fault of the court, but, as a result of that, they now have a system where the case goes to the Superior Court and the Superior Court refers it to a referee. The referee is a retired judge of the Superior Court. Now they always assign it to a particular retired Superior Court judge. He does all the work.

That works pretty well. It certainly keeps down the allowances.

MR. DODGE: Isn't there a regular trial by a jury?

JUDGE CLARK: No jury. The referee acts practically as a master. On the confirmation of his report the Superior Court judge never hears the evidence.

So, when I speak of their having a referee, it is practically a reference to a master who does not get any pay. He gets his state referee's salary.

MR. DODGE: Sometimes the juries will cut down the findings of the single judge. I have had that more than once.

MR. LEMANN: What was the sad case you referred to in regard to your ancestral home that your brother was involved in?

JUDGE CLARK: That was a case where they went to the

retired judge of the Superior Court who increased the award by two and a half times. Then it went to the Superior Court judge who declined to award interest. Then it was taken to the Supreme Court and got interest awarded. So he finally got three times what the state had deposited, and he still feels he was put upon.

Of course, as I say, under the local procedure the state has had title ever since they filed a notice.

CHAIRMAN MITCHELL: The trouble in my mind now is this: Everybody connected with the TVA, judges and lawyers and all the rest of them in a great big enterprise like that where they are anxious to get uniformity in award, prevent discrimination and set a standard on all cases in litigation, makes a strong case for the commission system in that kind of an enterprise. We say: If there is no Federal statute, the rule shall state that it shall be tried in the first instance without a jury. Then there are a great many other enterprises on a large scale that have all the reasons that the TVA have back of them for not getting a spotty result with a jury where we force a jury.

Isn't there a big enterprise starting in Missouri now?

JUDGE CLARK: I don't think it has gone through. There is a great deal of talk about the Missouri Valley Authority, but that still has not gone through.

CHAIRMAN MITCHELL: As for a jury in that kind of case, I agree that a jury works all right where there is a single block being taken or something like that, but not where a great area is being condemned.

JUDGE CLARK: I suppose, Mr. Pryor, you know more about that Missouri Valley thing. If that went through, that would cover several states.

MR. PRYOR: Yes. When I said I was in favor of a jury trial, I recognize the force of what you say about the desirability of arriving at somewhat uniform results with reference to the same character of property in a large area. I don't see how by rule you can draw a line between the two classes, and if we can't draw the line, I would let the decision go in favor of the jury trial, always excepting the class of cases that you mentioned such as the TVA and where Congress has provided for a commission.

CHAIRMAN MITCHELL: Could we provide that, if there is no statutory congressional act on the subject, there be a choice, the parties being able to choose the jury or the commission, or the judge can? Give him discretion to say whether it will be heard by a jury or commission, depending upon the nature of the controversy. Then we don't have to make the definition in here. He more appropriately describes the tribunal when considering the nature of the enterprise.

MR. PRYOR: There could be a waiver of jury under the

present rules. There was such a waiver in the case I mentioned.

CHAIRMAN MITCHELL: I know the trouble is that, if you get a big area and a lot of property owners, all owning the same kind of property, and the owner of the property thinks he can gamble with the jury, he won't waive. He will stick to the jury. If it can be done, it might be all right to leave it to the judge.

MR. LEMANN: Page 15 of our draft here says:

"Another alternative, not stated in the draft, would be to provide that the tribunal should be a commission with review by the district judge, but with power to the court in its discretion to order a jury trial on application of either party."

CHAIRMAN MITCHELL: I put that in there.

MR. LEMANN: Isn't that what you are talking about?

CHAIRMAN MITCHELL: I put that in the notes to raise the point. That is the same thing I am talking about now.

JUDGE DOBIE: Have you ever had any of these condemnation cases, Monte?

MR. LEMANN: No. My office had one recently tried to a jury that involved Government condemnation. The jury decided for the Government. My impression is that juries in wartime, if the property is taken for war uses, are likely to take the Government's point of view; in peacetime the reverse is the case.

MR. DODGE: I don't know about that. I tried a lot of cases in the state in connection with the metropolitan water takings, metropolitan sewerage. I don't think I could note any inconsistency between jury findings. We did find that juries dealing with what the public should pay are often more conservative than a single commissioner before whom cases were tried by agreement with a right to appeal to the jury. I remember many times where a jury cut a commissioner's award in half.

Our experience was that the jury trial, which is always a matter of right in Massachusetts, was a pretty satisfactory way of dealing with those cases, even in the large-area proposition.

CHAIRMAN MITCHELL: Of course, there is one feature you have to bear in mind. If your local government, city or state was condemning, the people who are citizens of the state, the taxpayers, and so on, are a little more careful about granting exhorbitant awards, but they are so well educated now to going down to Washington and grabbing a big piece of money, that the disposition of the jury is to soak the Federal Government as distinguished from the local government. That is pretty well developed. At least that was Seth Richardson's experience when he told me about the jury awards.

MR. PRYOR: There was a case I participated in a year or two ago where we got a verdict of $175,000 from the

judge. Then we went to the Circuit Court of Appeals and were reversed and we tried it the second time with a jury. The verdict then went down to $100,000. I think this can be said from the standpoint of the landowners: While in the big projects there might be some similarity with respect to all these various properties, there are no two pieces of land exactly alike, and he has the right to have it determined in the ordinary way by a jury trial.

Of course every piece of land is unique. That was the reason for the doctrine of specific performance. It seems to me that something can be said from that standpoint.

CHAIRMAN MITCHELL: Is it feasible in a condemnation case involving a great area to have one jury make one hundred awards to one hundred different landowners who own the property of the same general nature? The commission can wander around and try to reach a fair average in a great area, but, if you have a jury that is going to make awards to one hundred different property owners, in the same procedure can you have one jury for all of them?

MR. PRYOR: With the commission there is always the chance of being more or less hand picked.

PROFESSOR SUNDERLAND: Mr. Chairman, if we should provide for a commission system in states where they do not have a commission system, will it be necessary to have some additional legislation to provide for making payment for those commission

fees?

CHAIRMAN MITCHELL: You have put your finger on something else. I was just about to ask the question as to whether we can provide a system that calls for a draft on the Federal Treasury to pay for a tribunal that does not exist. We cannot do that.

PROFESSOR SUNDERLAND: In the TVA the statute provides for the payment of the commissioner fees in a state that does not use the commissioner system. I don't believe there would be legislation on which you could charge for the commissioner.

CHAIRMAN MITCHELL: You would assume that the court would assess the cost of the tribunal on the property. You couldn't assess it against the Government. We provide for masters and we don't say anything about their compensation.

PROFESSOR SUNDERLAND: If we use that term "master," I wonder if we aren't getting in under the general provision for a master under the general rule. But I suppose that would be charged against the parties.

MR. LEMANN: Who pays the cost? Doesn't the Government pay the cost?

PROFESSOR MORGAN: We have a rule with reference to that.

JUDGE CLARK: We have suggested a provision on that. Somebody who wrote in raised a question about costs and I think that is something we have to consider. In our last bunch of

suggestions we put in something about costs.

MR. LEMANN: No, there are no costs in any condemnation cases under any system. Doesn't it take an authority to pay it?

PROFESSOR MOORE: The condemnor.

PROFESSOR MORGAN: The comment says that generally speaking they do pay the costs of the commissioner, and so on and so forth.

MR. DODGE: That is the TVA.

MR. LEMANN: At least theoretically the concept is that it would be paid not by the landowner but by the condemning authority, as Mr. Sunderland pointed out.

Of course that might put a considerable burden of experience upon the condemning authority. It is interesting to me how the Department of Justice has reversed itself on this question of a jury trial.

CHAIRMAN MITCHELL: They did what?

MR. LEMANN: The Lands Division has reversed itself on this question of a jury trial. Originally they didn't favor a requirement for a jury trial; now they urge a jury trial.

CHAIRMAN MITCHELL: They have always asked for a jury trial since we have been working on it.

MR. LEMANN: I just got this recently.

CHAIRMAN MITCHELL: They tried to get two bills through Congress for a jury trial years ago. In Seth Richardson's day

they didn't want a jury trial because they had gotten bad results. Now they want a jury trial.

MR. LEMANN: I read somewhere they originally didn't want it, but now they do want it. Also it should be noted again here that twice they have had bills presented to provide for jury trials in all cases, but they have been defeated, perhaps because they didn't except TVA.

CHAIRMAN MITCHELL: I read the Congressional Record on those bills. I read it several years ago. Mr. Pryor may be interested in that. Twice the Department of Justice since 1933, under the Roosevelt Administration, tried to get bills through Congress providing for jury trials in all condemnation cases.

The department did not like the conformity system, because it resulted in many cases in a trial by commission and then a trial by jury de novo, meaning double expense. They were beaten both times.

Some of the congressmen were evidently confused about what was going on and I am not sure that they voted very intelligently. I read all the debate.

Both bills were beaten in Congress by a point of view that the conformity system ought to apply. The state system ought to be followed. That dominant sentiment in Congress that defeated the bills was the view that when you are taking property from a citizen of a particular state, they thought the

kind of tribunal he should get before his property is taken away from him ought to be according to state law.

So it didn't make any difference whether a congressman came from a jury state or a commission state, all of them clubbed together to say that the state system shall prevail and that was the reason for the overwhelming result.

If you want to satisfy Congress, provide that wherever Federal statute provides the system, that should prevail; where it doesn't, resort to a conformity system and the state law should prevail. It would leave them just where they are today. That is where they are today and we could satisfy Congress and satisfy the TVA, and the only thing we wouldn't satisfy would then be the feelings of the Lands Division of the department, unless they have changed their views now. We will find this out this afternoon.

MR. LEMANN: It wouldn't satisfy Mr. Armstrong.

CHAIRMAN MITCHELL: No. He makes uniformity such a fetish that, even though it works badly, he wants the same kind of condemnation procedure in every kind of condemnation.

MR. PRYOR: What is the upshot of that?

CHAIRMAN MITCHELL: This Committee would do this: Every state of the Union has all kinds of different rules about the form of the tribunal and form of complaint and nature of service, and we would establish a uniform system for every government agency and every condemnation case, uniform in every

respect except for the tribunal.

MR. PRYOR: It seems to me there is just as much reason for uniformity in that as for anything else.

JUDGE DOBIE: It is bad for a Circuit Court of Appeals such as ours which covers five states, Maryland, West Virginia, Virginia and the two Carolinas, if you have the conformity system. That is very bad. The decisions are not clear.

There is another point. I don't know whether it was the war that had something to do with it. Probably it did. We had a great many cases during the war. In most of the cases that came before us the appeal was by the landowner who claimed that he did not get enough, rather than by the Government who claimed he got too much. Four out of five were. One of the reasons for that was this land generally was pretty poor stuff.

CHAIRMAN MITCHELL: Worn-out plantation land.

JUDGE DOBIE: These fellows hopped up and showed they could grow pecans and showed the uses they could put them to. The jury usually was fair and we sustained them pretty often.

JUDGE CLARK: Even the states are not uniform themselves. There are all sorts of different procedures in a single state.

JUDGE DOBIE: Different kinds of condemnations.

JUDGE CLARK: The question is: Which state law should

be taken? In my little state there are at least two general systems if not more.

CHAIRMAN MITCHELL: Different as to tribunal as well as to practice?

JUDGE CLARK: Yes, sir. The older system was the old commission consisting of whomever the judge appointed. The practice was to include one lawyer, one real estate man and one man who didn't know anything. That was in the law that applied generally to municipalities, and so on.

Then they developed the old highway system with state referees.

That adds to the complications. What state practice are you going to follow?

Monte, on the question of costs, if you look at all the material put before you (I am sorry some of it is so late), in the section that has the abstracts of the suggestions from Mr. Moore and myself, dated January 28, 1948, on the last page is the abstract from the Lands Division which tells what they do as to costs.

These things are still coming in. I have had just handed to me another report from California. I think I better have it distributed to you so that you will see it. You already have before you a report of the California Bar Association, Southern Division. I am going to give you the Northern Division's report. There apparently is a split personality out there.

You have both reports now. They are apparently in favor of the jury.

CHAIRMAN MITCHELL: How do they feel about the present system?

JUDGE CLARK: I haven't been able to establish yet the things they agree and disagree on. There are certain disagreements.

CHAIRMAN MITCHELL: Where we have the conformity system and where Congress has not prescribed a tribunal and the state law provides for a commission, I noted down the question: Who pays for the commission under the system today?

PROFESSOR MOORE: The Government. That is what they say in their manual.

JUDGE CLARK: You understand what we are referring to when we say manual? We have a great compilation from the Department of Justice, which is a book in itself, and they call it the Lands Division's manual and that is where the quotation is from.

MR. PRYOR: We have some differences in procedure in Iowa with respect to condemnation. On condemnation for a public utility, such as a water works plant, the tribunal consists of three state district judges appointed by the Chief Justice. But generally speaking it is a jury trial after having been passed on by the commission.

CHAIRMAN MITCHELL: We couldn't then resort to the

conformity system. We just said that, if we take the provisions of the state law, we have to take the tribunal that the state statute provides for in the sort of condemnation cases we are talking about, if we can find it in the state law. It is hard to find it when you are condemning for a Federal agency that wants a tract for its purpose.

PROFESSOR SUNDERLAND: In this Rule 53 on masters the provision is that "compensation shall be fixed by the court and shall be charged upon such of the parties or paid out of any fund or subject matter of the action, which is in the custody and control of the court as the court may direct."

Does the court make an order that the United States shall pay? Is that the practice in cases involving this proceeding?

JUDGE CLARK: As I remember our records, there isn't any order on that. The United States goes ahead and pays.

PROFESSOR SUNDERLAND: They would have to do that if you established a commission system. They would have to go ahead and pay.

CHAIRMAN MITCHELL: If they do that already, we are not making an additional draft on the Treasury.

PROFESSOR SUNDERLAND: That would be the question, whether they are doing that already.

CHAIRMAN MITCHELL: I have a question to ask the Department of Justice man about that this afternoon. We

cannot make a provision here that calls for an appropriation by Congress.

PROFESSOR SUNDERLAND: There must be general legislation on the point that the costs of the jury shall be paid by the Government.

JUDGE DOBIE: Are there any statistics as to comparative costs of the commission or jury system? The Lands people may have something about that. I was thinking that Congress may object to saddling any more expenses on the Government, particularly in connection with the use of commissions. I wonder if there is any material available showing the difference between the cost of the commissioners and the cost of using the jury.

The commissioners command larger fees, but can it be accounted for more specifically?

JUDGE CLARK: That was one protest the Department of Justice made, that the commissioners were very expensive and that they did not act expeditiously.

CHAIRMAN MITCHELL: I think the TVA places a limit per diem that the commissioners get.

MR. PRYOR: And the number of days.

CHAIRMAN MITCHELL: I don't know whether they limit the number of days.

MR. PRYOR: I think that is the difference that Judge Clark raises, the tendency of a commissioner to kill time

on it.

JUDGE DOBIE: In practically all of these cases the Government prevails to the extent that they get the land. They ought to pay the costs.

PROFESSOR SUNDERLAND: They are sure to prevail on that point.

JUDGE DOBIE: The Supreme Court has held right along where you have three judges and one judge does what three judges ought to do, the action is void.

CHAIRMAN MITCHELL: They had the case where there was a three-judge court and two sat and agreed.

MR. DODGE: Did they agree to go on with the two?

CHAIRMAN MITCHELL: The judges did.

JUDGE DOBIE: I don't think the consent of the parties made any difference.

MR. DODGE: Then Judge Cox in the Northern District of Mississippi is wrong when he says that can be done?

JUDGE DOBIE: The Supreme Court has said that, if that judge was there, he might advance reasons that would have caused them to decide the other way.

MR. LEHMANN: I was wondering whether we ought to lay down some fundamental propositions and see how we address ourselves to them. Perhaps we could take some straw votes. I thought of two. If we were making the law, would we, without regard to what exists, say jury or commission? I gather certain

members would favor the jury and others would favor the commission system. Ought we not to see where we stand on that proposition?

Then, another fundamental proposition would be whether we are going to do what you say Congress wants to do. If we don't do that, the rule may be shipwrecked eventually. That may not be controlling.

CHAIRMAN MITCHELL: That is not controlling. We have never been shipwrecked yet, but we don't want to start in now.

MR. LEHMAN: It is a very persuasive consideration. If we take the second point first and we go on the nonshipwreck idea, we would adopt conformity, because what was true before with these other two bills is probably still true for the reasons you gave.

CHAIRMAN MITCHELL: I wonder where the state law in the area where the action is pending has different kinds of procedures for different kinds of condemnations (as we pointed out here in Iowa, for instance, water commissioner's condemnation having one procedure and maybe the railroad for a right of way having another), which do we pick when we are under the conformity system?

MR. LEMANN: If you are under the conformity system, you stick to conformity. You cannot subdivide conformity.

CHAIRMAN MITCHELL: I know, but maybe the Government

condemnation is not a railway condemnation or a water power condemnation but a fort condemnation and there is no state statute that provides any procedure at all because the state is not condemning any forts.

MR. LEMANN: I should suppose that in most states there would be some statute that would apply to the taking for state governmental purposes. There must be something. There can't be a vacuum.

MR. PRYOR: We have a general condemnation statute that applies generally to condemnation by the state, the Federal Government or railroad, but this other that I mentioned is an exception.

CHAIRMAN MITCHELL: I see. Then we would be no worse off than by stating conformity. Today the department has the same problem.

MR. LEMANN: Yes.

PROFESSOR MORGAN: Under the present system, do you have to have separate condemnation proceedings if the land lies in more than one state?

CHAIRMAN MITCHELL: There is no statute that gives the Federal court jurisdiction to condemn land outside of its district.

PROFESSOR MORGAN: Outside the district. Even TVA?

CHAIRMAN MITCHELL: How about that? Does the TVA statute give power to a court in a single proceeding to condemn

land in more than one state?

JUDGE DOBIE: No, the Federal district cuts across two states.

PROFESSOR MOORE: If the land is in two districts, I think the suit may be brought in either one.

PROFESSOR SUNDERLAND: There are a good many states that do not have a general statute. If they have a general statute, it is limited to certain types of litigation and there is no provision for litigation or condemnation by the United States.

In Michigan there is no general statute at all.

MR. PRYOR: At the present time, how does the Government condemn?

PROFESSOR SUNDERLAND: There is no general statute in Michigan. There is no special method for the United States Government. I don't know what they do.

Missouri has a general method applicable to corporations and no special method applicable to the United States. There are a half dozen states like that.

JUDGE CLARK: It is my impression that they go by analogy as much as they can, but it may be a strain to do it. I think that you are quite right, in many states it is hard to work out an analogy in the state procedure.

PROFESSOR SUNDERLAND: There is no close analogy and they have to take arbitrarily some one method.

JUDGE CLARK: Yes. Isn't that what happens?

MR. MOORE: I think so.

MR. LEMANN: Is the Lands Division of the Department of Justice going to be here at two o'clock, and the TVA?

CHAIRMAN MITCHELL: Yes, they will be both here.

MR. LEMANN: They can answer some of the questions we are asking.

CHAIRMAN MITCHELL: I am jotting these down. I have a question to ask the Department of Justice people: Who pays for the commission and why? When the land is in two different states, what happens? Where there is no general statute as in Michigan and no special provision as to Federal condemnation, what happens?

I don't think a state would have any power to pass a statute to relate to the Federal Government.

PROFESSOR SUNDERLAND: A great many of them do.

MR. PRYOR: In Iowa they follow the general statute. The question of commissioner's costs is covered by the quotation from the manual of the Lands Division.

JUDGE DOBIE: Let's hear from the Government people on those questions.

MR. LEMANN: I imagine that every state (even Michigan) must have some general condemning statute that would apply to governmental condemnation.

PROFESSOR SUNDERLAND: It doesn't have it.

MR. LEMANN: How does the City of Detroit expropriate land for its uses?

PROFESSOR SUNDERLAND: They have special statutes for courthouses, schools, rights-of-way, railways, canals, and so forth. We have seventeen methods and we are in the position of treating them as all special methods. The United States is not among the seventeen.

MR. LEMANN: Haven't you got a grab-all one?

PROFESSOR SUNDERLAND: No, we have no grab-all method.

MR. LEMANN: I should think every once in a while you would find one that does not fall into the seventeen categories, then you have to pass a new statute.

PROFESSOR SUNDERLAND: Even the law school at Ann Arbor, after they condemned land for a law school building, found they had done it under the wrong statute.

MR. LEMANN: If the Government wanted to expropriate lands in Michigan for a levee, you have no method for levees, have you?

PROFESSOR SUNDERLAND: No, we don't have.

MR. LEMANN: So if you can't find a statute for that, you couldn't do that.

Our most recent extensive governmental project was the spillway above New Orleans, which cost millions of dollars and took a good deal of land. I am quite sure it was done under

local statutes under the Conformity Act. The spillway was a peculiar thing.

In Michigan you couldn't do it because they didn't have a statute on it.

MR. PRYOR: Does each of the seventeen classes provide a procedure?

PROFESSOR SUNDERLAND: Every one of them, and there is no provision for the United States Government, and there is no general method.

MR. LEMANN: I don't think any of the local statutes especially refer to the United States.

PROFESSOR SUNDERLAND: A number of them mention the United States and give a method for the United States.

JUDGE DOBIE: It is like the old song, every little condemnation has a method all its own.

MR. DODGE: Don't we have two questions? (1) Shall we provide that where the Federal statutes provide a definite procedure, that shall be followed? (2) What method shall we apply for other cases where the Federal statute merely says that the state practice shall be followed, which we wouldn't hesitate to overrule? Shall we provide a uniform method, and what shall that method be?

Those are the two fundamental questions, aren't they?

MR. LEMANN: Haven't you the preliminary question whether they are going to stick to the conformity rule? If you

are going to stick to the conformity rule, that almost ends the story very largely.

CHAIRMAN MITCHELL: Of course, there is a new problem brought up by this discussion this morning, pointing out that the conformity rule has all kinds of differences because of this situation in states where they have a particular practice for each kind of condemnation and none of them fit the Federal Government.

MR. LEMANN: You will get some light on that from the Lands Division. There isn't anything but the conformity rule today except in the TVA situation.

CHAIRMAN MITCHELL: Except where provided otherwise by Federal statutes.

MR. LEMANN: Either a special Federal statute or the state law. So they have to find out what the state law is.

CHAIRMAN MITCHELL: I was in such a state of mental confusion about what I thought was the right thing that I did not want to suggest one way or another on the conformity rule business or anything else until I heard what the Lands Division and the TVA can add in answering these questions that we can't answer.

JUDGE DOBIE: We might very well have conformity as to the method of fixing the damages and nonconformity about notice and complaint and things of that kind.

CHAIRMAN MITCHELL: Exactly. Our proposition starts out with the assumption that as far as the procedure is concerned other than the nature of the tribunal, we will have a uniform system in every Federal court. If we didn't do that, we better not do anything.

JUDGE DOBIE: I am in favor of that.

CHAIRMAN MITCHELL: The Committee has always felt that way. The real question is whether we will have the uniformity absolute in regard to the tribunal and whether we can do it.

MR. LEMANN: What do you say in the first part of your statement?

CHAIRMAN MITCHELL: I said we always proceed on the assumption that we would have a uniform practice in all Federal condemnations under Federal power, with the possible exception that the constitution of the tribunal that settles the damages might differ. That is the point where we shall have departure from uniformity. That is our main problem.

MR. DODGE: Uniformity would result everywhere except in the TVA and in the District of Columbia.

CHAIRMAN MITCHELL: No, uniformity would be in the TVA as well as in the District as far as the procedure is concerned.

MR. DODGE: I meant as to the constitution of the tribunal.

CHAIRMAN MITCHELL: That is true if they are the only Federal statutes prescribing the tribunal. I don't know.

MR. DODGE: Those are the only two called to our attention in these notes.

CHAIRMAN MITCHELL: I don't know anything but the TVA and the District of Columbia where the nature of the tribunal is fixed by an act of Congress.

JUDGE DOBIE: The Lands people could tell us that kind of thing.

CHAIRMAN MITCHELL: We are supposed to have examined all the Federal statutes on the question of condemnation ourselves.

JUDGE CLARK: You look at page 50 where we have addended there some which did not come within any line. Take the Atomic Energy Act. This is in our first big book of suggestions. That may be a little different problem, whether there may not be eventually certain other acts that we ought to accept.

CHAIRMAN MITCHELL: What we are interested in is whether there are other acts which provide a tribunal on fixing damages other than the TVA and the District of Columbia.

PROFESSOR MOORE: I don't think there are.

MR. LEMANN: Is there some reference to existing statutes on page 23 of the pamphlet distributing the rule?

"There are a great variety of acts of Congress

authorizing the exercise of the power of eminent domain by the United States and its officers and agencies. These statutes for the most part do not specify the exact procedure to be followed, but where procedure is prescribed, it is by no means uniform . . .

"The following are examples of acts in which a more or less complete code of procedure is set forth in connection with the taking . . ."

Then they list the TVA and the District of Columbia. We don't say these are the only ones.

CHAIRMAN MITCHELL: I supposed that we had examined all the Federal statutes on condemnation and knew of every one of them, whether any of them other than the District and the TVA state whether a tribunal shall fix the compensation.

MR. DODGE: There is one, the Atomic Energy Commission.

PROFESSOR MORGAN: That is the one the Chairman talked about.

MR. DODGE: That provides for a Patent Compensation Board and an award with review by the Court of Appeals in the District of Columbia.

JUDGE CLARK: That deals with inventions and discoveries: "the Atomic Energy Commission is authorized to purchase, or take, requisition or condemn, and make just compensation for, any invention or discovery, patent or patent application useful

in the production of fissionable material or atomic energy or its utilization. Subsection (e) provides for a patent compensation board to determine and grant compensation awards and royalties, and provides for review of such awards in the Court of Appeals for the District of Columbia."

MR. LEMANN: That is a unique thing. You wouldn't condemn a patent or patent award.

MR. PRYOR: This rule wouldn't cover condemnation of patents.

CHAIRMAN MITCHELL: I am not so sure.

JUDGE CLARK: I don't think it is limited to land. As we have drawn it, it certainly isn't limited.

CHAIRMAN MITCHELL: I had a general impression in my mind from the old days down here with respect to patents that the Government went ahead and could either itself, or authorize a contractor to, use an invention, giving the property owner the right to sue in the Court of Claims against the Government and relieving the contractor from liability, substituting the Government. That was the old system.

The Government didn't take over the patent, because it didn't need it except for government purposes, and was willing enough for a man to hold a patent on a device or invention so far as outsiders are concerned, but as far as the Government was concerned, instead of condemning the whole patent or condemning the use by the Government, it simply went ahead under

that law and used the device and authorized the contractor to use it and the law prescribed that in that case it would be an action in the Court of Claims against the Government and not against the contractor.

JUDGE DOBIE: Just for damages.

CHAIRMAN MITCHELL: For damages for such use that the Government had made--sort of a royalty proposition.

MR. PRYOR: Is that a regulation in the patent law?

CHAIRMAN MITCHELL: I don't know that it is in the patent law proper, but it is in the statutes that authorized the Government to use any patents if necessary and authorized the government contractor to do so. They didn't have to have a license, but they just infringed and then they prescribed the contractor would be immune and the Government would be liable in the Court of Claims for such infringement or use, the reasonable value thereof--either the Government or the contractor for the Government. That was the system.

We must look out for that, because, if this statute applies, as I think it does, to all kinds of property-- I am not sure how it is worded.

JUDGE DOBIE: Would the Government ever question the validity of the patent there?

CHAIRMAN MITCHELL: It could. It is a question of the rules. I have a dim recollection of this thing. It is fifteen years ago.

JUDGE DOBIE: It is the same as in any other infringement, but they wouldn't grant an injunction against it.

CHAIRMAN MITCHELL: We have a rule here describing the practice.

JUDGE CLARK: There are statutes that go pretty far. Look at the end of that section on page 52, the one for the requisition of aircraft design that was passed in 1926. That contemplates "no condemnation proceedings in the district court; but, on the contrary, a taking without such proceedings and an offer of compensation, with a right in the owner to reject it and sue in the Court of Claims for compensation."

CHAIRMAN MITCHELL: My personal guess is that we ought to have this rule drawn so it doesn't apply to things like that.

JUDGE CLARK: We should. We shouldn't interfere with the Atomic Energy Act.

CHAIRMAN MITCHELL: I don't think we should upset the statutes.

MR. LEMANN: Would you include in your questions to ask the Department of Justice whether they have condemnations other than land?

PROFESSOR MORGAN: There is nothing in the rule with respect to personal property.

MR. LEMANN: Line 5 in the rule says "property".

CHAIRMAN MITCHELL: The rule is vague. It says

"one or more separate pieces of property". That doesn't sound like a patent right.

MR. LEMANN: Line 5 says "property", which would include a patent. I think we have to limit the language.

CHAIRMAN MITCHELL: I think we ought to make a note to limit the rule--

MR. DODGE: --real property.

CHAIRMAN MITCHELL: No, it might be personal.

MR. LEMANN: We can ask the Department of Justice.

JUDGE CLARK: If you get into a question of tangible and intangible property, that is not too good.

MR. LEMANN: Do you have a note to ask them about lands in more than one district?

CHAIRMAN MITCHELL: I have lands in two states. I will also say two districts.

MR. DODGE: Will you ask them what other statutes there are creating the tribunal?

MR. LEMANN: Do you mean Federal statutes?

MR. DODGE: We have apparently at the most four here, and also the last one that Judge Clark referred to.

CHAIRMAN MITCHELL: What statutes other than the District of Columbia and the TVA? What are the others?

MR. DODGE: The Atomic Energy Act.

CHAIRMAN MITCHELL: That relates to patent rights.

MR. PRYOR: Yes.

MR. LEMANN: Aircraft design, to which they refer on page 52.

MR. DODGE: That establishes the Court of Claims as the tribunal.

CHAIRMAN MITCHELL: It is not a condemnation proceeding. I don't remember any condemnation proceedings for acquiring patents. We didn't have to condemn them. We just used them and the Court held that this provision sending him to the Court of Claims and forbidding him to sue the contractor was constitutional.

I think the question of validity came up under the provision of the law that exempted the contractor from a patent infringement suit and in which the Government stepped in and said, "We guarantee the payment of damages."

Of course the owner couldn't sue the contractor and the Government had consented to sue for damages in the Court of Claims.

I remember there was an opinion by Associate Justice White. This is all pretty vague.

MR. LEMANN: One of the alternatives we have here makes two exceptions to the uniformity rule. One is Federal statutes which provide for tribunals and the other is a proceeding under the authority of a local law, a non-Federal authority under a state statute.

CHAIRMAN MITCHELL: Maybe we ought to talk about that

a little bit.

I am assuming that the Committee would like to go into the Supreme Court at twelve o'clock. There are some interesting cases on the docket. We can then come back here at two o'clock.

Let's talk about this business for five or ten minutes, this rare case where a condemnation under a state law in which the Government is interested is instituted under state authority and then reaches a Federal court because of diversity of citizenship or maybe because of a Federal Constitution question.

As you know, Judge Donworth was very strong for having that follow the state practice procedure. I was hopeful that Judge Driver would be here because there are some of those situations that have arisen in the Federal courts in the West.

Judge Donworth has talked about a big one.

What are we going to do about that? Are we going to provide that, if it started under state statute, then it is removed to the Federal court, we shall switch to the Federal system or stick to the state system?

There are other cases where the constitutional provisions of the state where the authority is granted or limited require that there be a jury trial, or something like that.

MR. PRYOR: That is the main question, whether or

not you have a jury trial in accordance with state practice, and that depends on what you decide was controlling.

MR. DODGE: We have three drafts of possible rules on that point on pages 8 to 11.

PROFESSOR MORGAN: Page 8 covers the tribunal and page 11 covers the procedure.

CHAIRMAN MITCHELL: Rule 38 (a). You see, this only deals with the tribunal.

PROFESSOR MORGAN: Page 11 deals with procedure.

CHAIRMAN MITCHELL: Judge Donworth's point was that under the first alternative on page 11, where the condemnation was under the state power of domain, in some states the state law would attach a condition to the granting of authority, which condition affected a substantial right of the litigant, including the question of a trial by jury.

One of the problems is: Are we going to switch procedures when we start in the state court and then switch to the Federal court?

PROFESSOR MORGAN: That would be terrible.

MR. DODGE: What was your question?

CHAIRMAN MITCHELL: If you started a condemnation case, a non-Federal condemnation case in a state court under the state power of eminent domain and the case was switched to the Federal court after the case started, would you switch to the Federal procedure? I am talking about the general

practice. Or would you follow the state practice right through to the end?

PROFESSOR MORGAN: I don't see why you should have any different case after removal than you have in other removals. You proceed just the same as if the case was begun in the Federal district court.

JUDGE DOBIE: I don't see any difference. I don't see any reason for having a difference in the procedure where the case was started in the Federal courts or comes there by reason of removal. That is what we have in the rule.

MR. DODGE: But you won't affect the substantial rights of the parties.

MR. LEMANN: If you accept the tribunal, it might be hard to fit it into the Federal court, although they do fit it in under the conformity rule today.

CHAIRMAN MITCHELL: I have been under the impression that, if a corporation was organized under the laws of the State of Washington, a condemnation suit condemning a piece of land in Washington that belonged to a citizen of New York--

MR. PRYOR: That is true of any state law. The state can't deny the right to remove if the proper jurisdictional features are present, even though the statute provides that the appeal shall be to the state district court or to the county court.

PROFESSOR SUNDERLAND: Or if the state statute

provides for the particular court you have to go into.

MR. DODGE: What was that?

PROFESSOR SUNDERLAND: Even if the statute that creates the right prescribes the particular court of the state that that right should be enforced, that wouldn't preclude removal to the Federal court.

MR. DODGE: You may be right, but I have never seen such a case.

JUDGE DOBIE: In Wisconsin in the Whitcomb case, they brought suit against a nonresident and they held it could be removed to a Federal court. If a state creates a right, it cannot limit the court to which you must resort for that right. If it is a state right and the conditions prescribed by the Federal statutes obtain, then you can remove it.

MR. PRYOR: The same is true with reference to appeals for drainage assessments. Even though the state statutes prescribe that the appeal must be taken to a district court of the district, where the owner is an out-of-the-state corporation, it can be removed.

[The meeting adjourned at eleven fifty-five o'clock.]

MONDAY AFTERNOON SESSION

February 2, 1948

The meeting reconvened at two-twenty o'clock, Chairman Mitchell presiding.

[The following joined the meeting at this point:]

Lands Division, Department of Justice:

A. Devitt Vanech
J. Edward Williams
Robert R. MacLeod

Tennessee Valley Authority:

Joseph C. Swidler
C. J. McCarthy

CHAIRMAN MITCHELL: We will ask the Department of Justice people to talk to us first, if you will find seats in the rear, anywhere that is comfortable.

The Committee is interested at the outset in trying to settle this question about the nature of the tribunal to award compensation. As far as the general run of the procedure is concerned, you probably won't have any very difficult problem. The problem can probably be worked out there. We are still at sea as to what sort of tribunal should we settle on.

We have the attitude that heretofore the Department of Justice has expressed its favor of the jury to settle compensation and no commission, and the TVA doesn't want a jury and wants the commission. All the Federal judges who sat in TVA cases criticize that act alone on the ground that it provides

for a three-judge district court and the three judges are hard to get and take time and delay proceedings. They wanted one.

Our Committee has been discussing this question. I think that we feel it is unsafe to proceed on the assumption that by a procedure you can abolish the specially constituted three-judge court. We can do it in this case in the TVA, but we cannot do it in labor injunction cases and half a dozen other things. Everybody would see red around the neighborhood if we tried it.

There are plenty of authorities from which we can reach the conclusion that it is a jurisdictional matter. The courts have required that a three-judge court have jurisdiction over certain controversies where the single-judge court does not have it.

I have a case before me which was handed down in 1946 in which a three-judge court was required. One of the judges became sick and two sat and agreed and rendered judgment. They held it was void for want of jurisdiction.

JUDGE DOBIE: Doesn't the Tennesse Valley Act give express provision?

MR. VANECH: They have their own special legislation.

JUDGE DOBIE: It is perfectly proper to provide for proceeding with one judge.

MR. McCARTHY: Yes, it is provided for in the act.

MR. DODGE: What would be the effect of the parties

agreeing to proceed with one or two?

MR. McCARTHY: The statute expressly permits it.

CHAIRMAN MITCHELL: I am trying to outline to you what we are interested in right now. We thought it would be better to talk out this question of tribunal and after we set that in order in our minds, then the other pieces would fit in without much trouble. We had a lot of questions raised this morning that I couldn't answer and we want the Department of Justice to tell us about those things.

First, when you are condemning a piece of property and you get under a conformity system of the state law (there being no Federal statute prescribing the practice and tribunal) and the state law calls for commissioners, who pays the salaries of the commissioners?

MR. VANECH: We do, sir.

CHAIRMAN MITCHELL: This Committee has always shied away from any provision of law that caused a draft on the Treasury beyond that now required. Do you do it because you think it is the fair thing to do or because there is a law requiring it?

MR. VANECH: We do it because under the mechanics of the law the United States attorney or the attorney handling the case engages the commissioners under a court order and pays $50 a day and in some states $100 a day.

CHAIRMAN MITCHELL: Who fixes that?

MR. VANECH: Just recently we had a case where we agreed with the commissioners for a fee of $50 a day and after they had finished it amounted to twenty days or $1000. The court signed an order then giving each commissioner $2500, which was $1500 over and above our contract price.

We objected to that and worked out a compromise.

CHAIRMAN MITCHELL: You are talking now about who fixes the thing. You are proceeding on the theory that there is no law at all that fixes it. Does the state law fix it, or what?

MR. VANECH: It is not set for any particular jurisdiction. In the past it has been, but in some of the states it is just flexible. We have tried to get the commissioners to agree to accept $50 a day, yet in the case in point the court gave them $1500 more than we agreed to pay them.

CHAIRMAN MITCHELL: What did the state law provide for commissioners in that case?

MR. VANECH: To be fixed by the court.

CHAIRMAN MITCHELL: How about your authority to spend that money? Do you have an appropriation in advance for it?

MR. VANECH: Yes, we just have that in the appropriations for personnel, services and other expenses in connection with the operation of the Lands Division.

CHAIRMAN MITCHELL: You make an estimate for your

budget every year for that sort of thing?

MR. VANECH: Yes, sir.

MR. DODGE: Does the statute provide that you shall pay the commissioners?

MR. VANECH: No, sir.

JUDGE DOBIE: Have you ever worked out (I don't know whether it would be practical, but you have some general ideas that would be useful) any comparison of expenses between the jury system and the commissioner system? I should say commissioners are more expensive.

MR. VANECH: Very much more expensive. As a matter of fact, we prefer the jury system and prefer to do away with the commissioners. We feel as though that expedites the whole proceeding.

JUDGE DOBIE: The jury is faster, isn't it?

MR. VANECH: Yes, sir. Where you have the commissioners, you sometimes go back to the court anyway and it is just a delay in procedure; however, where you have the jury system, you have the one trial and it is over with. We have to pay interest during the time there is a delay.

JUDGE DOBIE: Whereas under the commissioners system you have the commissioners and then an appeal to the court and then you go up.

MR. VANECH: Yes, sir.

JUDGE DOBIE: Do you all prefer the jury system?

MR. VANECH: Yes, sir.

I might say this, that in the Lands Division of the department (and I have with me Mr. Williams and Mr. MacLeod, who are probably the two best experts in the country in this particular field) we are all of the opinion that the jury system would be the best way to handle these cases; however, we have no objection to the TVA special legislation if the TVA wants to do it in their own setup.

It certainly is a little bit harder for us when we go into that area. They can afford to go out and pay a little bit more for land, possibly on the creation of good will with the neighbors down there, where we have to go in and try to get it for the rock-bottom dollar by the appraisals that are made. They have appraisals, too, but I think they can be a little more lenient than we can.

JUDGE DOBIE: Do you think that there is much justification for the TVA system as against the jury system? We have had several of those cases. I am on the Fourth Circuit Court of Appeals. Sometimes they cover a wide area of very diversified land and they probably would be more difficult for a jury than for expert commissioners. Is there anything in that argument?

MR. MacLEOD: We have condemned lands in that same area--not as large an area but in the same locality. Some of our cases have gone to your Court.

JUDGE DOBIE: That is right, and you think the jury system worked pretty well on those cases?

MR. MacLEOD: Yes.

CHAIRMAN MITCHELL: What were they for?

MR. MacLEOD: A variety of purposes. During the war we took a lot of land for camps down there. We took the Oak Ridge property for the atomic bombs.

CHAIRMAN MITCHELL: There is no such area as involved in the water power and irrigation projects.

MR. MacLEOD: Not as regards the entire project, but we have very large areas. We have now on the Savannah River 30,000 acres which we are taking in a program for the development of the Savannah River for hydroelectric power, flood control and river improvement.

The suggestion has been made in that case by the judge that we waive a jury and have a commission appointed. That isn't the immediate locality, but we are pretty close to some of the TVA projects right in that area.

We have in Alabama large areas which are right in the TVA area.

MR. DODGE: Who made the proposition that there be a waiver of jury?

MR, MacLEOD: The Judge suggested that. My personal view was that I could not recommend it to the department.

JUDGE CLARK: I wanted to ask that, too. While the

jury procedure is fundamental, do you have trials by single judges and waiver of jury?

MR. MacLEOD: In some cases; but very seldom.

JUDGE CLARK: That is what would happen ordinarily. If a jury was waived, it would go to the single judge.

MR. MacLEOD: That is correct, sir.

PROFESSOR SUNDERLAND: Is it your practice to join many parcels with different ownership in the same proceeding?

MR. MacLEOD: Yes, it is.

PROFESSOR SUNDERLAND: Do you find that that is confusing to the juries?

MR. MacLEOD: No, sir.

CHAIRMAN MITCHELL: Do you have one jury covering 30,000 acres with hundreds of owners to pass on it?

MR. MacLEOD: We would not ordinarily because in 30,000 acres with a number of owners we would have a great number who would settle. They would be eliminated. We have had thirty and forty tracts with one jury and there was no confusion whatever in taking them up one right after the other. It is a very common practice.

MR. DODGE: Do juries deal fairly by the United States?

MR. MacLEOD: Yes, and with the owners, I hope, sir.

JUDGE DOBIE: Several cases came before our Court in connection with war projects and in a majority of the cases

that came before us it was the owner who was objecting and not the United States, which would rather indicate that the juries had been pretty fair by the United States and didn't have the tendency of booming the prices in order to benefit the people who live there.

MR. VANECH: Our experience has been that the juries have been most fair as far as the Government and private litigants are concerned.

PROFESSOR MORGAN: Would you prefer to try your cases before a single judge or a jury?

MR. VANECH: It all depends.

PROFESSOR MORGAN: On the judge?

MR. VANECH: No, it depends on the type of case.

PROFESSOR MORGAN: Take this case of 30,000 acres where he said he wouldn't recommend substituting commissioners for a jury, would you recommend substituting the judge for a jury?

MR. MacLEOD: No, I would not, sir. That is my personal view.

PROFESSOR MORGAN: You would rather try it before a jury with thirty-five tracts of land than before a single judge.

MR. MacLEOD: Yes. In that particular case I mentioned there are three power companies involved which own most of the land. There will be a large number of private ownerships

later in the project.

I personally would prefer to try the case before a jury rather than a judge.

PROFESSOR MORGAN: In the matter of time consumed, does it take you much longer before a jury than before a judge?

MR. MacLEOD: In that particular case I would say that, with all respect to the court, it would probably take us longer with the judge, because the judge would not make any rulings on the evidence. The judge would hear the evidence and then rule, whereas with the jury he would, no doubt, exclude a great deal of evidence, so that it would probably take longer.

MR. WILLIAMS: It is a bit difficult to get a good record for appeal purposes for cases not tried before a jury.

PROFESSOR SUNDERLAND: How much do you save in the way of labor and effort by joining different tracts over bringing a separate proceeding for each ownership?

MR. MacLEOD: That would depend entirely on the case, sir. I couldn't estimate.

PROFESSOR SUNDERLAND: Do you think there is a very considerable saving in joining?

MR. MacLEOD: There is no question about it. We have had cases with 300 and 400 tracts.

PROFESSOR SUNDERLAND: With different ownerships?

MR. MacLEOD: With different ownerships. There is just a tremendous saving in the physical work of preparing

papers for 300 or 400 separate cases compared to doing it all in one case with mimeographed descriptions and mimeographed lists of parties. You can mimeograph your copies of notice since they are all the same. The saving in just physical work is tremendous.

MR. VANECH: Then you have a money saving, too, on publication.

JUDGE DRIVER: Isn't it true that you have to condemn on occasion land in town sites where you have literally hundreds of tracts of small value that would require separate pleadings if you had to separate them?

MR. VANECH: That is right.

MR. MacLEOD: We had made a practice of combining tracts without any objection or difficulty except that in Oregon the court requires us to break down the tracts when we make deposits. I think that is the only place in the country where that is required and we have had no difficulty in any place else in the country.

PROFESSOR MORGAN: Where you try these large numbers of tracts before a jury, do you get a separate verdict for each tract?

MR. MacLEOD: Yes, sir.

PROFESSOR MORGAN: Do you get it at the end of all the evidence or do you put in all the evidence on Tract A and get a finding of value there and then proceed to the next tract,

or do you submit the whole business and then have separate findings for each tract?

MR. MacLEOD: That depends entirely on the type of case and the type of land and the ruling of the court. The general practice is for the court to require whatever will do substantial justice and equity to the parties. Generally we start with one tract at a time.

PROFESSOR MORGAN: One tract at a time. Then you don't throw all the evidence to the jury at one time.

MR. MacLEOD: No. If the evidence is simple, it may be thrown in together.

PROFESSOR SUNDERLAND: In effect you have separate trials.

MR. MacLEOD: Yes.

MR. DODGE: You wouldn't favor a provision that there should be a commissioner with discretionary power in the court to order a jury trial on the application of either party?

MR. VANECH: We would rather not have that. We would rather have a jury trial in the first instance.

CHAIRMAN MITCHELL: Your principal trouble with commissioners is that their allowances have been too big?

MR. VANECH: It is quite an expense--expert witnesses and expenses therewith--Mr. Chairman.

CHAIRMAN MITCHELL: If you kept the jury sitting on one case with fifty different owners and separate trials day after

day and week after week, have you ever stopped to compute the jury mileage and per diem for the commissioner and compare the thing?

MR. VANECH: We feel that after you have accomplished that, you have accomplished something. Under your commissioner system it is just a preliminary and you have to start in all over again.

CHAIRMAN MITCHELL: You start in all over again if you provide for a jury trial on appeal from the commissioner, but suppose you go from the commission just to the court without a trial de novo and have immediate affirmance or disapproval on the record.

MR. VANECH: In a great many of these cases it has been our experience that where the commissioners are involved they have an interest in delaying the case and stretching it out, and in the long run it costs the Government more money. It may be a little more expensive in the situation you just cited to use the jury, but we feel that we have eliminated certain expenses that are not necessary by having the commissioners eliminated.

PROFESSOR MORGAN: Do you get a result more quickly from a jury than from a commissioner?

MR. VANECH: Yes.

PROFESSOR MORGAN: These commissions postpone and postpone so it takes forever and a day to get the case finally

submitted?

MR. VANECH: You will find that some of these commissioners probably will sit for a few hours a day and then sit again for a few hours on another day.

JUDGE DOBIE: And charge you by the day rather than by the hour.

MR. VANECH: Yes.

MR. DODGE: Then reserve a decision and wait until they can get together.

MR. VANECH: They will meet a few times to consider it and then we are paying for the additional expenses.

JUDGE DOBIE: That is the sort of situation we have had where New York law firms want to charge $30 an hour when a lot of the work was done by the law clerks and they wouldn't specify what was done by the law clerks and what was done by the partners.

MR. MacLEOD: We have a case now pending in New Jersey. We understand that counsel representing the landowners is receiving a fee of $400 a day. That is the rumor. That case is being tried to commissioners. I don't know the counsel representing the landowners. I don't know a thing about it, but certainly there is an incentive there for counsel to take a great deal of time before those commissioners.

There also is an incentive to the commissioners who will receive high fees, as they do in New Jersey, to go on day

after day. In that particular case we know that, unless the commissioners exceed in conscientiousness and ability anything we have ever had in the State of New Jersey before, we are going to a jury trial. It is just a positive fact that one side or the other is going to ask for a jury trial and we will get it as of right and it will be a trial de novo.

CHAIRMAN MITCHELL: That is an objection to the commission plus a jury.

MR. MacLEOD: That is correct.

CHAIRMAN MITCHELL: Just take the commission case alone with appeal to a judge.

MR. MacLEOD: Our experience is exactly the same with the commissioners without a right to a trial de novo by a jury.

We just had a case that was reversed and sent back to the court. It was tried to commissioners in New York. That case dragged on for days. The commissioners took it under advisement. They convened and considered it for days. That is the case you mentioned, Mr. Vanech, where the fees were $2500 apiece.

CHAIRMAN MITCHELL: Suppose you had a rule that forbade the court to allow more than $25 for an eight-hour day for commissioners. Your trouble is that you don't have any control.

MR. MacLEOD: We consider we do have complete control

over it.

CHAIRMAN MITCHELL: You were just complaining about a $2500 allowance.

MR. MacLEOD: We are in this position. It has been held time and time again that costs cannot be assessed against the United States. These commissioners' fees are payable from the funds that are appropriated to the Department of Justice and are under the control of the Attorney General and Assistant Attorney General. However, we have to try our cases in the courts.

CHAIRMAN MITCHELL: Your point is that, if you are stingy about fees, you get a bad result from the commissioners.

MR. MacLEOD: We have difficulties with the courts because they don't know their fees while they are acting. Their fees are fixed afterwards generally.

CHAIRMAN MITCHELL: Suppose you are not responsible at all. The rule would state a limit and that was to be for an eight-hour day. Why would you get any bad reaction as far as the result is concerned with the court or with the commissioners, if they are held down in that way?

MR. VANECH: In that connection we have to take into consideration that in some of these cases where you do get real experts in this field, if you held them down to some limit like that, I am afraid it would be hard to get these outstanding men whom we have to have sometimes in some of these big cases.

I am not complaining too much about the time they put in. I wouldn't mind if they would just do the job and do it expeditiously and not drag it out. I think that is what you mean by the eight-hour day.

If we tried to do that, I feel certain we wouldn't be able to get these expert appraisers we sometimes need in complicated cases.

MR. LEMANN: These are not appraisers.

MR. VANECH: Commissioners.

MR. LEMANN: They hear the testimony of the appraisers.

MR. VANECH: Yes.

CHAIRMAN MITCHELL: What does the TVA pay for commissioners?

MR. SWIDLER: We pay $15 a day, fixed by law.

CHAIRMAN MITCHELL: Do you succeed in getting competent men at $15 a day?

MR. SWIDLER: Yes, sir. The fee is not enough to make the job a political plum. The judges take pride in their appointments. There is some prestige attached to serving as commissioner and we secure on the whole very competent commissions.

TVA has no part in the selection of the commissioners. They are selected by the court.

PROFESSOR SUNDERLAND: Are they standing commissioners

who serve for a considerable period?

MR. SWIDLER: Yes, sir; they are standing commissioners for the whole condemnation program in a particular area.

PROFESSOR SUNDERLAND: How many would there be of those standing commissioners at one time?

MR. SWIDLER: There would probably be standing commissioners in each court in which we were condemning land.

CHAIRMAN MITCHELL: Three men in each court?

MR. SWIDLER: Yes, sir.

CHAIRMAN MITCHELL: No alternates?

MR. SWIDLER: No, sir; if one man cannot serve for any reason, a substitute is appointed.

JUDGE DOBIE: Doesn't the court confer with you before appointing those men?

MR. SWIDLER: Not ordinarily.

JUDGE DOBIE: You don't have anything to do with it at all?

MR. SWIDLER: No, sir.

JUDGE DOBIE: Does it confer with the landowners?

MR. SWIDLER: No, sir. Frequently the cases have not all been filed at the time they are appointed. At the time the first case is filed we submit orders in blank for the court to fill in the names and make the appointments.

CHAIRMAN MITCHELL: What happens in the District of Columbia when you have a government condemnation with this so-

called five-man jury law? Are they picked by the judges here?

MR. MacLEOD: The District of Columbia?

CHAIRMAN MITCHELL: Yes.

MR. MacLEOD: They are drawn from a special freeholders' panel and the regular practice with most of the lawyers who represent landowners is that there is an agreement among those lawyers (there are a group of lawyers who represent landowners)--

JUDGE DOBIE: Specialists?

MR. MacLEOD: Yes, they are specialists. They have a special jury panel that is made up of freeholders and there will be anywhere from twenty to thirty on that panel. Almost invariably government counsel and the landowner's counsel will get together and by agreement strike off the names except five and those five will then act.

CHAIRMAN MITCHELL: How much do they get paid?

MR. MacLEOD: Ten dollars a day.

CHAIRMAN MITCHELL: Is that a limit by law?

MR. MacLEOD: That is by law. The difficulty we have with this special jury in the District is the time factor. The case is tried in court and then there is no action taken until a transcript has been prepared. That may take a varying time, just depending on whether the reporter is busy and how long the trial was. Counsel will then meet and correct the transcript, which also takes time. The transcript is then

delivered to the foreman. They will consider it. We have at times endeavored to have the court fix the time for the jury to make their return.

CHAIRMAN MITCHELL: Does the judge preside at the hearing of evidence by the commission?

MR. MacLEOD: Presides at the trial; yes. The courts have not yet made any ruling in any case as to the time that the verdict shall be determined. When the commissioners have finally arrived at their verdict, they notify the clerk of the court and a return is made. In the ordinary case involving no unusual features, a trial would probably take three days, it would probably be six weeks or two months before there was a verdict.

I personally feel that those five-men commissions could arrive at just as fair and considered a verdict if not a better verdict if they did not adjourn and meet by themselves out of control of the court, if they did not have to arrange their own personal affairs so they can get together to discuss the evidence. In some cases the jury will pass the transcript around to each one of the five jurors to be read and studied, which is time consuming.

I personally don't see why in the District that question of value should not be decided in the same way as any similar question of value in any other case where it might arise. I don't see why the fact that it is a condemnation case

involving a $1000 piece of property should cause some special procedure to be established when the same factual issue would be decided in other types of cases by a regular common law jury of twelve.

MR. PRYOR: In the District does the prescribed procedure contemplate a trial at any point along the line before a regular petit jury of twelve?

MR. MacLEOD: I beg your pardon.

MR. PRYOR: Does your procedure in the District at any point along the line contemplate a trial by a regular jury?

MR. MacLEOD: No, just by the special jury of five.

CHAIRMAN MITCHELL: Are they real estate men by requirement?

MR. MacLEOD: The only requirement is that they shall be freeholders. As a matter of fact (how it occurs I don't know), generally they are businessmen around town and are not necessarily real estate men but generally a higher type of businessmen in the city. We have high-grade condemnation jurors.

MR. PRYOR: Who selects the members of the panel?

MR. MacLEOD: The Jury Commissioner.

CHAIRMAN MITCHELL: That is provided for by law?

MR. MacLEOD: That is correct.

MR. DODGE: It is called a jury of five?

MR. MacLEOD: That is correct.

MR. DODGE: Apart from the objections you have raised,

does the Department of Justice object to that form of procedure in the District of Columbia?

MR. MacLEOD: I am speaking from memory and am subject to correction. Mr. Williams knows more about that than I do. We have recommended the regular jury trial to include the District.

MR. WILLIAMS: That is correct.

MR. DODGE: Ordinary jury of twelve?

MR. MacLEOD: Yes, sir.

MR. WILLIAMS: We would prefer to have the evidence go to the evaluating body under the supervision of the court. We would much prefer that rather than, as happens in the commissioners, where one is appointed chairman and he rules on the evidence.

Under the situation you were discussing, Mr. Chairman, the report when filed would go to the court for consideration. Upon hearing of exceptions filed, the court would affirm or if it rejected the decision, it would go back to the commissioners for a further hearing. That necessarily has to be so.

If the court is given the authority to reduce or increase the amount of award, you might as well have your trial to the court in the first instance.

We find on appeal it is very difficult under normal circumstances to reverse a judgment based upon the findings of a commission where that commission arrived at the facts.

CHAIRMAN MITCHELL: You would have more trouble reversing the findings of a jury.

MR. MacLEOD: Not in perfecting the record.

MR. VANECH: The record is in better shape.

MR. DODGE: Doesn't the judge preside at the trial to a five-man jury?

MR. MacLEOD: At the trial but not in the hearings to consider their verdict. They do that themselves.

CHAIRMAN MITCHELL: The only difference is that in an ordinary jury trial they go off in a room by themselves and the judge is not there, but they have to sit there until they get through. Under this system they can take their time. All you need is a time limit by law or rule as to when the report should come in.

MR. MacLEOD: When you have a jury that has heard the evidence and then immediately considers the evidence and arrives at a verdict, they have everything that happened in the trial in mind. They remember the witnesses. They remember them not as names; they remember them as persons. They see them. They are testifying before them.

With the District system it is generally two weeks or a month before they are presented with the transcript. Almost anyone taking a transcript knows that it just isn't the same reading a transcript on black and white as considering what the witness has said on the stand, the demeanor of the witness, and--

JUDGE DOBIE: And he forms impressions at the time the testimony is given.

MR. MacLEOD: That is correct.

JUDGE DOBIE: Whereas, if he gets it stale afterwards, he has forgotten those impressions.

MR. MacLEOD: That is right.

CHAIRMAN MITCHELL: How does the TVA commission do its work?

MR. SWIDLER: The transcript is ordinarily not made up except in the case of appeal and decisions are handed down promptly after the conclusion of the hearing.

CHAIRMAN MITCHELL: What control have you? Why is it that the District of Columbia commissioners wander around for five or six weeks and the TVA commissioners make prompt decisions? We are trying to get at the causes of these things.

MR. SWIDLER: I don't know all the reasons. In our letters to the courts advising them of the need for appointing a commission we do make the suggestion that one member be a lawyer, and thus far every judge has accepted that recommendation and has appointed one member who was a lawyer--not more. The lawyers have been able men and the errors in the admission of evidence are probably not in excess of those which would occur in a trial to the court directly.

MR. PRYOR: There is one thing I don't understand about the District of Columbia situation. If the judge presides

at the hearing before the commissioners, how does it happen that the chairman of the commission has anything to do with the rulings on evidence?

MR. MacLEOD: I beg your pardon. I didn't hear your question.

MR. PRYOR: As I understand the statement a while ago, the commission appoints a chairman and the chairman rules on the evidence.

MR. WILLIAMS: I wasn't referring to the District of Columbia practice. I was referring to the commission system generally.

MR. MacLEOD: I don't want to volunteer statements here, but with reference to the jury trial my own personal view after a lot of experience with it is that we are taking what we consider to be the most universal method of determining compensation. There are some thirty-seven states where ultimately we have a trial by jury. So in our view that is the preferred method. We are following what is the statutory procedure in some thirty-seven states.

Of those states twenty-seven have a commissioner system as well, with a right to a trial by jury de novo. Our experience has been that the commissioner system injected into the jury trial method is merely a useless step. If there is any real controversy, one side or the other is going to ask for a jury trial.

CHAIRMAN MITCHELL: That is an objection to having both the commission and the jury. Let's forget about that for a while and think about one or the other.

MR. MacLEOD: My point is that in thirty-seven states or thereabouts the legislatures have seen fit to provide for a jury trial for the determination of this issue and in only seven or eight states do you have only commissioners--only four states, I believe. So our recommendation is in line with what is the majority opinion of the states.

Another phase of it is this: The issue of value in a condemnation case is no different than the issue of value in any other case. In those other cases we follow the usual method and have jury trials. I personally cannot see why there should be any distinction, when we have a case in which the United States is involved and we are spending the people's money, as to why the people should not decide how much shall be paid for property being condemned. After all, the jury spends the money of the general public and it is the general public that it represents.

MR. DODGE: Does the five-man jury have to be unanimous in the District?

MR. MacLEOD: Yes, unanimous.

MR. DODGE: How about the twelve-man jury?

MR. MacLEOD: Unanimous.

PROFESSOR SUNDERLAND: What is the essential difference in the function and operation between a commission and a

jury? Does the commission go off by itself and operate as a master would, taking testimony before it not in the presence of the judge, whereas the jury gets all the evidence in the presence of the judge?

MR. MacLEOD: That is right, and the court rules on the evidence.

JUDGE DOBIE: The court speeds it up, too, doesn't it?

MR. MacLEOD: Yes.

CHAIRMAN MITCHELL: The only big operation we know anything about where large areas are involved is the TVA. The United States had a number of other big enterprises, the Coulee Dam, the Hoover Dam, and I suppose other operations, that are on a parallel in a way with the TVA, involving great areas of land where you desire uniformity in awards. Certainly you don't want a jury giving one man twice as much as the fellow next door received.

Has the Department of Justice conducted those condemnation proceedings for those other big power and irrigation projects?

MR. MacLEOD: Yes, sir.

CHAIRMAN MITCHELL: Are they comparable in size with the TVA operation?

MR. VANECH: To a large extent.

MR. MacLEOD: We had projects along the Mississippi

River for the cannelization of the river from St. Paul to just above St. Louis. We took lands in connection with those projects in Minnesota, Wisconsin, Iowa, Illinois and Missouri. We had five different condemnation procedures. In Minnesota I think we had a six-man commission.

MR. WILLIAMS: Three; six in Iowa.

MR. MacLEOD: With a right of trial by jury. In Wisconsin we had a three-man commission with a right to trial by jury.

CHAIRMAN MITCHELL: You mean appeal to a trial by jury.

MR. MacLEOD: As of right.

In Illinois we had the jury alone. In Iowa we had a six-man commission. In Missouri we had a three-man commission with a right to a trial by jury.

I think that project would compare in extent and quantity of land, amounts of money involved and the complexity of the factual and legal questions with the TVA.

MR. WILLIAMS: We had tremendously large projects during the war, of course. One example was Camp Stewart in Georgia which consisted of 350,000 acres. Another example was the Hanford project in the State of Washington, in your district, Judge Driver, involving probably 500,000 acres.

CHAIRMAN MITCHELL: How was that tried? By a jury?

MR. WILLIAMS: By a jury.

CHAIRMAN MITCHELL: Did you have one jury handling the whole thing?

MR. WILLIAMS: They came on as contested cases and they were set down for trial as each case came up.

CHAIRMAN MITCHELL: Was there more than one owner involved?

MR. WILLIAMS: Yes. The tracts would average from 150 to 350 acres.

CHAIRMAN MITCHELL: You didn't get any uniform result with different juries dealing with the same sort of situation, did you?

MR. WILLIAMS: I think so. I don't think it was too much out of line. We have the Garrison Dam project in North Dakota, probably 500,000 acres, the Central Valley Project in California, the great Bonneville Dam in Oregon. Those were tremendous reservoir areas. Some of them go into many districts. You might have a different type of jury in different districts, still we think it is all right.

MR. VANECH: If the St. Lawrence waterway gets any place, it will be a big one.

JUDGE DOBIE: It will be a buster, won't it?

MR. MacLEOD: Depending upon the time and the conditions, there is a great uniformity of verdicts. It depends to a great extent on the area of the country.

For example, I can say that unless there was something

very unusual in Maryland our verdicts would run from 5 to 15 per cent over the Government testimony. I discussed at one time with Judge Chestnut the uniformity of verdicts. He told me at one time he and the assistant United States attorney had a formula for working out what the jury verdict would be and that was almost generally true.

For instance, on Camp Stewart, which consisted of 350,000 acres, there was a great deal of uniformity of verdicts. Of course that is not always true. We have some verdicts on particular tracts which will go up for one reason or another.

CHAIRMAN MITCHELL: In that case did you have to fight the thing out generally or did you settle a large portion of it without litigation?

MR. MacLEOD: In Camp Stewart we did settle not less than 80 per cent.

MR. DODGE: Is there any notable difference in tendency between commissioners and juries to favor one party or the other?

MR. MacLEOD: Are you distinguishing between commissioners and juries?

MR. DODGE: Do you get better verdicts from the jury than you do from the commissioners from the point of view of the Government?

MR. MacLEOD: I would say with commissioners you would get more compromise awards, where they arrive at some figure

in between all the evaluations testified to by the experts.

CHAIRMN MITCHELL: Isn't everything a compromise with twelve men on the jury and a unanimous verdict?

MR. MacLEOD: It is, but the juries are inclined to take one set of figures or the other. Also, they are instructed not to return a quotient verdict.

JUDGE DOBIE: Each man puts down what he thinks and they divide it by twelve.

Did you not find Judge Chestnut very expeditious and a very fine judge?

MR. MacLEOD: In my opinion in condemnation cases he is the finest judge you can find on the bench, and every land-owner gets justice in his court, at least in my experience.

CHAIRMAN MITCHELL: I have written every judge that ever sat in a TVA case and asked his views on this point and as far as the TVA is concerned, about the only objection to the system that is quite general among the judges is the necessity of having the three-judge district court instead of having the one-judge district court. If you eliminate that in the TVA system, you would have 95 per cent of the judges who dealt with those things not only in favor of the commission system and violently opposed to the jury system, but they volunteered the information that they believed in the commission system in cases other than the TVA cases.

I was in the Department for four years and I saw the

results of the conformity system where juries were used. I remember to this day how the Assistant Attorney General in charge of the Lands Division, Seth Richardson, shouted his head off because juries soaked the Federal Government. It was he who drew the TVA Act. He was out of the Department, but Senator Norris was interested in the TVA and he and another friend he had in the Senate appealed to him to draw up the TVA practice in condemnation cases and there it is. He wiped out the jury and substituted the commission and provided for this three-judge court. His idea was that, if three judges established a sort of standard for an area, the rest of the people would just about accept that in settlement. The TVA people have had splendid results.

I wrote Seth Richardson who used to be head of the Lands Division and who wrote the TVA law and handled condemnation cases for four years in the Department and his idea was that it was a question of whose ox was gored. For the four years he was there, from his experience (maybe they weren't as good trial lawyers as you fellows are), they were just outraged at the way juries would soak the Federal Government. They seemed to feel that, if the state or city was condemning in their own community, that was something else; but they could raid the Federal Treasury down here in Washington for the benefit of the landowners in their territory, and they were willing to do it.

Of course, it is hard for us to realize what a difference of experience there is in that sort of thing.

MR. VANECH: I think the trend has changed since then. There have been more dealings with the Federal Government on the part of the people of the various states.

CHAIRMAN MITCHELL: They are paying more taxes to the Federal Government.

MR. PRYOR: There are more people paying taxes, too.

MR. VANECH: They are getting to know the Federal Government.

MR. MacLEOD: I don't know whether Mr. Richardson mentioned the experience of the Department of Justice in the District of Columbia.

CHAIRMAN MITCHELL: He didn't have an awful lot of it in the District.

MR. MacLEOD: Some years ago, prior to 1929, the District had a purely commissioner system of three commissioners, who operated generally as commissioners now operate throughout the country. They sat and heard evidence and considered it themselves and, if you didn't like their award, you went to the court.

MR. Glassey, who was under Mr. Richardson and who was considered an outstanding condemnation lawyer in the District, instigated the movement to change the District act to provide for the five-man jury which would sit before the court so that

the court could rule on the evidence. His reasons were that the commissioners, as they do now in our cases where we have a commission, will take all the evidence there is and go on day after day and let the Government or the landowners offer evidence that is totally immaterial and irrelevant, with great expense and great loss of time and also, of course, of some influence to the commissioners by considering inadmissible evidence. I believe under Mr. Richardson Mr. Glassry drafted the present District condemnation act, which provides for the judge to sit and rule on the admissibility of the evidence at the time.

That is only indicative of my personal objection to the purely commissioner system where the commissioners sit out of the presence of the court with no ruling, and the experience in the District led to the change in the law to provide for this five-man jury system.

MR. VANECH: In connection with fixing the fees of commissioners, I didn't clarify my reason for saying $25 a day. It depends upon the type of property you are taking. For example, we are requested to take over an office building, say, for the Veterans Administration. You wouldn't get very good commissioners to sit who would understand that type of work for $25 a day. That is why if there was some breakdown between business property and vacant property and other commercial property, so the fees could be fixed in keeping with the type

of property that would be taken, I would be willing on that score; however, I am afraid to just limit them outright.

CHAIRMAN MITCHELL: What is the District law on fees for commissioners?

MR. MacLEOD: The District of Columbia?

CHAIRMAN MITCHELL: Yes.

MR. MacLEOD: Ten dollars a day.

PROFESSOR MORGAN: That is for the special jury.

CHAIRMAN MITCHELL: They are specially chosen people who would not work for $10 a day.

MR. LEMANN: What kind of people do the TVA get for $15 a day?

MR. SWIDLER: One lawyer, usually a real estate man and farmers usually who are well versed in land values.

MR. LEMANN: They are in a rural community. They could probably get a better man for $15 a day than you would in the City of Washington.

How many days do they usually sit?

MR. McCARTHY: That would depend of course on the complexity of the case. I would say that the average case is tried in one to two days. I don't believe the total commission fee on any case runs over three days. That is the length of our average case.

MR. LEMANN: Do they make a transcript of the proceedings?

MR. McCARTHY: They make a record, but it isn't then typed up until there is an appeal. The commission meets just like a court. They meet in the Federal courtroom. The attorney is always the chairman. He passes on the evidence. They hear proof in strict compliance with the laws of evidence. They decide the cases frequently that day, almost always in a week.

MR. LEMANN: When you go to the district court on appeal it is heard de novo by the three judges? They don't pay any attention to that record, you make up a new record, or am I wrong?

MR. McCARTHY: The statute says de novo, but actually the case is heard upon the record before the commission. All the district courts in which the TVA operates have made such a rule with the exception of Virginia. I don't think they have made such a rule as yet. The district courts all have standing orders which require each party on an appeal from an award of the commission to show cause why they should introduce additional proof, and in eight trials out of ten it is excluded. I don't believe we have had more than four or five cases in which additional proof has been taken by the court.

PROFESSOR MORGAN: It is really an equity appeal rather than a trial de novo.

MR. McCARTHY: The court passes on it pretty much the way the Circuit Court of Appeals would, except that it has

greater freedom in permitting evidence.

PROFESSOR MORGAN: That is not my idea of a trial de novo.

MR. MacLEOD: Wasn't that raised in the Parson case and the Fourth Circuit Court of Appeals spoke on that?

JUDGE DOBIE: We decided we could go into it de novo.

MR. LEMANN: In the appellate court the statute says you are not bound by the findings of the commission or the district court, but it doesn't say you shall try it de novo. The district court is supposed to try it de novo. The appellate court is free to disregard either the commissioner's report or the report of the district court in the awarding of compensation. They can ignore the verdict of either tribunal. I would think that the district court would try it de novo, but in practice apparently even the district court couldn't try it de novo, as I understand it.

CHAIRMAN MITCHELL: Do the words "de novo" appear in the statute?

MR. McCARTHY: Yes. It says: "On the hearing before the district court, such judge shall pass de novo on the proceedings had before the commission, may review the findings and may review additional evidence."

CHAIRMAN MITCHELL: That means they can receive the record made before the commission and add to it if they want to.

MR. LEMANN: It doesn't say try de novo; it says "pass de novo".

greater freedom in permitting evidence.

PROFESSOR MORGAN: That is not my idea of a trial de novo.

MR. MacLEOD: Wasn't that raised in the Parson case and the Fourth Circuit Court of Appeals spoke on that?

JUDGE DOBIE: We decided we could go into it de novo.

MR. LEMANN: In the appellate court the statute says you are not bound by the findings of the commission or the district court, but it doesn't say you shall try it de novo. The district court is supposed to try it de novo. The appellate court is free to disregard either the commissioner's report or the report of the district court in the awarding of compensation. They can ignore the verdict of either tribunal. I would think that the district court would try it de novo, but in practice apparently even the district court couldn't try it de novo, as I understand it.

CHAIRMAN MITCHELL: Do the words "de novo" appear in the statute?

MR. McCARTHY: Yes. It says: "On the hearing before the district court, such judge shall pass de novo on the proceedings had before the commission, may review the findings and may review additional evidence."

CHAIRMAN MITCHELL: That means they can receive the record made before the commission and add to it if they want to.

MR. LEMANN: It doesn't say try de novo; it says "pass de novo".

important thing to the litigants and to the Government. Many of these people have their life's savings tied up and we feel that this should be presented in such a way to a court that they can be properly protected, that records can be made, that the rules of evidence can be passed upon by the judge who is competent to pass on them.

In that way, we feel that, although it costs the Government more money, if it does that, justice prevails. We are not out to take these people and knock them over the head, and take their property away. That isn't the right thing and it isn't the proper thing to do.

Where, as in the last war, the Government had to go into a big program of taking people's property overnight, the American people have showed their patriotism by giving them up. In many cases there were bulldozers at the back door before they had a chance to relocate themselves.

If we are going to do that (and we have to move in fast), we can deposit the money and take possession, as was done during the war. They could draw out from the deposit the amount put on the property by the appraiser for the Government. They have the right of appeal.

We should see to it that the whole procedure is iron-clad in that it protects the rights of the individuals as well as the Government. The only way to do that is to have it done through channels that people who are working on this particular

procedure may have a chance to pass on the legal questions. That is why in a jury trial with the judge passing on the questions, you have established a record that is fair to all concerned.

MR. LEMANN: How many condemnation proceedings did you have in 1947? How many were instituted?

MR. VANECH: I would say 15,000 to 20,000.

MR. MacLEOD: Tracts.

MR. LEMANN: Not that many separate proceedings, but thousands of proceedings.

MR. WILLIAMS: The average is ten tracts per proceeding.

MR. MacLEOD: There are something like 285 river improvement and flood control projects being carried on by the War Department at the preset time. We will have a great deal of condemnation in each one of those projects. A great deal of that work will go into a great number of tracts.

MR. LEMANN: Is the TVA likely to decline more in condemnation cases?

MR. SWIDLER: I wouldn't say so, sir. We are not yet in the bulk of condemnations that will be necessary in connection with the two dams which are now under construction, and the volume of condemnation cases for transmission-line purposes will probably remain stable, if it does not in fact increase.

I think it will have appeared to the Committee, if I may say so, that the Department of Justice and the TVA are not talking about the same kind of a commission proceeding. The experience of the Department with a commission proceeding apparently has not been very happy; but they have had no experience with the TVA commission procedure. Their proceeding has been under the Conformity Act with the commissions established under various state laws.

Ours is one specifically designed for a Federal agency and has features which are quite distinctive and which do not present any of the major objections to which the Department of Justice refers.

CHAIRMAN MITCHELL: What are the distinctive features of the TVA commission as compared with the general use of the commission?

MR. SWIDLER: Well, the first one is that there is no appeal from the commission to a jury. In most of the states apparently, as I gathered from the statements which were just made by the representatives of the Department of Justice, the commission proceeding is a wasted effort because either party may, and one almost always does, exercise the right of appeal, and then the whole case must be tried again before a jury.

In the second place, under our proceeding all of the evidence must be put in before the commission because the courts require a showing of necessity before permitting the introduction

of additional evidence, so that there is importance and dignity in the proceedings of the commission.

Another feature is that the commission is not appointed for single cases but is appointed for the whole proceeding in the area, so that they acquire a degree of competence which commissions acting in isolated cases would not be likely to obtain.

Moreover, the statute provides that the commissioners must not be drawn from the area in which the property is located, so that the commissions, although usually consisting of men generally well versed in real property values, exclude the men who have an interest in awards being either high or low.

CHAIRMAN MITCHELL: How does that work? Is the United States district court under your system limited to including no more than land in that district in its proceedings? It cannot have lands in two districts or two states before a single district court?

MR. SWIDLER: That is right, sir.

CHAIRMAN MITCHELL: If you have a larger area than the district that is being condemned, you cannot go outside the district to select the commissioners?

MR. SWIDLER: None would be selected who live in the reservoir area, for example, so there isn't the pressure of one's neighbors being involved in the condemnation.

MR. LEMANN: You have standing commissioners?

MR. SWIDLER: Yes.

MR. LEMANN: How many such groups do you have today?

MR. SWIDLER: Half a dozen.

MR. DODGE: How frequently does the TVA appeal to the three-judge court from the commissions?

MR. SWIDLER: Very, very rarely. What would you say?

MR. McCARTHY: I would say there are appeals in possibly 8 to 10 per cent of the cases and that the appeals were about equally divided.

CHAIRMAN MITCHELL: Between the Government and the property owners.

MR. McCARTHY: Yes.

MR. LEMANN: They usually stop in the district court?

MR. McCARTHY: Almost always, sir.

MR. SWIDLER: There have been only a dozen cases that went to the CCA in all.

MR. MacLEOD: With all respect to Mr. Swidler, if I may say so, there is nothing unusual about a Federal statute providing for a commissioner system. In the Mississippi flood control legislation they originally provided for a commissioner system, a commission of three men. That was amended about two years ago to provide for the determination of value in accordance with the state procedure, applying specifically with respect to the determination of compensation and the Conformity Act with respect to the Mississippi flood control project.

JUDGE CLARK: Who asked for that change? Did you?

MR. MacLEOD: We did not.

MR. WILLIAMS: It was principally as a result of the objections of the State of Missouri and others that we are not entitled to a jury trial.

MR. MacLEOD: Congress eliminated the three-man commission and made us conform to the Missouri state law.

CHAIRMAN MITCHELL: Isn't that what you have in the situation that arose when Congress beat you down on the two bills that were introduced a couple of years ago, where no matter what the system was in the state, jury or commission, all the congressmen clubbed together and said they wanted to have conformity with the state law?

If we provided for a jury system in all cases such as you want us to do, you would run up against the same situation in the House. I read all the debates on those two bills. Their views are reflected in the Mississippi case saying that the system ought to be whichever is prescribed by state law. Congress would disapprove any such attempt on the ground that we were not using the conformity system as to these compensation tribunals.

I read all the debates in Congress on those two bills and without a doubt the bulk of the congressmen were of the opinion that the conformity system ought to prevail and everybody who spoke on the subject said, "I want the system that my

state uses," be it jury or commission. And they all voted against the bill.

MR. MacLEOD: The reports you received from the bar generally indicate the same view.

JUDGE CLARK: You have had them all.

MR. MacLEOD: They generally favor their local system.

MR. VANECH: They are jealous of their own system.

MR. LEMANN: Except Mr. Armstrong who says that we are poltroons unless we adopt a uniform system for everybody.

MR. MacLEOD: I can't see the distinction that Mr. Swidler endeavors to make. His principal point was that these findings of their commissions were not appealable to the jury. We have that experience in four states and we had it under the Mississippi flood control legislation prior to the amendment. We follow the regular rule in selecting jurors which are impaneled. And the judges invariably follow the rule that they want and we want jurors and commissioners from the area rather than from some other area who may be totally unfamiliar with the land in that area.

We feel the better informed whatever body is that is determining the compensation, the fairer and more equitable will they be in their determinations.

Outside of that one distinction that the commissioners under the TVA must not be from the area, I see no difference

than the proceedings we have had with the commissioner system.

MR. LEMANN: How many other statutes besides the Mississippi River improvement statute are there that you can think of setting up a special system?

MR. MacLEOD: Federal?

MR. LEMANN: Yes.

MR. MacLEOD: None except the District.

MR. LEMANN: That was one of the questions we were agitating this morning: How many other Federal statutes are there that set up special tribunals, other than the TVA and the District of Columbia?

MR. WILLIAMS: You do have a procedure in the District using commissioners.

CHAIRMAN MITCHELL: They use the five-man system.

MR. MacLEOD: That is right.

CHAIRMAN MITCHELL: In addition you have the Federal statutes that specify the tribunal, like TVA, the District of Columbia and the Mississipi River flood control.

MR. MacLEOD: That was amended.

CHAIRMAN MITCHELL: But it was fixed by Federal statute.

MR. DODGE: There are a lot of the Federal statutes that say you should follow the local practice. There is one of them in Mississippi.

MR. MacLEOD: Yes.

CHAIRMAN MITCHELL: In the original statute they provided for a commission and not a jury.

MR. MacLEOD: Yes.

CHAIRMAN MITCHELL: The same as in the TVA, from commission to judge. Is there any other that provide for commissions?

MR. MacLEOD: Do you know of any other?

MR. WILLIAMS: No.

JUDGE CLARK: There are new ones like the Atomic Energy Act, which deals with patents, and so forth.

MR. VANECH: We handle that in the Department for them.

JUDGE CLARK: That has a special tribunal or patent compensation board.

MR. WILLIAMS: Not for the acquisition of real estate.

JUDGE CLARK: Our rule on the surface would deal with everything, and, if not, it should deal with everything.

MR. WILLIAMS: As to real property it should deal with everything.

The rule says: "property for public use".

CHAIRMAN MITCHELL: Do you conduct condemnation proceedings in the Department today on personal property for the Government's use?

MR. VANECH: Leaseholds.

CHAIRMAN MITCHELL: That isn't personal property. I am talking about machinery and patents and rights of that kind.

MR. VANECH: Not in the Lands Division.

CHAIRMAN MITCHELL: Is the law on patents about what it used to be, that the Government could make use of the patents without a license and authorize its use by a contractor without a license and then forbid the patentee from suing the contractor, requiring him to bring a suit in the Court of Claims to recover the reasonable value for the use the Government put the patent to?

MR. VANECH: I haven't been in that field, but there has been some change with regard to properties that are held by the Alien Property Custodian.

CHAIRMAN MITCHELL: The title to those patents are in the Government, but I am talking about an American citizen, not an alien enemy. The law used to be, as I knew it, that the Government did not have to condem and there was no procedure for condemning a patent and taking title to the patent. They used the invention and also contracted with the contractor so he could use the invention and prohibited the patent owner from suing the contractor, or enjoined him, and relegated the patent owner to suing in the Court of Claims for damages.

Is there any difference in that today?

MR. VANECH: I wouldn't know. That is handled in the

Claims Division exclusively. That is a special field.

CHAIRMAN MITCHELL: If there was a condemnation statute, wouldn't you know about it?

MR. VANECH: Yes. We deal only with the land.

MR. MacLEOD: Mr. Chairman, with respect to your question about machinery--

CHAIRMAN MITCHELL: I am not talking about fixtures.

MR. MacLEOD: You usually talk about machinery affixed to the real estate.

MR. LEMANN: Can you give us cases where you tried to get through Congress special procedures, as in the Mississippi project, and Congress voted them down?

MR. VANECH: For example, the Columbia River Valley Authority. They wanted to handle the litigation with respect to their particular projects, similar to the way TVA handles its own projects, in connection with real estate out there.

MR. LEMANN: That was voted down?

MR. VANECH: What really happened was that we were not consulted about it. It had passed the Senate. We recommended a veto. The parties who sponsored the bill said they would take the section and introduce new legislation if the President wouldn't veto the bill. That was done and it eliminated the necessity of a veto.

MR. LEMANN: That legislation went through with a provision for the application of the Conformity Act in the

Columbia River project?

MR. VANECH: That was mainly the handling of different problems in connection with the Columbia River authority.

MR. LEMANN: How do you handle it when you expropriate property there? Do you proceed under the laws of the state?

MR. VANECH: Yes.

MR. WILLIAMS: The Bonneville attorneys wanted to represent themselves. It had nothing to do with procedures.

MR. LEMANN: Or tribunals fixing values?

MR. WILLIAMS: No, sir.

MR. LEMANN: Have you had other instances where you tried to get statutes through to set up special tribunals and Congress voted them down?

MR. WILLIAMS: The general bill to establish the jury trial system throughout the United States, getting away from the Conformity Act.

MR. LEMANN: That was tried twice, wasn't it?

CHAIRMAN MITCHELL: Yes, there were two bills.

MR. MacLEOD: A bill was offered and not acted upon in one Congress and then introduced in the next Congress and voted down.

CHAIRMAN MITCHELL: You want us to adopt a rule that provides for all the cases you have to deal with, that a jury shall be used notwithstanding the state law might provide for a commission.

MR. VANECH: That is right.

CHAIRMAN MITCHELL: In the face of the fact that Congress twice refused to pass that kind of law and in the Mississippi case has changed from the commission system and gone back to the conformity system, what chance do we have of being overruled by the Congress?

MR. WILLIAMS: We suggest either party, if he so desire shall have a jury upon filing a demand for it in the usual way. They can be tried by the court unless the parties desire a jury.

CHAIRMAN MITCHELL: I am talking about a commission. You want us to exclude by rule the use of commissions. You don't like commissions and you want the rule to provide for a jury trial unless the parties waive a jury and try it to a judge.

That proposition has been put up to Congress twice and beaten, and in one case where they provided for a commission system, not a jury, in Mississippi, that desire for a conformity system has induced Congress to pass a law changing the Mississippi system and make the tribunal that which is prescribed by local Mississippi law, as I understand your statement.

MR. VANECH: Mr. Chairman, we feel the recommendation we made is the fairest to the Government and the property owners.

CHAIRMAN MITCHELL: What is that recommendation?

MR. VANECH: That the matter be handled by the jury system and we do away with the commission system.

CHAIRMAN MITCHELL: I know you do. How are we going to override the record in Congress and gamble on getting by?

MR. VANECH: I think if they have proper hearings on this, we can point out that it is the only fair way to deal with property owners. Then they have competent people passing upon the evidence and dealing with the litigation and you get away from a lot of these dilatory tactics that I feel has made many of the people of the country a little disgusted with the time and red tape it takes to put through a proceeding. It is no fault of the court because the commissioners have to have time to consider it.

CHAIRMAN MITCHELL: You are satisfied, if you refused to follow the conformity system which Congress seems to want and prescribed a jury trial in all cases as the initial and final body to pass on values, you could persuade Congress to shift its position, which obviously is in favor of the conformity system, as far as the tribunal is concerned, and I think you are counting on that pretty strongly in view of the arguments you are going to have in the House. I didn't see any argument in the Senate.

MR. DODGE: Don't we have jury trials in thirty-seven states?

MR. MacLEOD: Yes, sir.

MR. PRYOR: If Congress wants to conform to the system that is representative of thirty-seven states, they would be getting it by voting for a jury trial.

JUDGE DRIVER: Congress might view a proposed rule differently than a bill introduced in Congress. The burden of proof is the other way.

MR. WILLIAMS: Particularly if it had the support of this Committee.

JUDGE CLARK: Do you recall, Mr. Vanech, the four states that had some other system?

MR. VANECH: Michigan, Oregon, New Jersey and New York.

PROFESSOR SUNDERLAND: Michigan has both kinds.

MR. MacLEOD: New Hampshire.

JUDGE CLARK: How do you decide what to conform to? There are various procedures in some states.

Mr. Sunderland, who comes from Michigan, was telling us about the number there. In our own state, Connecticut, there are two recognized practices. One is the full commission of three and the other, which is particularly being followed now in highway cases, is the court which refers it to a state referee, a retired judge as a master. How do you decide what to conform to?

MR. WILLIAMS: If they have a general statute, we conform to a general statute.

JUDGE DOBIE: Suppose they don't have a general statute.

CHAIRMAN MITCHELL: Michigan doesn't have a general statute. They have a dozen different statutes.

MR. WILLIAMS: It is fixed by the Federal Court in Michigan and they use the commission system.

MR. MacLEOD: Michigan is illustrative of what we run into in regard to the general practice. In the Western District we use commissioners under a rule of the Court, with a right to a trial by jury on demand. In the Eastern District we can go directly to a jury. We have no commissioners in the Eastern District.

MR. WILLIAMS: That is true in Virginia, too.

MR. LEMANN: Did you say there were thirty-seven states that provide for jury trials?

MR. WILLIAMS: Yes, sir; either in the first instance or upon request.

PROFESSOR MORGAN: I was interested in the Mississippi project where you had four states, three of whom had commissioners with appeal to a jury and Missouri had commissioners alone. What was your experience in that situation with reference to speed, and so forth, contrasting Missouri with Wisconsin or with Minnesota?

MR. WILLIAMS: We had the same staff of attorneys handling that project. They preferred the Illinois system of

a direct jury trial in the first instance. You try a case once and for all and you are through with it.

PROFESSOR MORGAN: They thought that was better than the Missouri system of commissioners with appeal to the court?

MR. VANECH: Iowa has six commissioners.

MR. WILLIAMS: The attorneys preferred the Illinois practice.

MR. MacLEOD: And none of them were Illinois lawyers.

CHAIRMAN MITCHELL: What about the burden on the courts in having jury trials in all these cases where there are many scores of property involved?

MR. WILLIAMS: The vast majority of those cases are settled. On occasions where an agreement has been reached and the title is bad we have to run it through the court and proof it up. We can proof it up before a jury faster than we can before a commissioner and get pretty much of a directed verdict.

CHAIRMAN MITCHELL: How about a contested case?

MR. WILLIAMS: If it amounts to anything at all in thirty-seven of our states, it will get to the jury anyway. One party or the other will oftentimes not put up his case before the commission, saving it for the jury trial and not wishing to reveal it.

CHAIRMAN MITCHELL: Again you are arguing against both the commission and jury. I haven't heard anybody on the Committee favor that. But here was your Missouri situation,

which for some time was a matter of commission plus a judge, and you had other jurisdictions in which you had a jury system alone, or did you have commission and jury?

MR. WILLIAMS: The Illinois practice is a jury in the first instance.

CHAIRMAN MITCHELL: Between the two, how much of the time of the Federal court in the last state you mentioned, Illinois, was taken up with jury trials?

These judges down in the South say that, if you put the TVA on a jury system, you will have the Federal court loaded down with jury cases. Everybody will be appealing because they will want to gamble on a jury verdict.

MR. WILLIAMS: I don't know. I think Mr. McCarthy said they filed 157 cases last year.

MR. McCARTHY: Last year we didn't file so many, possibly 100.

MR. WILLIAMS: Their experience in settling cases is just as good, if not better, than ours. So they had 10 cases to go to trial on in that district court, which will not burden that court.

CHAIRMAN MITCHELL: You don't quite see my point. That is the merit they claim for the commission system. They have no jury. They say (and the judges down there agree) that, if you provide for a jury and not a commission and they have to call juries into these cases, they will be swamped with jury

trials in the TVA areas. What do you have to say about that?

MR. MacLEOD: Throughout the war we took various areas of lands in all states. Our experience has been almost universal that in those states where they have a short, clean-cut procedure for condemnation with the jury trial and where the courts will require us and the landowners to prosecute the cases with diligence, we dispose of a far greater number of tracts and cases in less time than in the states where we have a commission system.

The places where we dispose of our work with the greatest rapidity are in the states where the case goes on the regular civil calendar and when the case is called, it is set for trial. If there is one tract or fifty tracts or a hundred tracts, the case is set for trial, unless someone shows some particular reason why one or two tracts should be set aside and tried some other time.

The case comes on for trial and the cases are called by number seriatim and they are disposed of. The result almost universally is that after the trial on four or five or six tracts, it is very clear, unless there is something most unusual, that the verdicts are going to run along a certain percentage or average over the government testimony, or a certain percentage below the landowners testimony. At that time we settle out the great majority of the remaining tracts in the case.

CHAIRMAN MITCHELL: Are those cases where you use one jury and the jury returns a verdict on one tract after another before it goes on to the next one?

MR. MacLEOD: That is correct.

We have disposed of as many as forty tracts in five days in the District Court of Maryland. Of those we have actually tried nine tracts. We settled twenty-one after the verdicts were returned on those nine. The others we took formal verdicts with no evidence against the Government. That is generally true. That is what invariably happens in the speed of disposing condemnation cases, just like in other cases. If the courts will give us a special term of two or three weeks, we can dispose of fifteen to twenty cases in two to three weeks.

MR. LEMANN: I don't think I quite see that that meets Mr. Mitchell's statement of the TVA point. You have demonstrated by your answer that you move more rapidly by the use of the jury, but his point in regard to TVA is that you wouldn't settle as many cases out of court if you had a jury applied in the TVA situation, because the landowners, without regard to the time taken for the disposition, would be inclined to think they would get a better award from a jury than they now get from the commissioners.

Wasn't that your question?

CHAIRMAN MITCHELL: Yes, but it was on the assumption that there wasn't one jury which would pass on all the cases.

They are making a case where they have one lawsuit involving every piece of land in that district that is going to be condemned, and, as I understand them, they impanel a jury not for each particular tract or two groups of tracts, but one jury for the whole business. So the jury starts in and hears each case in turn. They hear the evidence on Smith and return a verdict for Smith and then they would go along for several weeks trying cases one after another. Because the same jury is used, there is a uniformity in the result achieved there.

MR. LEMANN: Might not Smith and Jones conceivably have a feeling that, if they could get a jury to pass on them and all their associates and friends, that jury would do better for them than the commission would? I understood that to be the point.

MR. MacLEOD: Our experience is to the contrary on those people who want to take a chance. The commissioner's hearing is very informal. A lot of owners will not sell until after the commissioner's award, because they feel they have another bite to take before the jury. It is the finality of the action either with the TVA or with the jury that determines when you are going to get settlement. They settle on the courthouse steps.

MR. SWIDLER: Do you want the TVA representative to comment as to these points as they come up?

CHAIRMAN MITCHELL: Yes, we want you here all together

so you can contrast these situations.

MR. SWIDLER: May I ask the Department of Justice one question? Of the two systems now in effect under acts of Congress, you favor changing the District of Columbia system and you would be content to have TVA as it is.

MR. VANECH: We don't object to the TVA doing what they do, but we don't want that system to apply for us.

MR. SWIDLER: But you favor a change in the District of Columbia?

MR. VANECH: We favor that all condemnation cases should be by a jury system. That is fairer to the Government and the property owners. Your records are in much better shape and that is the system used in thirty-seven states.

CHAIRMAN MITCHELL: We might put in a provision that wherever Congress has specifically established a tribunal that should be followed and, if there isn't an Federal act on the subject, have a jury trial. That is one way of doing it.

You wouldn't be very comfortable about sticking a clause in that everybody should have a jury trial except the TVA, mentioning them by name. There are a lot of other enterprises around the country bringing condemnation proceedings which it would be hard to differentiate from TVA.

There isn't much excuse for picking out that one agency. We might pick out all the agencies that resemble them and put them in a class. Or we might say where Congress has

prescribed a tribunal that should be followed. That includes the TVA and the District of Columbia. It isn't feasible to put in a clause that TVA is different from any other agency.

MR. LEMANN: That is the only existing one.

CHAIRMAN MITCHELL: You told me about the Mississippi system.

MR. LEMANN: That has been changed.

CHAIRMAN MITCHELL: The Mississippi is now in conformity. That isn't the TVA system. There is an agency that is in the same class as the TVA and we allow one system for the TVA and another for them.

MR. LEMANN: The TVA has a special tribunal provided in the statute and there is no other statute that sets up a Federal tribunal except in the District of Columbia.

MR. VANECH: If there is a statute, you will follow the statute; otherwise, have a jury trial.

MR. LEMANN: Is there any other statute other than TVA and the District of Columbia which provides a tribunal, a special method, for fixing the valuation of the property?

MR. WILLIAMS: The Lower Mississippi Flood Control Act which we have been discussing establishes the procedure that is in accordance with the state statutes.

JUDGE DOBIE: That is conformity. TVA is the only one that specifies what the tribunal should be.

PROFESSOR SUNDERLAND: And the District of Columbia.

JUDGE CLARK: That is for real property.

MR. LEMANN: Yes, sir.

JUDGE CLARK: Is it agreed that we should limit it to real property?

MR. LEMANN: We haven't come to that.

MR. VANECH: We want to limit our testimony to real property.

JUDGE CLARK: Atomic Energy is one place that deals with patents.

MR. VANECH: We handle the Atomic Energy land programs.

MR. PRYOR: Not the patent programs?

MR. VANECH: No, but the land programs.

MR. DODGE: You handle the lower Mississippi program?

MR. VANECH: Yes, sir.

JUDGE DOBIE: Has there been any appreciable appropriation of the patents in that situation?

MR. VANECH: We haven't done any.

JUDGE DOBIE: I seriously doubt whether there has been. I might see a case where a man gets up a machine gun which everybody says is magnificent and he has a patent in connection with that machine gun. Of course the Government wouldn't hesitate a second to grab the Wilkins patent for that and compensate them. I don't believe that happens once in a coon's age.

MR. VANECH: Very rarely.

JUDGE CLARK: You would know whether there is any other condemnation procedure, even though you don't handle it.

MR. VANECH: Yes, sir.

JUDGE CLARK: You can take it pretty clearly that we have the ground before us.

MR. VANECH: That is correct.

MR. MacLEOD: We handle all of it except TVA.

MR. VANECH: We handle it for all the agencies.

JUDGE DOBIE: All real estate condemnation for the United States goes through you?

MR. VANECH: Yes, sir, with the exception of the TVA.

CHAIRMAN MITCHELL: Does the Atomic Energy Act provide for condemnation of land for their purposes according to the conformity system?

MR. VANECH: Conformity Act.

CHAIRMAN MITCHELL: So there is another case where you have to buck Congress if you are going to have your jury proceeding go in under a nonconformity system. There you have another example where Congress has refused to provide a jury system.

MR. MacLEOD: Mr. Chairman, the general practice of Congress in authorizing Federal agencies to acquire lands and the legislative practice is to grant the authority to acquire lands by purchase and condemnation and then provide that the condemnation procedure shall be in accordance with the general

condemnation statute of August 1, 1888, which is the general conformity statute. That is just a catch-all. That is on the books for that purpose, so whenever they give the power of condemnation they always put in that the procedure shall be in accordance with that act.

PROFESSOR SUNDERLAND: That is just an easy way out.

MR. MacLEOD: That is right.

CHAIRMAN MITCHELL: But I can't get my point over that Congress has said time and time again that they won't provide a jury system, that they want the conformity system. I don't see how you can say, or anybody can say, that it is going to be an easy thing to take a rule that provides for a jury system and doesn't say, to follow the state practice and get it passed by Congress. You tried it twice and failed and they have gone to the conformity system in the Mississippi situation and in the Atomic Energy Commission. And they seem to be sticking to that.

MR. VANECH: May I say this: I think one of the members of the Committee stated it very well this afternoon. I think if it is put before Congress in the way of a rule, that the reaction would be altogether different than to try to get special legislation through. They will know that this Committee has considered it and whatever they recommend would be to the best interest of the people of the country.

If there were hearings on that, the mere fact that

thirty-seven states have adopted this procedure would indicate that this is the fairest procedure to the property owner and to the states.

While we have had some difficulty in the past, I think the recent program that has just been concluded and which is continuing in another field, which arose out of World War II has made these people realize for the first time in their lives that the Government should have a definite procedure in a land program such as we have gone through and we are going through now for the Veterans Administration for hospital facilities, and so forth.

While there has been some opposition in the past, I think the members of Congress would be very fair-minded when we can point out to them that this is not a procedure to railroad things through but is a procedure that will better protect the rights of all concerned, the property owners and the Federal Government itself. I don't think that can be said about the commissioner system. You all know the mechanics of the thing better than I do and how you have to select these people, and you have experienced how long we have been delayed with red tape to get things through. Sometimes we are no further ahead than if we didn't have it.

JUDGE DOBIE: You know better than we do about the practical application of these systems.

MR. PRYOR: If this rule provides for a jury trial,

that will be providing for conformity with state practice in thirty-seven states.

MR. VANECH: That is right. We want uniformity and simplicity.

MR. DODGE: And it will go before the Congress with the backing of the Supreme Court of the United States instead of the way it went before them before.

CHAIRMAN MITCHELL: In these thirty-seven states does the local law provide for a jury trial without a commission?

MR. VANECH: Some with and some without.

CHAIRMAN MITCHELL: Then you don't have thirty-seven cases that provide for a jury without a commission.

MR. DODGE: You have thirty-seven states where you have a compulsory right to a jury trial.

CHAIRMAN MITCHELL: Preceded by a commission hearing.

MR. PRYOR: You won't find anybody in a state with a commission preceding the jury trial in a district court defending that situation.

JUDGE CLARK: How many of those thirty-seven would have the combination?

MR. VANECH: Twenty would have the combination.

JUDGE CLARK: Twenty would have the kind of conformity none of us like. That is the thing nobody defended.

MR. DODGE: I don't recall in the comments we have had from the bar any clamoring for conformity. Has there been

any?

MR. LEMANN: Very few, if any.

JUDGE CLARK: I don't think they put it in those words. They either want one system or the other. Some people want the jury; some want the commission. There isn't much of conformity per se recited in that language.

CHAIRMAN MITCHELL: If you adopt ironclad rules for juries and not commissioners, you do not have thirty-seven states in back of you; you have seventeen. And twenty out of those thirty-seven have both.

I don't know, maybe reading the debates in Congress made an undue impression on me, but they just didn't want any Federal statute regulating the question of the tribunal. They want their own system, whatever it is--two bodies or one or whatnot.

PROFESSOR MORGAN: May I suggest if our rules had to be approved by Congress, we would never have them approved.

MR. MacLEOD: Isn't the entire spirit of the Federal rules to simplify and make direct your judicial procedure? You provide, for example, that the reference to a master shall be the exception and not the rule, while in some districts in the past it was the rule and not the exception. You expressly provide that that shall be the exception and not the rule. The commissioners are no more than three masters sitting together and in the thirty-seven states you ultimately have a right to

a trial by jury and you are going to get to that jury trial anyway. Wouldn't you be eliminating in the twenty states the intermediate step that is of no great advantage to any litigant?

MR. VANECH: Congress already indicated how they felt about it when they did away with the state law in six states and provided a separate system for the TVA. Therefore, this wouldn't be any more.

I might say, Mr. Chairman, if there were any hearings on this, we could back up our stand. Judge Driver will tell you the same thing. Our United States attorneys throughout the country who have worked on these programs during the war are known to most of the members of the House and Senate and could testify on that score.

JUDGE DOBIE: They had something to do with their confirmation and selection.

MR. VANECH: They would be able to point out to them the value of uniformity and simplicity in this procedure.

MR. LEMANN: You had hearings in connection with at least one of these bills which was defeated, because I have in my file a pamphlet of the hearings. Do you recall them?

MR. WILLIAMS: Yes, I recall them.

MR. LEMANN: Who appeared on behalf of the bills, the Attorney General and members of your staff?

MR. WILLIAMS: The Attorney General recommended its enactment.

MR. LEMANN: Did he testify?

MR. WILLIAMS: No, except by his letter.

MR. LEMANN: Did you testify?

MR. WILLIAMS: Yes.

MR. LEMANN: And other members of the staff?

MR. WILLIAMS: Yes, sir.

MR. LEMANN: Was there opposition that testified?

MR. WILLIAMS: Yes.

MR. LEMANN: Who were they?

MR. WILLIAMS: Principally the same group. I believe the bills went up together on the jury trial and also this other bill to establish a new procedure in the handling of condemnation proceedings. That was opposed by the title companies and by some insurance companies and by others who thought that by that method there would be a question raised as to whether due process had been carried out, whether or not adequate notice would be given. That bill was defeated and I don't believe ever got out of committee, but the two bills were more or less related and the same objections went to the jury bill as to the other.

I don't believe I read the discussion at the hearings. We discussed that at the last hearing before this Committee. I am satisfied that the merits of the jury trial bill were not before the Congress. They were talking about the declaration-of-taking act and the failure to make deposits and that sort

of thing, which had nothing to do with the merits of the bill.

I have talked to representatives of the title companies and I know they have no objection at all to establishing a procedure of uniformity and simplicity, calling for one method of evaluating property. They have no objection to that.

MR. LEMANN: How long ago were these unsuccessful attempts?

MR. WILLIAMS: I believe three or four years ago.

MR. LEMANN: There were two bills at different times, one three or four years ago and the other earlier.

MR. WILLIAMS: Yes. One died in one Congress on the jury question, and then it was reintroduced in the next Congress, and I just don't recall right now.

MR. LEMANN: May I ask this other question that was brought up this morning? Suppose a majority of the Committee felt that we would be inviting disaster to junk conformity and therefore we had to preserve conformity as to the tribunal fixing the compensation award, would it be worth while to proceed with the balance of this rule in the event of that provision? Would there be enough gained by the other provisions?

MR. WILLIAMS: You might gain by the establishment of uniform lengths of time in which published notices are to be given to people and there might be some other advantages.

MR. VANECH: We would be breaking the ice for the future. Anything we got into operation would be a recognition

of that situation.

MR. LEMANN: It would simplify your burdens if you had simple procedures. It must be a hardship on you to look up the local practice in each case.

MR. WILLIAMS: It is. We feel our condemnation cases should be under the Federal rules, as any other lawsuit. We would like to see the Federal courts establish a practice that is uniform. We don't have it now. The Federal courts do not comply strictly with the state laws. Under the law they are admonished to comply with the state provisions as near as they can, which doesn't apparently mean as near as may be possible.

So there is a variation in the Federal courts on the matter of giving notice and the general handling of the cases. The Federal courts pretty much dictate the manner in which cases are to be conducted.

MR. LEMANN: If we preserved conformity in this class of cases, would it be the only kind of case in which the Federal court would have to look to the state law for procedure since the adoption of the Civil and Criminal Rules?

JUDGE DOBIE: You are speaking on procedure of course.

MR. LEMANN: Just on procedure.

PROFESSOR MOORE: It would look to state law as to when an attachment and other provisional remedies would apply.

MR. LEMANN: We have adopted a general provision on evidence that is rather liberalizing in effect. Would that

apply to condemnation proceedings if we preserve conformity?

CHAIRMAN MITCHELL: When you say conformity, the only discussion we have had is with respect to the tribunal. We all agree that, if we have a procedure for conducting the pleading, service and handling of the condemnation case, it is going to be uniform. The only thing that is open is the question whether we shall have an iron-clad rule that in every condemnation case, regardless of state law, it shall be a commission or a jury or a judge or whatnot.

That is the only argument. That is the only phase we are discussing.

MR. LEMANN: In many of these states that provide for juries is there a provision, as in the District of Columbia and as in my state, that the members of the jury must be freeholders or property owners?

MR. WILLIAMS: I believe most of the statutes do have some such requirement.

MR. VANECH: It is the exception and not the rule.

MR. WILLIAMS: These new rules are now applicable to appeals in all condemnation cases, regardless of conformity statutes, so we have a uniformity as to parts of the proceeding and not as to the initial parts of it. We would like to see a uniform Federal national procedure. We think it would be desirable from all standpoints.

MR. MacLEOD: Is there any reason in principle why

when the Federal Government is condemning the man's land on one side of the Savannah River that he should have a more cumbersome procedure than the same individual if he owns land right across the river in Georgia. Under the two systems there is quite a difference, although they both have a jury trial.

On one side of the river South Carolina eminent counsel have concluded that they had to bring an injunction procedure against the Federal Government; in Georgia they merely brought a motion to dismiss.

I don't see why there should be that lack of uniformity in Federal condemnation procedures.

JUDGE DOBIE: It seems to me that the situation in Michigan and Virginia where you have two different procedures in two different parts of the state tops that.

MR. MacLEOD: In New York State you use commissioners and a judge in the one district and the judge in another.

JUDGE DOBIE: I think that is silly. I believe you could get it through Congress.

JUDGE CLARK: You use a judge in one district.

MR. MacLEOD: In New York City.

JUDGE CLARK: Which district?

MR. MacLEOD: The Southern District, the city itself.

There is a state procedural statute for the city itself which provides for the determination by the judge and

we use that system there. Just outside of the city limits we use the three-commissioner system.

JUDGE CLARK: Under the World War Veterans Act, the acquisition of veterans hospitals, and so on, there is provision for the condemnation of personal property, too, and you handle that, don't you?

MR. MacLEOD: That is only lands.

JUDGE CLARK: Don't you condemn for veterans hospitals?

MR. MacLEOD: Oh, yes; sites and leaseholds.

JUDGE CLARK: How do you separate that? The statute provides that the Administrator "may acquire by condemnation or otherwise any hospitals, facilities and incidental personality including 'vehicles, livestock, furniture, equipment and accessories'."

MR. WILLIAMS: I don't believe the power of condemnation is given as to the latter articles.

JUDGE CLARK: Yes. I am taking an abstract we have on this situation:

"The World War Veterans Relief Act . . . provides that the Administrator of Veterans Affairs may acquire by condemnation or otherwise any hospitals, facilities and incidental personality including 'vehicles, livestock, furniture, equipment and accessories'."

He has it in quotes here. Mr. Moore made that abstract.

MR. VANECH: They acquire their lands and leaseholds and things through the Department of Justice. I don't know what their procedure is in regard to personal property. It is probably so small that it hasn't come up. If we restrict it to real property, I am wondering what it will do to that.

"The Nitrates Act . . . . authorizes the President to purchase or acquire by condemnation not only real estate but 'materials, minerals and processes, patented or otherwise'."

The TVA has used that power in TVA v. Ashwander.

MR. SWIDLER: That was cited in the Ashwander case as a part of the legislative history of the Wilson Dam-Muscle Schoals project. We have not used the condemnation power in the 1936 act to acquire any property whether real or personal.

JUDGE DOBIE: Do you know of any condemnations sought to be made of personal property for the TVA under any statute?

MR. SWIDLER: No, sir.

JUDGE DOBIE: I mean of personal property.

MR. SWIDLER: No, sir; I do not.

JUDGE DOBIE: I believe it happens once in a coon's age.

MR. SWIDLER: It has not happened at all at TVA.

MR. VANECH: Judge Clark points out in connection with the Second War Powers Act that we had that authority in connection with personal property. A lot of it was personal property which was tied into the realty.

MR. MacLEOD: The Second War Powers Act provided for the condemnation of real property, any interest therein, together with personal property thereon or in connection therewith, and in some cases we took personal property, but only when it was on the land and used in connection therewith. The personal property feature of the war powers legislation was the requisitioning act.

CHAIRMAN MITCHELL: That was a requisition and suit in the Court of Claims.

MR. VANECH: Yes, sir.

CHAIRMAN MITCHELL: Would you be kind enough in the Department tomorrow to take up and find out whether there is any statute on the books that provides for the condemnation of personal property alone? I am quite clear in my own mind that this rule, as we have it here, as we have drawn it, had in mind nothing but real estate.

For instance: "property, designated by quantity, lot, parcel, or tract". That doesn't sound like personal property. If we are going to limit it to real estate, we ought to say so in the rules. We want to know whether we want to do that or not.

If there are any statutes on the books for an ordinary condemnation proceeding to get title to personal property as an adjunct to realty, we ought to know about it.

JUDGE DOBIE: The question came up whether on lands

MR. MacLEOD: The Second War Powers Act provided for the condemnation of real property, any interest therein, together with personal property thereon or in connection therewith, and in some cases we took personal property, but only when it was on the land and used in connection therewith. The personal property feature of the war powers legislation was the requisitioning act.

CHAIRMAN MITCHELL: That was a requisition and suit in the Court of Claims.

MR. VANECH: Yes, sir.

CHAIRMAN MITCHELL: Would you be kind enough in the Department tomorrow to take up and find out whether there is any statute on the books that provides for the condemnation of personal property alone? I am quite clear in my own mind that this rule, as we have it here, as we have drawn it, had in mind nothing but real estate.

For instance: "property, designated by quantity, lot, parcel, or tract". That doesn't sound like personal property. If we are going to limit it to real estate, we ought to say so in the rules. We want to know whether we want to do that or not.

If there are any statutes on the books for an ordinary condemnation proceeding to get title to personal property as an adjunct to realty, we ought to know about it.

JUDGE DOBIE: The question came up whether on lands

in two states you bring two separate proceedings.

MR. VANECH: That is right.

PROFESSOR MOORE: But if the tract is in two districts, although in one state, you can bring it in one action.

MR. VANECH: Yes.

JUDGE CLARK: When you answered the Chairman's question, I wonder if you might not want to consider these instances that I have spoken of: The Nitrates Act, the World War Veterans Relief Act, the Helium Gas Act. Do you have anything to do with that? The Secretary of the Interior may "acquire by purchase, lease or condemnation lands or interests therin or options thereon; to construct or acquire plants and other facilities, and 'to acquire' patents or rights therein". Then there is the condemnation title of the Second War Powers Act which I suppose are through now, 50 U.S.C. Sections 171 to 172.

Another is the requisition of aircraft design. That permits the "taking of property . . . with a right in the owner to reject [an offer of compensation] and sue in the Court of Claims for compensation."

MR. VANECH: We have no objection.

MR. WILLIAMS: We have no objection to those, of course.

JUDGE CLARK: Suppose we eliminated any reference to personal property and limited to real property and you had

a case where you were asked to appropriate personal property.

MR. WILLIAMS: There would be a legislative authorization to condemn it. In accordance with these rules we would do it.

JUDGE CLARK: The World War Veterans Relief Act does provide for condemnation of personal property.

MR. VANECH: That is handled by the Veterans Administration itself.

PROFESSOR MOORE: There hasn't been a case on it.

MR. VANECH: It gives them the power to take automobiles in connection with disabled veterans. I think they have been able to work it out in most cases by negotiation.

JUDGE CLARK: If we started to define property, perhaps you might help us by saying how you define it. We had a discussion as to the difference between intangible and tangible property.

CHAIRMAN MITCHELL: Did you have something you wanted to say?

MR. SWIDLER: I have been accumulating a few comments, Mr. Chairman; if this is the appropriate time to make them, I would like to submit them.

One of the differences between our commission procedure and the others that have been referred to I mentioned when you discussed the question of the matter of costs. One of the principal objections to the commission procedure has been

that it is expensive. It is not expensive under our procedure.

JUDGE DOBIE: Chiefly because you specify the compensation of the commissioners.

MR. SWIDLER: Because we specify the compensation and because the procedures are expeditious and the saving is not only in the disbursements that we make for costs but also in the number of attorneys that are required to handle the work. We now have only the equivalent of three man-years, which is devoted to condemnation work; under a jury system I am satisfied we would need additional lawyers, and perhaps several of them in order to handle the work.

So far as results are concerned, the point the Chairman made, we think, is a very good one. Right now we settle 97 per cent of our cases without going to condemnation. The percentage that was mentioned for the Department of Justice condemnations, which of course are under a variety of procedures, none of their selection, is about 80 per cent. We are satisfied that we would not better that percentage of 80 per cent in settlements if we were compelled to go to a jury system and that instead of having the same number of trials, we would have perhaps seven or eight times as many.

Then another point I want to make is this: Right now we file a separate suit for each tract. The volume of work we would handle and the way we handle it makes that perfectly feasible, and it is eminently satisfactory to the landlords.

The Department of Justice gets some degree of uniformity apparently by filing omnibus suits and the jury, having a great many tracts involved in a single case, achieves apparently some degree of consistency in that way. We would be compelled, I assume, to use the omnibus system as a partial method of achieving the same result if we were compelled to go to a jury system. We would very much prefer (and I think the landowners would prefer) our present system of filing a separate bill for each tract.

CHAIRMAN MITCHELL: What do you mean by a tract? In common ownership?

MR. SWIDLER: In common ownership;yes, sir. If a piece of property is owned by a number of people, it is the subject of a single suit and all the interests in a piece of land are acquired in the same suit.

CHAIRMAN MITCHELL: What do you mean by a piece of land?

PROFESSOR MORGAN: If you want a tract of 25 acres and you have five owners each owning 5 acres in fee, do you have five suits?

MR. SWIDLER: Five suits.

CHAIRMAN MITCHELL: If that same tract has divided interests, you have one suit?

MR. SWIDLER: Yes, sir. If there is a mineral interest outstanding and a leasehold interest, we take all those

interests in one suit.

PROFESSOR MORGAN: In talking about the time it takes for trial he said the average was one day or two days or three days. If you had five two-day suits and it took ten days, you can't compare that with the time consumed or the expense of a single suit under the other system. There we have a single suit with fifty different owners, not of separate interest but of separate pieces of property in the tract.

MR. SWIDLER: That is correct.

CHAIRMAN MITCHELL: I always said a tract was a government subdivision, a quarter section or a township, or something like that. How do you define what you call a separate tract?

MR. McCARTHY: A tract the way we use it is an arbitrary term. It can be 1000 acres or 20 acres.

MR. SWIDLER: We follow established ownership lines.

JUDGE DRIVER: Fee ownership.

JUDGE DOBIE: All rights in the land are tried, life interests and reversions and all?

MR. SWIDLER: That is right.

MR. McCARTHY: We do begin sometimes three or four tracts in one case where it seems as if it is feasible and easier to handle it that way.

MR. VANECH: We only pay $10 a day for commissioners in Tennessee where you pay $15. So it is not down there that

we are worried about the expense, it is throughout the rest of the country, the metropolitan areas.

JUDGE DOBIE: That is where they are the highest.

MR. VANECH: That is right.

MR. SWINDLER: We have no objection at all to the Department of Justice's position as to their own proceedings. I don't understand that we are in opposition with them. Our comparisons are not between any existing commission system that is employed by the Department of Justice and the jury system; it is strictly between our own, which we think is different from any under which they operate, and the jury system. And we feel that our system is superior, at least it isn't subject to any of the defects that they have mentioned.

MR. PRYOR: You are interested in getting your projects excepted from any rule that would impose any other system than the one you have.

MR. SWIDLER: Yes, sir.

There is one further point I would like to make. We have a special kind of relationship to the people in the area. We are the only project of this kind in the country.

JUDGE DOBIE: And the people favor it.

MR. SWIDLER: And we live there. We cannot file a suit and escape the consequences of that action, get on a train and go somewhere else and try another case in another state. We have to live with the people. The people look to the TVA,

not to the courts or the commissions or the juries, to see that there is fairness in the consistency of results. If the people are dissatisfied with the distribution of the awards and relative equity, the repercussions show up in our whole program.

JUDGE DRIVER: This good will element would lead you to make more liberal offers down there and that cuts down your percentage of trials.

MR. VANECH: That is what we can't do.

MR. SWIDLER: So far as our liberal offers are concerned, I don't know how to offer an answer to your question. We don't try to buy off litigation by paying more than the property is worth. On the other hand, we do try to make fair offers and to consider when we make the offer the fact that the landowner is in an unenviable position, that he must look for a new place where he can make a livelihood and settle. Again, that is one of the factors which is given consideration. I frankly don't know whether we pay more than the Department of Justice does. If I had to guess, I would guess not.

MR. VANECH: Do you have salaried appraisers?

MR. SWIDLER: Yes, we do. We have a staff of appraisers who live in the area and have a great deal of experience at the work. A good many of them have years of experience working in that one area.

MR. MacLEOD: Would you be surprised if you knew that some of those appraisers were called in on some of our cases to

testify against the Government.

MR. McCARTHY: I know that is a fact.

MR. MacLEOD: Because their appraisers are much higher than the ones we employ by the day and by the job.

MR. SWIDLER: I wouldn't say there was consistency among all the people who appraise a tract. I wouldn't be surprised to find that some of ours are higher than yours, but I wouldn't be surprised also to find if some of yours are higher than ours. We wouldn't get 100 per cent consistency over a tract.

MR. VANECH: They see an ultimate benefit coming back to them by TVA moving along. If they acquire another piece of property, they will reap the benefit. When we go in to take property for another agency, that is the end of the job for us.

JUDGE DOBIE: They concede that.

MR. SWIDLER: There is another point on the question of unified responsibility. We also have to live with the cost because, unlike most of the projects for which the Department of Justice condemns, the cost of condemnation goes into the cost of our project and at least so far as power is concerned which carries a major share of condemnation costs, we must earn a return, and the question of return is one under which we are under a great deal of pressure. We think this would be much more expensive and we have a special interest in seeing that the total cost of the condemnation, which includes the attorney's

fees and the court costs as well as the award are kept within as low a figure as fairness to the landowners permits.

JUDGE DOBIE: Of course, that is utterly foreign to the situation when you condemn land for a hospital or a camp which are not run for profit.

MR. SWIDLER: That is right. If a statement is made that a camp will cost 50 million and it costs 100 million, that is not a great matter for anyone in the Department of the Army or the Department of Justice or any other agency, but, if we estimate a dam at 50 million dollars, it had better not cost 55.

MR. MacLEOD: A great deal of our work in peacetime is for the War Department on flood control and river and harbor improvement and reclamation. All those projects are submitted to Congress after sometimes years of surveying, and they are approved by Congress only after Congress has concluded that the particular project, considering the purpose, flood control, river and harbor development or hydroelectric development, is economically feasible.

The Chief of Engineers in his reports every year reports on those projects and he reports the estimated cost and the estimated income and those projects are approved only when they are economically feasible, considering the benefits for harbor improvement, utilization of channels, and so forth.

JUDGE DOBIE: I want to ask you a question there:

Is there very much logrolling in that?

MR. MacLEOD: If you will recall, when President Truman limited the expenditures on these hydroelectric and harbor and river improvement projects, there were several independent caucuses held by the various men in Congress to take some action to free those funds, and that was very definitely organized. Of course, you are aware of that situation from the newspapers.

MR. VANECH: The Lands Division of the Department is placed in this position: TVA can plan where they are going to go and can control their own program, but we must be merely ready to serve any agency of the Government that says, "Move in and take this piece of property." Sometimes the community is hostile. We have just moved in on a piece of property in Chicago for the Atomic Energy and the people there were most hostile to the Government taking over that property. That makes a very hard program to try to put through.

In the case of the TVA they need good will. The people have some benefit coming back to them. When we move in we simply take the property, and that is the end of it as far as they are concerned.

That is why our program is a little different than the TVA program. We have nothing to show them in return other than the price they get for their property.

MR. SWIDLER: That is a very good point. I think

there is a difference between a unified program such as the TVA and the kind of programs which the Department of Justice undertakes and in which they act as the land acquisition agency.

JUDGE DOBIE: I understood that in connection with the camp in Carolina County in Virginia, which involved your taking over one-third of the county, they were very hostile to it because it removed one-third of the country land from the tax rolls.

MR. VANECH: We had that in the Nevius tract in Arlington. The county did not want that taken off the country rolls.

MR. MacLEOD: That is a very serious proposition in a community where they have a bonded indebtedness and the rest of the property cannot carry the indebtedness.

JUDGE DOBIE: Particularly where it involves one-third of the county.

MR. McCARTHY: I would like to say just a word here about that project that Mr. MacLeod referred to where former TVA appraisers had been retained by the landowners to testify against the Government. That was the Oak Ridge project right outisde of Knoxville.

MR. MacLEOD: I was thinking about Gadsen Ordnance in Alabama.

MR. McCARTHY: That I hadn't heard about.

MR. SWIDLER: You mean the Huntsville Arsenal?

MR. MacLEOD: It might have been.

MR. McCARTHY: The instance I was familiar with was the Oak Ridge project where former TVA appraisers were employed by the landowners. That particular project was right outside of Knoxville in the middle of the TVA area. There was a lot of ill will created down there. It wasn't the fault of the Department of Justice. I think it was the fault of the procedure under which they had to operate. It got to the point where congressmen were asking for an investigation. And there were a great number of condemnations. Judge Taylor's docket was loaded with condemnation cases for a year or more.

If we had to buy our land in Tennessee under that same system, we would be out of business. We just cannot go into an area and risk that kind of a result. I think the Committee might be interested in our appraisal procedure. We have an appraisal group, some of whom have been with us since 1934 and 1935. They are all skilled appraisers.

Let's suppose that the TVA is going to build a reservoir. We don't go out there and file a blanket condemnation and then get some appraisers to appraise the land. We go in there a year or more before the reservoir is going to be built. We make a study of that reservoir. We check every sale of land that has taken place in every county in which that reservoir is located, for the past year. We study the industry. We study the crops. We study the farming practices. We talk

to local people to get their ideas on value--well-informed people in the area. Then, by the time we get ready to appraise, we have a pretty solid basis on which to appraise that reservoir area. We have a system whereby the appraisers go in and make their appraisals. Those appraisals are reviewed by a three-man committee. It is their main job to equalize them, to see that everybody in that area is being treated the same way, so that John Doe isn't offered $90 an acre for his land and his neighbor $100. That is not good.

People in that area know what we have been doing. They know we have made a study and they know when we come out to offer them a price for the land, that isn't just somebody's idea, some appraiser's idea who has gone in there and has never been in that area before. They know that price is just about right. For that reason, most of the people settle and accept the offer.

In appraising land we try to appraise it on, I suppose you might call it, a generous basis. After all, market value is a matter of opinion. We try to arrive at a fair value, something that will be fair both to the Government and to the landowners.

If we had a jury trial procedure, we don't think we could do that, because we think (and we think we are right) that a lot of people would say, "We will take a gamble on the jury trial." I will tell you something that happened just last

week on that. I was up in Louisville. I had a case before Judge Shelbin. He is from Paducah. He hasn't been on the bench but a year or two. We got chatting after the case was over and he told me a little experience he had. He said that a woman came into his office in the early days of the Kentucky Reservoir. She thought TVA didn't offer enough and she thought she was entitled to a jury trial. He thought that he should tell her to refuse to sell. He then checked up the statute and found out about the commissioner procedure and went to talk to our land acquisition people and found out how the land was appraised and who the commissioners had been and what their experience had been, and he told her to settle.

I am confident that same story has been repeated a thousand times in the Tennessee Valley. If we didn't have the commissioners, you can see from that example what would have happened.

The Chairman asked a question right at the beginning as to what there was about the TVA commission procedure that differentiated it from the procedure that the Department of Justice had in common.

Mr. Swidler has explained a number of the differences. They are the important differences that bring about a different result, but I think there is one other factor present. Any procedure you have is just as good as the way you administer it. And the courts in Tennessee Valley have been very careful

to pick good commissioners. I think maybe the fact that they only get $15 a day has been a factor in getting good commissioners, because they take the position from a sense of duty and not because it is a chance to make some money. There is no incentive to them to keep hearings running on indefinitely. That commission sits on several cases and we have often found that the first awards will be high. On the first case or two the commission may go 20 to 30 per cent over our offer. We have had that happen two or three times. Then they get a feel for it; they get experienced in judging witnesses and they become convinced after they have had two or three cases that TVA knows what it is doing, that the appraisals that we have made are fair, that we have tried to be fair and we have tried to treat people all alike. From then on the commission awards aren't going to run very much above the offer.

That has been our experience. And, as Mr. Swidler points out, in time, including the time it takes to look at the land, I don't think the average case costs us more than three one-day fees, $45 a commission. That is pretty cheap and expeditious.

We don't have to bother the court at all. The court does not have to convene a jury. It doesn't have to fit these cases into its regular dockets. All it has to do is appoint a commission and the commission goes ahead and tries the cases.

MR. VANECH: The opposite to that is where we get

an order to move in and take the property within five days. Here TVA has been able to plan for a year and spend some time working on that.

Judge Driver knows on the Hanford project and the McNary project the difficulties we had in getting property, especially when we had to move, as we did there, with speed. I think that system is fine under a project like TVA and is probably working out well, as they point out, because these things are planned so far in advance.

However, especially in wartime, you have to move in overnight and on some of these atomic energy plants you have to file a declaration of taking and move in in five days. You know how hostile property owners are to a project like that. We have no control over it. We are not the policy-making people.

JUDGE DRIVER: In the Hanford project you couldn't tell them what you were taking it for.

MR. VANECH: No.

MR. MacLEOD: We didn't know.

CHAIRMAN MITCHELL: There is a clause in the proposed rule (this is aside from what we have been talking about) which says: "The plaintiff may join in the same action one or more separate pieces of property . . . whether or not sought for the same public use." Suppose a government agency wants a post office in one part of town and another agency wants a jail in

another part of town, you can combine them in one condemnation.

MR. VANECH: As long as it is for a public use.

CHAIRMAN MITCHELL: This rule, subdivision (b), right at the start says: "The plaintiff may join in the same action one or more separate pieces of property, whether in the same or different ownership and whether or not sought for the same public use."

Why did we put that in there?

MR. MacLEOD: We have this situation that I can think of offhand. We will condemn land for the War Department or the Navy Department, say (this is an actual case in your circuit, Judge Dobie), for a Marine camp. Part of that land is actually being acquired as part of an over-all project, one portion of which will be a recreational area or a housing area to be utilized by the Federal Public Housing Agency to provide homes, say, for commissioned officers or noncommissioned officers and their families, or used for a recreational area.

CHAIRMAN MITCHELL: You think this is all right?

MR. MacLEOD: There would be two uses but the same over-all use.

PROFESSOR SUNDERLAND: It wouldn't be much trouble to have two separate suits.

MR. MacLEOD: That case went to the Circuit Court of Appeals on the question of whether or not the housing area was in the camp.

MR. VANECH: We have no objection, Mr. Chairman, if you don't want that provision in there.

JUDGE DRIVER: They ought to be limited to one project in a suit. I read that somewhere in Chicago they were widening a street, building a bridge, and doing something else, and there was a lot of litigation as to whether it was the same use.

PROFESSOR MORGAN: It is a good idea to have it there, because you avoid the question whether or not it is the same use. There is no chance of the Department really doing it unless they are closely related.

JUDGE DOBIE: That is the case where one is for a camp for the Marines, which would be the Navy, and the other would be housing in connection with that same project but run by Public Housing.

PROFESSOR MORGAN: Major Tolman gave a good example of that in his comments.

JUDGE DRIVER: If the court has the discretionary right to do that, it would help. If they tried to join a post office and harbor development, I would make them separate it, and most judges would. I think they have that discretion.

JUDGE CLARK: This isn't something we thought of. This is something you urged on us.

PROFESSOR MOORE: I think you wanted it for that reason, to avoid that kind of a dispute.

MR. VANECH: It is helpful, as in the Hanford project

where we moved in for Atomic Energy, when you don't want to disclose your hand, and there was another project along with it.

CHAIRMAN MITCHELL: We could leave it in and we might add that the court in its discretion may order separation.

MR. WILLIAMS: Or leave it out.

JUDGE DOBIE: Leave it in. It is helpful.

JUDGE CLARK: As a general rule, the district court can order separate trials.

PROFESSOR MORGAN: That is under the regular rules.

CHAIRMAN MITCHELL: Now, gentlemen, do you have something more to say about this question of tribunal? If you haven't, the Committee wants to consider that and reach some conclusions about it before we take up the step-by-step minor changes here. We thought it would be simpler to settle the main thing and then settle the rest of the rule on that basis.

The Department of Justice people are in the city and you gentlemen will be available. Will the TVA people be available? Have you presented all your suggestions?

MR. SWIDLER: We would be glad to make ourselves available.

CHAIRMAN MITCHELL: Can you stay in the city while we are going through this thing?

MR. SWIDLER: What is the time factor on that?

CHAIRMAN MITCHELL: We are going to try to finish up

sometime Wednesday evening or Wednesday afternoon. That is our guess, but we are not sure about it.

MR. SWIDLER: Either Mr. McCarthy or I will stand ready to be available at a few minutes' notice.

CHAIRMAN MITCHELL: Where are you staying?

MR. SWIDLER: We are both stopping at the Hay-Adams House or we can be reached in the TVA office in the Woodward Building.

It has been a great privilege for Mr. McCarthy and I to be present and present our views.

JUDGE CLARK: I want to ask about (j) "Assessment for or Deduction of Benefits." Have you looked at (j)? There has been some objection on that on the ground that we are getting toward substantive law and, if we don't get toward substantive law, we are not saying anything very much. The question is whether we ought to drop that out.

PROFESSOR MORGAN: I think we ought to.

MR. MacLEOD: So far as we are concerned, it doesn't relate to our proceedings at all.

MR. VANECH: We haven't any interest in that.

JUDGE CLARK: Should we take it out?

MR. SWIDLER: We think it is a matter of substantive law. We think it ought to go out for that reason.

PROFESSOR MORGAN: You are not going to take out the matter of assessing benefits for separate tracts, are you? If

he takes a part of a single tract, it is the value of what is left before and after.

MR. McCARTHY: Here's our view on that. The way it was originally drafted it provided that the benefits should be assessed by the court and deducted from the award, whether the award was by a jury or by a commission. We objected that separate valuations in our experience always tended to inflate the award. We think that the proper method of putting in proof where part of a tract is taken is to put on a witness who testifies as to what the value was before and what the value was afterward. That automatically includes both severance damages and benefits to the remainder.

Judge Clark's suggested redraft provides that the same tribunal that fixes the award shall provide for the deduction of benefits if it is provided by law, "that benefits which accrue, by reason of the taking, to the remaining property not taken, may be deducted from the award of compensation". That is what the tribunal does anyway, so that if "by law" here means by statute, then this changes the substantive law and provides that there shall not be a deduction of benefits unless it is so provided by statute. If it means law including the common law or the case law, why, then it is hard for me to see that that sentence means anything. It is just a statement of what necessarily follows from the substantive law.

MR. MacLEOD: It was our conclusion that the first

sentence in the section was intended to apply to state or local condemnors when condemning in the Federal court, if for any reason they should. And it would not be applicable in any way to the Federal Government. I quite agree with your statement on the second sentence, which might cause us some difficulty. Actually it is intended to apply to so-called severance damage rule or before and after evaluation when there is only part of a tract taken, which is determined in connection with the determination of the compensation to be paid and is not in the form of a deduction to be made by the court. I would think that the second sentence is substantive and, furthermore, would be confusing, particularly in our cases.

CHAIRMAN MITCHELL: It only comes up in a proceeding under state power of eminent domain. Is that your thought of the first part of it?

MR. MacLEOD: The first part. The second part is evidently intended to apply to all condemnations and, since it affects the amount of compensation to be made and not merely a procedural step, I think it would be substantive law and not in accordance with the present substantive law, which is that the benefits, if there are benefits to the remainder, are determined and a deduction made by the compensation-determining body and not by any deduction by the court.

CHAIRMAN MITCHELL: I don't see what the first sentence means anyway, because the Federal court is authorized

to make an assessment.

MR. McCARTHY: It happens in connection with water power.

JUDGE DRIVER: In the District of Columbia do you have special improvement districts where they levy an assessment for streets and roads?

MR. MacLEOD: That might be applicable to the District of Columbia highway condemnation. They have the assessment of benefits over the area that is benefited by the condemnation. That might be applicable to them, not to the Federal Government.

MR. WILLIAMS: It is always authorized by law.

MR. MacLEOD: Yes, it is authorized by local law and provided for by local law.

The second sentence apparently would be applicable to all condemnation and is evidently intended to express what is already embraced within the law in the allowance of compensation when part only of a tract is taken, and the proper method under existing cases of determining the compensation when a part of the land is taken is to have a determination of the value before the taking and after the taking, which of course allows for any damages resulting solely from the taking or any benefit to the remainder.

CHAIRMAN MITCHELL: You think that is taken care of any way in the proof of it?

MR. MacLEOD: That is correct. It is substantive law.

JUDGE CLARK: I suppose the assessment you speak of in the District of Columbia could be imposed by the court anyway. The court would have that power.

MR. MacLEOD: Yes, under the statute.

JUDGE CLARK: We have started out to do something and it has become more dangerous as we go along. We have become a little worried about it.

MR. PRYOR: So far as the latter part of that rule is concerned, if it applies to states, I might say that the Constitution of Iowa provides that the jury in assessing damages shall not give any consideration to any advantage that may result to the owner on account of the improvement.

PROFESSOR MORGAN: That is for taking the street, but suppose they put a pavement over that street. That is a separate thing. They get you coming or going.

MR. MacLEOD: The Federal Government so far has no authority except here in the local District. The Federal Government of course has no authority to collect benefits from lands that may be benefited.

JUDGE CLARK: That is all I have.

MR. McCARTHY: There was just one other question in connection with the tribunal. And that is the question of whether a change in the tribunal would be a matter of jurisdiction within the authorization of the statute.

CHAIRMAN MITCHELL: That is the question I put up to

you when I asked you whether the acts of Congress provided that a three-judge court be constituted to hear these cases and by a procedural rule we should make it one, and I was worried about all the other three-judge court provision in labor cases and injunction cases and whatnot. I was afraid that the Court might say that was a question of jurisdiction and, if we said that a single-judge court shall have jurisdiction where a three-judge court now has jurisdiction, we might be going beyond the jurisdictional procedure.

I have distributed your letter. We have no record of that letter. You say it was addressed to me. There is no record of it in my file. If the letter had come to my office, it would be in my file. So I think there must have been a plane crash or something and the letter was burned up. We have it now.

What more did you want to say about that?

MR. SWIDLER: Since that letter was written we have had a chance to do additional thinking about the subject, and I would like to call to the attention of the Committee the statement made in the majority opinion in Sibbach v. Wilson & Co. There seems to be an admonitory sentence in the majority opinion at 312 U.S. 10, where the Court refers to the express limitations on its powers to prescribe rules and then adds: "There are other limitations upon the authority to prescribe rules which might have been but were not mentioned in the act, for

instance, the inability of a court by rule to extend or restrict the jurisdiction conferred by a statute."

So, as I read it, the court is suggesting that there would be a congressional bar to an act which gave the court the power to alter the jurisdiction of a court.

CHAIRMAN MITCHELL: I assumed that was so and the only question in my mind was whether this was a jurisdictional matter, and I thought it was.

MR. SWIDLER: We have cited in our letter some cases on that point. I should also like to add that I hope that the decision of the Committee will not go off on the point of legality but will deal rather with the merits of the forum.

CHAIRMAN MITCHELL: That particular point has nothing to do with the question of whether it will be a commission in the case. It simply relates to the question whether there will be one judge or a three-judge court when it gets to the court.

MR. McCARTHY: I think it goes beyond that, sir. A jury trial means a trial by a twelve-man jury which is final, subject to the usual requirements.

CHAIRMAN MITCHELL: Presided over by a one-judge court.

MR. McCARTHY: That is right.

JUDGE DOBIE: Who must be present all through the trial, too.

MR. McCARTHY: Under our statute if you substitute a

jury trial for a commission, you still have the provision in there for appeal to a three-judge statutory court which passes on the proceedings de novo. So that couldn't be a jury trial. If you tried to substitute a jury trial in the TVA cases, you would be changing from a three-man to a twelve-man commission and you would still have the power in the district court to change the award entirely.

CHAIRMAN MITCHELL: Have you any objection to our making a recommendation, if we see fit, to do that based on the general opinion of the judges who tried TVA cases? Most of them agree that a three-judge court is a block and an undesirable thing, and it ought to be just a single judge. They had trouble getting three judges together and they don't want to use the time of three judges to hear these cases.

Would you have any objection to our stating that the only trouble with the TVA system that has been expressed is the three-judge provision and we have refrained from touching it on the theory that it might be a matter of jurisdiction, but we feel that the views of the judges who tried these TVA cases should be considered by the Congress, thus giving you an opening to have Congress change the act?

MR. SWIDLER: We hoped you wouldn't do that.

MR. McCARTHY: I will tell you why. In the first place, this three-judge court bottleneck isn't as much of a bottleneck as some of our friends have said it is. TVA, at

least in the last year or so, has always been willing to waive the three-judge court. We have offered to stipulate to all landowners that the case may be held before a single court.

CHAIRMAN MITCHELL: Does the act permit you to do it?

MR. McCARTHY: Yes.

JUDGE DOBIE: Expressly in the act?

MR. SWIDLER: It is expressed in the act.

MR. McCARTHY: We don't want to give an invitation to Congress to monkey with our act.

JUDGE DOBIE: There is a special provision to waive it and you do waive it in every case where one judge will serve as well as three.

MR. McCARTHY: We have waived it in all cases. We only found one attorney who was unwilling to stipulate that the case be tried by a single judge. We had a case with Walter Armstrong and we offered to stipulate, but he refused. He wanted a three-judge court. That was the only case.

CHAIRMAN MITCHELL: In the article in the Federal Rules Service he quotes half a dozen letters from the judges who objected to the three-judge court because it is cumbersome and causes delays.

Well, has TVA or the department anything to say further on this?

MR. VANECH: No, Mr. Chairman, except the Attorney General wanted me to express to you his deep appreciation for

giving us an opportunity to come here and explain these matters, and we will be available at all times to answer any further questions you have.

JUDGE DOBIE: We ought to thank the Attorney General for sending such an intelligent group to present the case for the department.

MR. SWIDLER: We have nothing further to add, except to express our appreciation, too.

MR. WILLIAMS: Are you satisfied with the provision on the naming of parties? It is the same old question we have discussed so many times before, the matter of naming party defendants of record.

CHAIRMAN MITCHELL: We have provided that you can start a proceeding without naming all the defendants and then look up the title as you go along and the only condition is that before you fix the compensation on the piece of property you will have to look up the title and make service and add as a party the other people whom you discover to be the owners.

MR. WILLIAMS: The rule is drafted so that it will make it hard for us to comply with it and may make the eventual naming of all the parties impossible.

CHAIRMAN MITCHELL: What is wrong with it? They have broken up here, but we can call you back for that. Just while you are here, you can tell us what we have done.

MR. WILLIAMS: In some places it is almost impossible

to get the title evidence appearing of record completely back to the original source.

CHAIRMAN MITCHELL: It is a case of the owners being unknown, isn't it?

MR. WILLIAMS: No, not necessarily. We limit our searches depending upon the type of property. For certain types of easments we make a twenty-five year search, which we deem sufficient in those situations. On low valued land we make a forty-five year search.

CHAIRMAN MITCHELL: How would you word it? You want to name all the parties, don't you?

MR. WILLIAMS: Yes. Under this requirement we have to go back to the original source of title and in some places, as in Virginia and in the East, we cannot go back very far except to get into hopeless confusion. Our title companies will not search that far back and they will not certify that those parties they show to be the owners are those appearing of record.

CHAIRMAN MITCHELL: Suppose you draw up a provision as a substitute for what we have that places the burden on you to name and serve as a known party people who have an interest of record that it is possible to get at and put some clause in there that is going to protect you in the cases that you speak of, and let us look at it.

MR. VANECH: We will draw up a new provision and submit

it with our recommendations as to why we recommend this new provision.

CHAIRMAN MITCHELL: You will run into severe opposition, just as we did before where it didn't expressly require you to name and serve a fellow who had a recorded interest. You will never get away with that.

MR. WILLIAMS: We don't want to. We think, however, there must be some discretion left in the pleader.

CHAIRMAN MITCHELL: I don't believe you will get anywhere with the Committee by leaving it to the discretion of the department whether they will name the man or not. You say that you always make a search, so why require it by the rule; but the people who look at this rule, the title companies and the American Bar Association, rose up on their hind legs and said there was nothing in the rule as originally drawn that required you to name a man that had a recorded interest.

MR. VANECH: They go back forty-five years, and that is a pretty good search; but to comply with the letter of the law you are supposed to certify that you have gone all the way back.

CHAIRMAN MITCHELL: Draw up a clause that you think will meet the point.

JUDGE CLARK: We have your suggestion in your letter that appears on page 10 of the abstract.

CHAIRMAN MITCHELL: They haven't drawn a clause, have

they?

JUDGE CLARK: Is that the one you mean? Page 10 of the abstract:

"At the time of the commencement of the action the complaint need name as defendant only the persons having or claiming an interest in the property whose names are then known, but the plaintiff shall add as defendants the names of all persons appearing of record or known to the plaintiff to have or claim an interest in the property [prior] to any hearing involving the compensation to be paid for the property."

That is your suggestion, isn't it?

MR. VANECH: That is right.

JUDGE CLARK: That is what you will develop.

CHAIRMAN MITCHELL: That is what the rule is now.

MR. VANECH: I don't know. Is that the suggestion from us, Judge?

JUDGE CLARK: That is your suggestion. You incorporated the objection in your letter of July to the April draft and we are carrying over from the April draft. That is on page 10 of our abstract here.

MR. VANECH: Under the procedures that we recommended (which we won't take the time to recommend now, but we will make a new draft anyway with the explanation why we want it) no one would be injured, but we would have the time extended for search and it would be easier for us to deal with the title companies

who cannot go back any given period, in some places 25 years, some places 45 and some places 60, depending on the locality.

JUDGE CLARK: I took it in general that you thought we had not made clear that this wasn't much different but was more a statement making it entirely clear from your end.

MR. VANECH: We felt that this rule, as it was drafted, put more of a burden on the Government than the procedure we have been really going on.

MR. MacLEOD: This change in this suggested phraseology "prior to any hearing involving compensation to be paid for the property" is intended to indicate that if the Committee is going to adopt the present rule, then it should be changed at least in that respect.

CHAIRMAN MITCHELL: In what respect?

MR. MacLEOD: By limiting the rule. The rule now provides that they be named before any hearing and we concluded that might be interpreted to mean a hearing at which we would seek an order of possession and, if this rule were to be adopted, it should be modified so that the hearing before which all parties should be joined would be the hearing for the determination of compensation.

CHAIRMAN MITCHELL: Is that the only correction you want?

MR. MacLEOD: Our objections go further than that; our objection goes to the entire rule.

CHAIRMAN MITCHELL: I know, but we spent a whole day on that thing before and the Committee stands unanimously in favor of the proposition that, if a man has an interest as a matter of record, the Government must sooner or later make the proper search of the record and the name of anybody that is disclosed as having an interest has to be added as a party at some stage of the proceeding.

I was under the impression it was before the matter of compensation should be tried in these cases. If you are not going to make a man look at the record (and I think we agree that we will not agree to a provision that left it to the discretion of the Government's lawyer whether to name him or not), what is your proposal?

MR. VANECH: You really certify in there that you made the search. That is not true. You are putting a burden there that I wouldn't want to certify that a certain thing had been searched unless I actually made the search.

CHAIRMAN MITCHELL: How can you go to the court and say the owner of this property is unknown when there may be somebody else with an unknown interest? If you want an order for the publication of someone, how can you satisfy a court or say that the owner is unknown if there is something in the office of deeds that shows he has an interest.

MR. MacLEOD: Our objection is this: That this rule as now drafted requiring that we shall name all persons appearing

of record places upon the Government a great burden. The Lawyers Title of Richmond, which does, by far, the greatest part of the title work for the Government, will insure a title on a sixty-year search. This isn't limited to sixty years. This is from the sovereign. In searching for the title in Maryland we have to go back to 1632.

CHAIRMAN MITCHELL: Your point is that the kind of search we provided for is too severe. You don't want to strike out the provision entirely that you make a search of the record.

MR. VANECH: But limit the search.

CHAIRMAN MITCHELL: How would you limit it?

MR. WILLIAMS: Suppose you provide that the plaintiff shall name among other things the necessary and proper parties defendant.

CHAIRMAN MITCHELL: We have examined the law of twenty to thirty states of the Union on condemnation cases and I don't believe there is one that we have seen that has not prescribed that you shall name parties known or of record having an interest. This thing went up to the American Bar Association in the first draft and it was booted out of the window because it didn't say anything about the parties of record, and every title company in the United States raised a row about it, because it didn't call for a search or a search of title or something.

MR. VANECH: Of record.

CHAIRMAN MITCHELL: The Bar Association objected, although we said that we claimed the words "known to have an interest" which we used in the original draft was intended to cover knowledge acquired through a search of the land register.

We are not going to waste any time in this Committee on the proposition that there has to be some kind of a search of the records before fixing the value of the property in order to find out who has an interest of record.

MR. MacLEOD: Under this rule, if we are condemning the right to use from month to month two offices in the Woodward Building in Washington, we would required to have a certificate of title based on a searching of the title of the Woodward Building.

CHAIRMAN MITCHELL: You don't institute such proceedings.

MR. MacLEOD: I beg your pardon.

MR. VANECH: For a year or two we do.

MR. MacLEOD: We have condemned for two months.

CHAIRMAN MITCHELL: It seems to me to be pretty late in the day to go back to a draft that leaves in the discretion of the Government's lawyers who shall be named and served. I am sure you can't get it through the Committee and the bar and the profession generally.

MR. VANECH: You say "parties of record". There should be a limitation. That means we have searched the title

going back to the first records established in the state.

CHAIRMAN MITCHELL: If you want some kind of a provision that would be suitable and satisfactory to the demand that exists for a reasonable search of the record and can draw it for us, we are not against that.

MR. VANECH: That is all we want, something to take the burden off us in that regard.

CHAIRMAN MITCHELL: You don't give us any alternative. You argued from the beginning that this thing ought to be a matter of the Government's attorneys' discretion as to whom they shall name and serve. The Committee is against that. Our original draft was badly mauled because we didn't have a provision, as scores of state statutes have, for searching the record, and we threw it out of the book and abandoned the problem of getting these rules. We are not going to buck that attitude. The Committee would not do that now. If they did, the title companies and the Bar Association would go to the Supreme Court and bust us right now.

PROFESSOR SUNDERLAND: We can't see why the Government cannot do as they are required to do under state statutes.

MR. MacLEOD: This goes beyond the state statutes. My recollection is that the majority of states provide for naming of owners and persons interested.

MR. WILLIAMS: I think that is true. We would be satisfied with some such provision as that. Mr. Hamlin, I

think, researched that exhaustively and made a report and I think that the usual phraseology of the statutes is: "shall name the owners and parties interested". That is perfectly satisfactory. We would be glad to be required to name the owners.

MR. VANECH: We are not trying to deprive anybody. If anybody was overlooked, they would still have a right to come in and claim compensation. It is just the burden of going back to the very beginning if we comply with this rule.

PROFESSOR MOORE: Would you think it is possible to have a provision naming persons appearing of record for a period that would be necessary to acquire a fee simple by adverse possession.

CHAIRMAN MITCHELL: I am not saying that you ought to go back to the Indians on your titles, but you do not propose anything except to strike out this business with reference to the record and you give us no alternative. We tried the other alternative once and it was mauled badly.

MR. VANECH: Let's come up with a modification, if I may use that term.

CHAIRMAN MITCHELL: That is all right. I tried to get a bill through Congress to allow the Attorney General to accept a certificate of a reputable title company in the District of Columbia as to who was the owner. We had a law then that required the Attorney General to give his personal opinion about

the title. That meant a search right back to the time Columbus landed. It involved the Supreme Court Building at that time. The Government had a contract with a title company giving it exclusive right to furnish abstracts. They had a grip on the business and we waited six months for an abstract and never got it. Chief Justice Taft raised cain with me as to why we didn't get that title so they could go ahead with the courthouse.

We tried to put that bill through and our friend LaGuardia thought that was a scheme on my part to throw business to the title company and he busted that.

I don't know what you are doing now.

MR. MacLEOD: We have that law now which permits us to accept title certificates.

CHAIRMAN MITCHELL: Draw up some suitable clause as to the nature of the search that is reasonable, such as an ordinary businessman would rely on.

MR. VANECH: We will look into the suggestion about limitation to a time which would cover adverse possession.

CHAIRMAN MITCHELL: We will meet tomorrow morning at nine-thirty.

[The meeting adjourned at five-forty o'clock.]

TUESDAY MORNING SESSION

February 3, 1948

The meeting reconvened at nine-forty o'clock, Chairman Mitchell presiding.

CHAIRMAN MITCHELL: The meeting will come to order.

How about taking a vote on this tribunal problem, the various aspects of it? Are you ready for that? It is a troublesome situation.

How about the provision, first, that where Congress has specified the tribunal, it shall remain? I mean specified; I don't mean a congressional act that provides that it shall be according to the state practice.

JUDGE DOBIE: You mean specifically?

CHAIRMAN MITCHELL: I think there is an ambiguity in the rule there now as to whether Congress has specified it and has passed an act saying that it shall be according to the state law, as in the Mississippi law. I think we ought to make it clear that we are talking about a case where Congress has prescribed it.

PROFESSOR MORGAN: I think so.

CHAIRMAN MITCHELL: On the main point we leave the thing as it stands wherever Congress has specified. All those in favor of doing that raise their hands.

PROFESSOR MORGAN: We should do it largely because of the TVA, I think.

JUDGE DOBIE: So do I.

PROFESSOR MORGAN: I think they made a wonderfully good case yesterday.

PROFESSOR SUNDERLAND: They made a good case.

CHAIRMAN MITCHELL: In addition to that, if we tamper with the TVA system, we are going to run into the question whether the three-judge court is a jurisdictional matter, and that is a dangerous point.

Let's act on the main point, that we leave the thing as it stands wherever Congress has specified the tribunal. We are all agreed on that, aren't we?

[There was unanimous agreement.]

CHAIRMAN MITCHELL: Where Congress has not specified a system, what is your pleasure about that? Do you want to provide for a jury trial or do you want to provide for the local law or a commission?

PROFESSOR MORGAN: I will take the jury trial.

JUDGE CLARK: Couldn't we discuss a little bit how to approach it? We might look at the alternatives we have here, unless you have them in mind. These were worked over very carefully.

I think the issue could be a modified conformity, if I may put it that way. The issue might be stated this way, I suppose, either local conformity or jury or you can make a situation in between.

If you look at the alternatives we had, for example, the first one was a modified conformity or is conformity only for jury trial, and that gets away from this double-barreled thing that nobody would approve; that is, the commission plus the jury.

CHAIRMAN MITCHELL: We are all against it if we can get by with it.

JUDGE CLARK: That is really the point of my suggestion, that we do not need to go completely along with state conformity. And these provisions go to a modified conformity and the issue might be between a complete jury and this kind of modified conformity.

PROFESSOR MORGAN: The Department of Justice made a very good case for a regular rule for a jury trial normally unless the parties waive it. It seems to me they made an excellent case for that. Let's not talk about state conformity; let's have a jury trial according to the rule.

CHAIRMAN MITCHELL: Let's take a vote on that. All those in favor of not having a commission and for a jury say "aye." You are all agreed about that, I guess. If that is so, it knocks out the conformity idea completely, doesn't it?

PROFESSOR MORGAN: Absolutely.

CHAIRMAN MITCHELL: And we are left now to a jury trial in all cases where the parties ask for it, either party asks for it, in all cases except where Congress has specified

another tribunal.

MR. PRYOR: Isn't that what you have in the second alternative?

JUDGE DRIVER: I was impressed yesterday by what you said, Mr. Chairman, about the possible difficulties in Congress. I wonder if that doesn't mean we could largely meet that difficulty by having the first alternative. We could point out in the section that where they have a local commission the judge in his discretion can provide for it in any particular case.

CHAIRMAN MITCHELL: That is the note I tucked into the note myself here, as a possible aid in getting it through Congress. Another alternative to those stated in the draft would be to provide the tribunal be a commission with review by the district court, with power in the court to permit a jury trial upon the request of either party.

You reversed that. You have a jury trial but give the court power to order a commission instead of a jury.

JUDGE DRIVER: Yes, a commission instead of a jury. If that is put in, I wouldn't want then an appeal to a jury because you would get back to the old system.

MR. PRYOR: I like this second alternative. It doesn't provide for any commission at all. You can have a jury if you are willing to accept the second alternative, or you can waive the jury, you don't have to demand it, and it can be tried by the court.

JUDGE DOBIE: You may have delays if you have the optional commission with the judge. They will be applying for it and that will hold it up. I am inclined to go to the straight jury, of course with power in the parties to waive it and try it before the judge. I believe that that will go through Congress this time.

CHAIRMAN MITCHELL: There is another thing about it that reconciled me to the idea of not having any commissions at all unless Congress has prescribed it. Then you have to go into the field of fixing their pay and that gets us into dangerous grounds again. It involves an appropriation by Congress, and that sort of thing. One of the principal objections to the commission system has been the exhorbitant allowances that have been made on compensation.

PROFESSOR MORGAN: I think you are right about that.

MR. PRYOR: If you are establishing a rate that is high enough, you are likely to have the commission stalling, and, if you make it too low, you cannot get good men.

CHAIRMAN MITCHELL: Yes. And there is a time element, to try to get the commission to make a report and not delay. That is a hard thing to do. What can you do if they don't report?

Charlie, it looks to me as if the Committee is unanimously agreed all along the line as to principle. What alternative will carry out what we have just agreed to?

JUDGE CLARK: The second will do it more completely. The second can do that with some slight revisions, but the second was intended to do that anyhow.

MR. FRYOR: I think it does it.

CHAIRMAN MITCHELL: That second alternative hits it right on the head. I mean paragraph 1 of the second alternative.

PROFESSOR MORGAN: What is it? Where is that?

JUDGE CLARK: Page 8 of the draft.

CHAIRMAN MITCHELL: Are we ready to vote on that as it stands or have you any suggestions as to alterations or details?

JUDGE CLARK: We should take out the word "now" in the first sentence. Then there is the question whether the matter in the brackets should go in or not. I don't know whether you want to take that out.

JUDGE DOBIE: We are applying Rule 38 to it; in other words, there is no jury unless the parties demand it.

CHAIRMAN MITCHELL: Does that exception mean you merely file it?

JUDGE CLARK: You do not have to serve on all parties. This was another thing the Department of Justice thought would be very burdensome. They have all these numerous parties, so they want to file it instead.

CHAIRMAN MITCHELL: Is there any necessity of having it say that it should be filed but need not be served?

JUDGE CLARK: That is gilding the lily a little. This is the draft that Major Tolman drew up and he was trying to make it ironclad. Of course the first sentence might be shortened, but he is trying to make that just as definite as he can.

MR. PRYOR: I think you could strike the words "in all other respects".

PROFESSOR MORGAN: You might as well strike them.

JUDGE CLARK: Do you agree with the Department of Justice that the demand need not be served?

MR. PRYOR: Yes.

CHAIRMAN MITCHELL: Rule 38 doesn't say anything about filing. It just says it has to be served. Shouldn't we say here in that bracketed statement that it should be filed?

MR. LENAHAN: Rule 38 (b) says:

"Demand. Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor".

CHAIRMAN MITCHELL: My point is: If you abolish service, you ought to substitute filing.

JUDGE CLARK: Filing is covered by Rule 5 (d) under the general rules. Our general setup was that we always talked about serving; then there was the additional provision, the general one for filing.

PROFESSOR MORGAN: Say: "by filing the demand therefor within the time provided in Rule 38 (a)."

MR. PRYOR: For service.

MR. LEMANN: Except that the demand shall not be served, provided it is filed within the time limit.

JUDGE DRIVER: There should be a time limit on the demand.

JUDGE CLARK: It is covered by the original Rules 38-39. The general rules say twenty days or thirty days and within ten days after the filing of the answer.

CHAIRMAN MITCHELL: It says:

"Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than ten days after the service of the last pleading directed to such issue."

Is that the way we want it?

PROFESSOR MORGAN: That won't do for us.

CHAIRMAN MITCHELL: A lot of people won't put in an answer.

JUDGE DRIVER: They need not answer at all.

CHAIRMAN MITCHELL: They still have their right to have a compensation award. To avoid confusion our bracket ought to specify in some form that it must be filed, but it need not be served, and that the filing should be within the time

specified.

PROFESSOR MORGAN: Why shouldn't you say: by filing a demand therefor within so many days.

MR. PRYOR: Filing a demand within the time prescribed in Rule 38 for the service of such demand.

CHAIRMAN MITCHELL: That provides for service after issue is joined by answer.

PROFESSOR MORGAN: It will cost them money.

CHAIRMAN MITCHELL: How shall we specify it?

PROFESSOR MORGAN: By filing within so many days after what? After service of the summons.

CHAIRMAN MITCHELL: It ought to be a certain time before the term of court in which the case is to be tried. We want the judge to have time to get his jury.

MR. LEMANN: Do we allow twenty days to answer?

PROFESSOR MORGAN: Yes.

MR. LEMANN: Why not give them twenty days to demand a jury?

JUDGE CLARK: Then under the ordinary system there could be a reply and then ten days after the reply.

PROFESSOR MORGAN: You are not going to get a reply in these cases, are you? Are there going to be counterclaims against the Government?

JUDGE CLARK: It is pretty hard to think of any.

PROFESSOR MORGAN: That is why I was thinking of that.

Replies are forbidden if you do not have a counterclaim.

CHAIRMAN MITCHELL: I am wondering if twenty days to answer means twenty days after service.

PROFESSOR MORGAN: That is what it says.

CHAIRMAN MITCHELL: We have a provision here that is different than our old rule which provided for service by publication being complete at the last publication and you gave a fellow twenty days after that; he may not have even seen the publication.

You are hurrying him too much on a substituted service when you say twenty days after the last publication.

MR. LEMANN: Doesn't that bring up another point now? Ought we not to stick to the question of what time we are going to allow him for demanding a jury. The point you are raising seems to me one which we will come to later.

MR. PRYOR: The fair proposition seems to be that the demand should be with reference to the time for trial.

CHAIRMAN MITCHELL: It really isn't fair to say you waive your jury unless you are served by publication and you demand the jury within twenty days after the last publication. You may not have a lawyer then.

PROFESSOR MORGAN: Suppose you say within a certain number of days before the date set for trial.

MR. LEMANN: Why not give him the time provided for filing the answer, whatever time we fix for that?

CHAIRMAN MITCHELL: The time to answer is now twenty

days after the last publication. I am not worried about actual personal service. Then if the fellow has twenty days from actual service to get a lawyer and file a demand, that is fair. However, there are so many cases where a man isn't served at all.

MR. LEMANN: We should have whatever we finally decide to have for an answer in publication cases.

MR. PRYOR: He doesn't have to answer or have anything on file in order to get compensation.

CHAIRMAN MITCHELL: No.

MR. LEMANN: We do fix the time he may answer whether by personal service or by publication. Why not use that same time, whatever we may fix it at, as the time to demand a jury?

CHAIRMAN MITCHELL: Haven't we fixed the time now as twenty days?

MR. LEMANN: We have. You may want to change it in the publication cases. I don't know that we may not want to do that. That is a separate point. But whatever we fix it at, I don't see why that would logically not be the time to demand the jury.

CHAIRMAN MITCHELL: Suppose we leave it as it is, still don't you think that the suggestion has been made that instead of the jury being demanded within so many days that we take the other tack and use the trial of the term and say so many days before trial, or some such equivalent?

MR. LEMANN: That would be tied up with the answer, I should suppose. If you are going to permit an answer, I don't see how you will assign a case for trial before the time for the answer has expired.

MR. PRYOR: The chief purpose for the demand for a jury is to enable the court to arrange for it. The logical thing would be to fix the time in the light of that situation.

MR. LEMANN: How could the court very well fix the case for trial until the time for the answer has expired?

JUDGE CLARK: I agree with Lemann. As I know the way the district court operates, there isn't any time of potential trial that you could know about. In consequence, while they do not have a jury very much, they practically fix the thing especially when they have the case. The terms of the court are more theoretical than actual. The terms of the court mean, in effect, that the court has to be ready to hear cases if they come along. But actually the court sets a case when it has it ready to be heard.

MR. LEMANN: What is the answer to the argument that you could not fix a case for trial before the time for the answer has expired?

PROFESSOR MORGAN: It is impossible to do that except by stipulation.

MR. LEMANN: I don't see how you can fix a case for trial until the time for an answer has expired.

CHAIRMAN MITCHELL: I agree with that, but then we can fix the time after that.

MR. LEMANN: Then we will be prolonging it. If we leave it twenty days, that would be long enough to ask for these trials by jury.

MR. PRYOR: Under Rule 38 it can be filed within twenty days after the answer.

CHAIRMAN MITCHELL: We can provide that it shall be filed within the time fixed for the answer and the court shall have discretion to extend the time. Then, if a fellow has been served by publication, the court would have power to extend the time. Why wouldn't that leave it so he could work it out?

MR. PRYOR: That does it.

JUDGE DRIVER: As a practical matter, what you get in these condemnations is that they have been setting a date for appearance. This notice contemplates the same thing. On the day for appearance these people (they usually fix the notice on everybody for a certain day), sometimes as many as fifteen to twenty-five, come to your courtroom. They don't have any attorneys. The court explains the procedure and, if they wish to contest the action or the amount of compensation, they should employ an attorney. Then some of them arrange for an attorney. Others say they are not satisfied and come in at the time set and perhaps make objections or put on testimony without an attorney. That is what happens in my court at any

rate in these cases.

JUDGE DOBIE: The trouble about the trial of course is that it is indefinite.

CHAIRMAN MITCHELL: I would suggest instead of the bracket that we provide in substance that the demand for a jury need not be served but shall be filed within the time fixed for the answer, but the court shall have discretion to extend the time for filing a demand.

PROFESSOR MORGAN: Just as you have in Rule 39 (b).

JUDGE DRIVER: They make this point in 39 (b):

"Issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court; but, notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion upon motion may order a trial by a jury of any or all issues."

MR. PRYOR: I like the language you used. I think it would be better to specify in the rules instead of relying upon the general provision.

PROFESSOR MORGAN: You have a similar provision here. I agree with that.

MR. LEMANN: Has the court the general right to extend time except as prohibited in specific cases by the rules?

I am addressing myself to a certain phase of draftsmanship. If you make a general provision that all the rules

shall be applicable and you put in things that are already covered by the rules, it is not artistic.

CHAIRMAN MITCHELL: It makes the lawyer thumb through the old rules, whereas a few words here would clear it up. Here we have been wading around to find something in the old rules that will give the court discretion to extend the time for demanding a jury.

PROFESSOR MORGAN: We had a lot of difficulty on that question of extension of time and we put in a general rule with certain specified exceptions in the amendments.

CHAIRMAN MITCHELL: There is another thing: We provide that the court under 6 (b) cannot extend the time.

MR. LEMANN: Not 39 (b). I think 39 (b) is somewhat arguable as to whether he is entitled to a jury as of right. You get into the argument as to what the words "of right" mean. I would rely on 6, if that is the time rule. Every lawyer ought to know that; every judge would know it.

JUDGE DRIVER: Rather than give the court the discretion to extend the time, I would give the court discretion to grant a jury trial at any time before trial. The word "extension" might imply that the party should come in before the time of asking for a demand expires and is given an extension. I think a party who never has answered who comes in twenty days after the time for answer should have a right in the discretion of the court, should have his jury trial.

CHAIRMAN MITCHELL: Suppose we say that the amendment

need not be served but shall be filed within the time allowed by these rules for answer or such further time as the court shall fix. That leaves him power in any case to grant an extension.

PROFESSOR MORGAN: I think that is a good idea.

CHAIRMAN MITCHELL: The proposal then is that instead of the bracketed clause in subdivision (1) of the second alternative of page 8 in our printed preliminary draft, substitute a provision that the Reporter will work out in detail, that the demand need not be served but shall be filed within the time allowed for answer or such later time as the court may fix.

Does anybody have further suggestions about that? If there is no objection, that is agreed to. Is that all right?

JUDGE CLARK: I think so. This is what I have written down:

"except that the demand need not be served but shall be filed within the time allowed for answer or within such further time as the court may fix."

PROFESSOR MORGAN: That is right.

PROFESSOR SUNDERLAND: Read that again.

JUDGE CLARK: This is to take the place of the bracketed statement:

"except that the demand need not be served but shall be filed within the time allowed for answer or within such further time as the court may fix."

CHAIRMAN MITCHELL: And he can allow it at any time, as late as will permit him to get a jury and arrange for it.

MR. LEMANN: What are we doing with the District of Columbia under this?

CHAIRMAN MITCHELL: We are not touching it, because that is fixed by act of Congress.

JUDGE DOBIE: We are leaving that alone.

JUDGE CLARK: Before you leave this, I want to take up, first, the other sentence in the brackets and let's make sure what we are doing, too, in respect to that. You will notice the scheme of this rule is that the only issue that goes to the jury is just that of compensation. Suppose there should be a question of power of taking, or anything like that, that will be for the court, because the last sentence says: "In all other respects Rules 38 and 39 govern."

I should think that certainly should stand. It is important, isn't it?

Then, the next question is the question raised by Mr. Pryor: Do we have to have a direct provision with regard to Rules 38 and 39? We want the scheme of waiver in here. Does it incorporate it without that language?

CHAIRMAN MITCHELL: Rules 38 and 39 are made applicable by the regular provision, and the fact that there is a demand required and a time limit fixed on it shows that if you don't do it, you don't get a jury trial.

JUDGE CLARK: Then we leave out the second sentence of the bracket and of course retain the last sentence.

MR. PRYOR: That is right.

JUDGE CLARK: Then, too, we will have no provision for commissioners at all, unless possibly in the case where the master rule applies. I mean Rule 52 or Rule 53.

PROFESSOR MORGAN: It would be a master. You mean where the case is tried by the court and he appoints a master?

JUDGE CLARK: Yes.

PROFESSOR MORGAN: I don't suppose we can stop it.

CHAIRMAN MITCHELL: The question is whether we even permit it.

JUDGE CLARK: I guess we do, because we incorporate the other rules.

PROFESSOR MORGAN: Suppose you don't demand a trial by jury and, say, the trial is by the court.

JUDGE CLARK: That is so restricted.

PROFESSOR MORGAN: We cannot do anything more. We cannot tell the court, can we, that in those cases compensation should not be fixed by a master?

CHAIRMAN MITCHELL: What is the harm in having a master in some cases?

MR. PRYOR: You can have it under the general rules without any reference to it here.

PROFESSOR MORGAN: You can.

CHAIRMAN MITCHELL: You talk about preventing it.

MR. LEMANN: I don't think you ought to prevent it.

CHAIRMAN MITCHELL: There are all kinds of restrictions.

PROFESSOR SUNDERLAND: The master rule provides for compensation charged against the parties.

JUDGE CLARK: We are going to take up the issue of costs later. It is a problem of whether we want in our section on costs to mention something about a master's fees and put the court in mind of it.

CHAIRMAN MITCHELL: I don't like to do that. We get into this field of appropriating money for an extra kind of tribunal and soaking the Government and forcing Congress to appropriate money, which we have always dodged.

You can see from the answers by the Department of Justice that, notwithstanding that there is no law now that provides for the Government paying the master's fees, they get the appropriations to do it.

PROFESSOR SUNDERLAND: Without a bit of authority.

CHAIRMAN MITCHELL: Somebody has to pay it and they think it is right for the Government to pay it, so they get the money from Congress without any rule and get along fine.

JUDGE CLARK: I don't know whether you want to take up that general issue yet or not. I think you have to say something about costs and expenses. We do say the general rule on costs

is 54 (d): That costs shall be taxed in favor of the prevailing party. The prevailing party here is the United States and we either have to say in some way that Rule 54 (d) does not apply or use the weasel way out that we suggested. We suggested that we put in an additional provision (m): "Costs shall be awarded in accordance with law and are not subject to Rule 54 (d)."

MR. LEMANN: What does "in accordance with law" mean?

CHAIRMAN MITCHELL: Whatever Congress has done.

MR. LEMANN: What has Congress done?

PROFESSOR MORGAN: Congress has done nothing, but the department has done it.

MR. LEMANN: By the principles of equity, if the claimant doesn't get more than the Government offered him, he should bear the costs; if he gets more than the Government offered him, the Government should bear the costs. That would be analoguous to the usual rule.

PROFESSOR SUNDERLAND: The Government does not have to make an offer under our rules.

MR. PRYOR: If the costs were paid by the landowners, that would reduce the compensation and that would be unconstitutional.

MR. LEMANN: He gets compensation for his land and pays costs on the side because he has made it necessary to have a tribunal to determine what he should get. That would not

reduce the compensation for his land, practically perhaps, but not legally.

PROFESSOR MORGAN: You are going to get into a lot of practical difficulties here in connection with fixing prices on a whole bunch of lands, to tell how much of the master's fees, for instance, goes on this land and how much on that land, and so on.

MR. LEMANN: Does the TVA pay all the costs?

PROFESSOR MORGAN: Yes, sir.

CHAIRMAN MITCHELL: We are in a question of substantive law when we try to deal with costs. Is it a substantive right?

PROFESSOR MORGAN: The trouble is that we have the master's charges taxed as costs in 53.

PROFESSOR SUNDERLAND: Yes, we do.

JUDGE CLARK: Rule 54 (d) is even more troublesome: That costs shall be taxed in favor of the prevailing party.

CHAIRMAN MITCHELL: Why don't we say: "when allowed by law."

JUDGE CLARK: Then we specifically take out 54 (d).

CHAIRMAN MITCHELL: Leave it to Congress or the Appropriations Committee in the House.

MR. LEMANN: Who would know what the law is?

CHAIRMAN MITCHELL: When Congress appropriates money for that sort of thing and the department uses it as a matter

conscience to pay these costs, it seems to me that is done by law.

JUDGE DOBIE: The use of a master in these cases is very exceptional. Have you ever used a master in a condemnation case?

JUDGE DRIVER: No.

CHAIRMAN MITCHELL: The item comes under an appropriation possibly that was made for the purpose of the general expense of a certain project.

MR. PRYOR: I have never heard of a master in condemnation cases.

MR. LEMANN: How do the judgments run in condemnation cases? Do they make reference to costs?

JUDGE DRIVER: No, I think not. The Government just pays them, as I recall. There isn't any specific provisions about them.

MR. LEMANN: The general practice is for the Government to pay?

JUDGE DRIVER: Yes.

PROFESSOR MORGAN: They don't pay for the defendant's witnesses.

JUDGE DRIVER: No.

PROFESSOR MORGAN: No costs are taxed?

JUDGE DRIVER: No.

PROFESSOR MORGAN: No costs are taxed one way or

the other?

JUDGE DRIVER: There might be a case where a master would be used. I can't conceive of any. The factual issue in condemnation cases is the value of the property. There couldn't be anything more simple and narrow than that.

JUDGE CLARK: Our state procedure is essentially that. They technically refer it to a referee who actually serves practically as a master. The only thing is that they do not need to pay him because he is already on a pension salary.

MR. LEMANN: I suppose fees of expert witnesses would be ordinarily taxed as costs in an ordinary suit. Does the Government pay those fees?

JUDGE DRIVER: Not for the defendant's fees for witnesses, but they pay for their own.

MR. LEMANN: Theoretically, on Mr. Pryor's theory, suppose the Government sues to appropriate my office building and I hire some high-class experts as witnesses to support my position. I have to pay them and I don't get that back. That reduces my compensation for my property.

PROFESSOR MORGAN: It doesn't reduce your judgment.

CHAIRMAN MITCHELL: Your lawyer's fees do, too; but you don't get that back.

MR. LEMANN: That is right. In don't infer that it would interfere with just compensation but practically it costs

me money to vindicate my position.

MR. PRYOR: We went through that about a year ago. We had the case I mentioned the other day where we got a judgment in the court of first instance for $175,000 and the Government appealed to the CCA. We had a lot of expert witnesses in that case. We had to pay costs for all our witnesses and the Government paid all the costs; but we had to pay our own costs on that appeal. The Government appealed, but we had to pay costs for printing, arguing, records, and so forth. It came back and was tried again and we got another verdict from a jury for $100,000. The Government took care of everything except our own costs. There wasn't anything in the judgment about costs.

PROFESSOR MORGAN: Neither side was taxed costs?

MR. PRYOR: That is right.

PROFESSOR MORGAN: In the trial court they just don't tax costs.

CHAIRMAN MITCHELL: Why do our rules say they should be taxed costs? We ought to modify them in condemnation cases.

PROFESSOR MORGAN: Rule 54 (d):

"Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers and agencies shall be imposed only to the

extent permitted by law."

MR. PRYOR: The term "prevailing party" is not applicable to condemnation cases.

CHAIRMAN MITCHELL: Why don't we say in the condemnation rules we are excepting those general rules that are not applied and simply say that costs shall not be taxed?

PROFESSOR MORGAN: Say that Rule 54 (d) will not apply.

JUDGE DOBIE: I don't think in practice we have much difficulty, do you, Judge?

JUDGE DRIVER: Not at all.

JUDGE DOBIE: I think that is a good suggestion; put a negative reference in there that that rule shall not apply.

JUDGE CLARK: That is what we recommended. All we say is that it should be according to law.

PROFESSOR MORGAN: Cut out the first part.

JUDGE CLARK: I guess that is all right.

JUDGE DRIVER: You must remember that you have some telephone companies and railroad properties that are condemned and there is no reason why those companies should not be taxed with costs, but I should leave it out and say: Rule 54 (d) does not apply.

CHAIRMAN MITCHELL: Say that it doesn't apply in cases against the United States.

MR. PRYOR: That is what you say in the first

paragraph.

CHAIRMAN MITCHELL: When we go to paragraph 2 we might handle it there. We provided that "the tribunal to try the issue of just compensation shall be as specified by the constitution or the statutes of the state in which the property is situated."

There is a provision on page 11 which reads: "If the action involves the taking of property for public use under the right of eminent domain arising under the constitution or statutes of a state, the foregoing provision of this Rule 71A do not apply."

MR. PRYOR: As I understand, the word "law" has been substituted for "constitution and statutes".

JUDGE CLARK: Somebody suggested that. We didn't see why that wasn't the way to put it. It would read "under the law of the state".

CHAIRMAN MITCHELL: How is that, Charlie? What are you going to do?

JUDGE CLARK: Take out "constitution and statutes" and substitute the shorter term "law".

CHAIRMAN MITCHELL: I am wondering, we have a choice here and certainly I have in mind mind whether we are just going to provide the tribunal shall be according to the state law and the general provisions, that the whole procedure shall be the state procedure.

JUDGE CLARK: That is an additional question. This question we are talking about is just a question of the language.

CHAIRMAN MITCHELL: Suppose we get an expression of opinion right now on this question of state procedure. We had cases that may be removed and the procedure has started under the state law and service has been made and publication has taken place and whatever pleadings are allowed by the state law have been filed. Then one of the parties is a nonresident corporation and it removes his section of the case into the Federal court. Under one of our proposals here you shift at that point from the state practice to the Federal practice, except that the constitutional laws of the state about tribunals shall apply or any condition that the state law attaches to it.

That is pretty delicate and those cases, while they are few, get you into a situation where you have to shift from state to Federal practice in the middle of the case.

JUDGE DOBIE: That is bad.

CHAIRMAN MITCHELL: I am wondering whether those situations, being so few in the Federal court, wouldn't indicate to us that the practical thing for us to do is wipe out this rule as applied to any state case and say that the state's power of eminent domain shall be conducted in all respects in accordance with the law of the state.

MR. LEMANN: Another alternative would be to say that

our rule shall apply in all cases.

MR. PRYOR: There are very few of those cases. It seems to me that it would be better to follow the same rule as to the tribunal.

JUDGE DOBIE: I don't see why they should not be the same whether you are proceeding under state or Federal law.

JUDGE CLARK: I was going to put in a little plea for alternative No. 1. Armstrong says that he recommended alternative No. 2, but what he says is alternative 1.

Alternative 1 says that the Federal rules shall govern in the Federal courts except for the tribunal. Alternative 2 says in this one case we go back to state law.

PROFESSOR MORGAN: The whole case.

CHAIRMAN MITCHELL: Here is the first alternative in a state case on page 11, and Judge Donworth had in mind the Constitution of the State of Washington where the condition is attached to the exercise of the right. It reads:

"If the action involves the exercise of the power of eminent domain under the constitution and laws of a state, the provisions of this Rule 71A shall apply, with the proviso that the practice herein prescribed may be altered to the extent necessary to observe and enforce any condition affecting the substantial rights of a litigant attached by the state constitution or laws to the exercise of the state's power of eminent domain, including any applicable provision relating to trial by

jury."

PROFESSOR SUNDERLAND: That principle is broader than we are applying here. The Supreme Court referred to any right created by the state statute and a procedure is provided for the enforcement of that right which is to be taken as a condition for the exercise of that right, then that procedure must be used. We don't say in our general rules that wherever a right is created and a procedure is provided in the state which is a condition to the exercise of that right such shall be the situation. We don't say that in our general rule. Why do we say it with regard to condemnation?

It is a general principle that would have to operate whether we say anything about it or not. We are inviting people here to claim that it is a condition to the exercise of a right.

PROFESSOR MORGAN: A condition for the deposit of money, that's what he had in mind.

CHAIRMAN MITCHELL: He had in mind the method of trial.

PROFESSOR MORGAN: We have taken care of that by allowing a jury trial. You have to cut out that last thing because we have already provided for a trial by jury.

MR. LEMANN: Have we anything in these rules relating to substantial rights? That is a matter of substantive law.

JUDGE CLARK: I can tell you the history of this. There is a great deal in what Edson said. Judge Donworth was

very much afraid of our interfering here. Originally he wanted to go so far as the second alternative which removes everything; by negotiation or at least by considerable correspondence we got him to accept this and we were more or less inclined to take it as stating the situation.

CHAIRMAN MITCHELL: I like the first alternative except for the words "including any applicable provision relating to trial by jury."

MR. PRYOR: You don't need that.

CHAIRMAN MITCHELL: I think the lawyers are blind about the thing. I agree that maybe since it is already taken care of by decision, we may not need it. How many lawyers know that? Judge Donworth on page 11 clears the whole situation up in just a sentence and nobody has to hunt around for decisions to find the law. It is surprising how some lawyers are ignorant about some things. If you don't hit them in the face, they do not know what to do.

PROFESSOR SUNDERLAND: This provision would present the question to the lawyer whether or not these special conditions in the state practice are conditions for the exercise of the right.

CHAIRMAN MITCHELL: He has it anyhow.

PROFESSOR SUNDERLAND: Why tell him about it and try to encourage him to raise the point?

CHAIRMAN MITCHELL: It is like the business when the

new amendments were required to become effective a year ago. Just think of it! The act under which the rules were promulgated provides that when rules are filed by the Court at the opening of the term of a session of Congress, they shall not take effective until after the close of the session. That is plain enough.

The first session of the 80th Congress adjourned in July. Their adjournment was not sine die. On the Congressional Record it plainly stated that Congress had adjourned until January 2, 1948, at which time the first session of the 80th Congress was to resume its sessions. The adjournment in July was plainly not the close of the session. So Congress had the theoretical right within those next three days; it had the legal right before the next session started to condemn these rules.

So the session was not closed. I don't see how anybody who looked at the Congressional Record could be in doubt as to when these amendments to the rules took effect.

Yes, the whole bar of the country was upset about it. Nobody looked at the the Congressional Record to see what the adjournment was, whether it was sine die or a recess, it just being a question as to the length of recess.

Some of the courts got mixed up on that one. Two judges handed down decisions that the rules were already in effect three months after July 1947. That is an illustration

of what I mean by saying, if you leave the lawyers to weave around and get a conclusion they ought to reach, they just do not do it. Even though it is unnecessary and may suggest a ground for litigation, you are leaving them up in the air. There will be lawyers riding around wanting to know what to do.

We had it in the draft that has gone out. Now we will strike it out and the lawyers will hit the ceiling wondering why we struck it out.

PROFESSOR SUNDERLAND: I don't think it made much of an impression on the lawyers. Nobody commented on it. I don't think they understood what we were driving at.

CHAIRMAN MITCHELL: Let's get an expression of opinion about what you are going to do with state cases. We have adopted subdivision (1) of the second alternative on page 8 and subdivision (2) of that same alternative deals with the state power of eminent domain, and we find it also deals with it in the first alternative on page 11. My suggestion is that we strike out paragraph 2 under the second alternative on page 8, which is limited to tribunals and adopt the first alternative under page 11, with the exception of the words "including any applicable provision relating to trial by jury."

MR. PRYOR: As a separate subsection?

CHAIRMAN MITCHELL: That is right.

JUDGE DOBIE: What effect will it have?

CHAIRMAN MITCHELL: It will mean, in effect, that all

state cases that get into the Federal court by removal or have been originally instituted there on the ground of adversity are governed by this rule, except that we caution the court that, if there is any condition attached to the state power by the state constitution and law, the practice may be altered but only to the extent necessary to enforce that condition.

JUDGE DOBIE: Otherwise no conformity.

CHAIRMAN MITCHELL: No conformity.

JUDGE DOBIE: That is all right.

MR. LEMANN: In line 347 we should revise the language: "this Rule 71A shall apply, with the proviso". That will be omitted and it will then read:

"If the action involves the exercise of the power of eminent domain under the laws of a state, the practice herein prescribed may be altered to the extent necessary", and so forth.

MR. PRYOR: Substituting "under the laws of a state" for the words "under the constitution or laws of a state".

MR. LEMANN: Yes, in line 346.

CHAIRMAN MITCHELL: Then we alter the heading on the second alternative, page 8, because that applies only to the tribunal.

MR. LEMANN: That is right.

JUDGE CLARK: We can say: "(h) Trial", and leave it that way. Or shall we say: "Under the Federal Power of Eminent

Domain"? "(h)" is the heading for the whole section. That is line 220.

MR. PRYOR: "(h)" is all right for the heading of that section. Under (1)--

JUDGE CLARK: You wouldn't have (1) because (2) has dropped out.

MR. PRYOR: Your heading under (1) would be "Federal Power of Eminent Domain" and under (2) you would put your first alternative on page 11.

JUDGE CLARK: Is that what you want to do. I thought there was a suggestion that it remain in a separate place.

CHAIRMAN MITCHELL: I think you are right about that.

MR. LEMANN: Cut out the caption on line 242 and cut out subdivision (1) and then go on with "(h) Trial".

CHAIRMAN MITCHELL: And strike out "Under the Federal Power of Eminent Domain" and that covers either Federal or state. Then along comes the first alternative on page 11, set up as an independent section that provides that the Federal practice shall be applied in state cases except that it may be altered to apply with constitutional conditions. It would not be appropriate to put the first alternative on page 11 down under the present heading of paragraph (2) on page 8. The first alternative is something more than the tribunal.

MR. LEMANN: It is like a footnote for lawyers, because it is something that would be so anyhow.

CHAIRMAN MITCHELL: Are you gentlemen agreed on the proposition that the Federal rule shall apply to state cases except as to the extent necessary to carry out a condition attached to a state power? Is there any doubt about that?

[No objection was raised.]

JUDGE CLARK: May I recapitulate? First, line 346 to 348 will read as follows: "domain under the law of a state, the practice herein prescribed may be altered to the extent necessary", and so forth. Then we stop with a period at line 354 after the words "eminent domain". That is what we have settled.

If that is settled, I want to come back to costs. I am not clear what we did as to that.

PROFESSOR SUNDERLAND: What is the relation of that provision to No. (1) on page 11?

JUDGE CLARK: What we have done to that is this: As to subdivision (h), which starts at line 220, we will have the word "Trial" and then we will take out the numeral (1) at 242 and the heading at 242 and 243. Then will we continue with that as part of (h) as we finally recast it, and (2) on page 8 will drop out entirely.

MR. LEMANN: You asked about costs. I think we voted that we should insert the provision of 54 (d). shall not apply.

JUDGE CLARK: I want to get at how we incorporate it. Of course, you answered it. Shall we have a new provision (m),

which says: "Costs. The provisions of Rule 54 (d) shall not apply"?

MR. LEMANN: Instead of saying "shall not apply," say "shall not be controlling."

JUDGE DRIVER: It is less of a prohibition.

MR. LEMANN: That could cover Judge Driver's point about the railroad cases, for example.

MR. PRYOR: That is better.

MR. LEMANN: I think the way to handle that is by a separate subdivision.

JUDGE CLARK: Then you agree not to make it an affirmative statement, just a negative statement. Then (m) will read:

"Costs. The provision of Rule 54 (d) shall not be controlling in proceedings under this rule."

MR. LEMANN: It leaves it up in the air, but I don't know what we can do about it.

CHAIRMAN MITCHELL: It is up in the air today. The department pays the costs.

Shall we go back now and start in with the rules section by section and consider the minor objections we have before us?

Is there any change on page 1? What is your recommendation?

JUDGE CLARK: Yes, we have suggested some changes

of wording. The first one would really go back to the title and section (1). The government men have objected to the use of the words "for Public Use." They say that is surplusage, that after all, under Federal law at least, you don't go to a concept of public use directly, you go to the statutes and wherever the statutes apply, they govern. The words "for Public Use" are at best surplusage and they may raise a question whether you have to prove public use.

Our suggestion is to leave out the words "for Public Use."

PROFESSOR MORGAN: What about substituting "under the Power of Eminent Domain"?

JUDGE CLARK: We substituted that in the first place. It appears in section (a).

PROFESSOR MORGAN: If you substitute it there, then you could leave it out elsewhere.

JUDGE CLARK: To cover that fully our recommendation would be to end the title with the word "Property" to read: "Rule 71A. Condemnation of Property."

Then in (a) we would say: "The Rules of Civil Procedure [leaving out the word "provision"] for the District Courts of the United States govern the procedure for the condemnation of property under the power of eminent domain, except as otherwise provided in this rule."

MR. PRYOR: That brings up the question that bothered

us yesterday as to what property we are going to cover. I think we ought to say something here to indicate what we are including.

CHAIRMAN MITCHELL: Is there any doubt but what this rule was intended to be drawn to apply only to real property and interests therein?

MR. PRYOR: I think that is right.

CHAIRMAN MITCHELL: We tried to find out whether there was any condemnation procedure for condemning personal property. I am a little hazy in my mind as to what the situation is there.

PROFESSOR SUNDERLAND: I am surprised they never condemned factories with factory equipment.

MR. PRYOR: On a leasehold. That General Motors case.

PROFESSOR SUNDERLAND: If they took the factory, they have to deal with the personal property.

CHAIRMAN MITCHELL: They might be fixtures. Do we want to proceed to investigate that further and see if we want to modify this rule to include personal property?

MR. PRYOR: In that General Motors case it was a condemnation of a leasehold, but the compensation question went to the value of a lot of equipment that was in there, determining whether or not the owner, the leaseholder, General Motors, was entitled to compensation because of the inconvenience it was put to in having to remove this equipment which was fixed.

PROFESSOR SUNDERLAND: The Government didn't take the equipment.

MR. PRYOR: The Government didn't take the equipment, but the point involved there was whether or not they were entitled to compensation for all this work of moving this stuff.

PROFESSOR SUNDERLAND: Suppose under the war necessity they wanted to take a factory including the equipment which was in it, could they take it under our rule?

CHAIRMAN MITCHELL: Including the loose tools, not the fixtures.

PROFESSOR SUNDERLAND: Yes. Could they take it under our rule?

MR. PRYOR: That is a matter of substantive law.

CHAIRMAN MITCHELL: Did we ask the Department of Justice to give us further light on it? Remember I asked them if they wanted to define property and mentioned the suggestion of a tangible and intangible property, which raises many problems.

PROFESSOR MORGAN: As a matter of hereditaments they don't want to distinguish between tangible and intangible property.

MR. PRYOR: Because you have such things as easements.

PROFESSOR MORGAN: You might between personal and real.

JUDGE CLARK: The department officials didn't have

too many ideas on this subject. Apparently they didn't think about it.

CHAIRMAN MITCHELL: Neither have we. We have all been thinking in terms of land, leaseholds, interests in land, estates less than fee, and all that sort of thing, but all of land.

MR. PRYOR: In these condemnation proceedings I know that the Government does pay compensation for a lot of personal property, but I don't know of a case where they have gone through condemnation.

For instance, they took over some 25,000 acres in my home county for an ordnance plant and they settled with all these farmers for a lot of personal property, but there was no condemnation, there was no trial in condemnation.

CHAIRMAN MITCHELL: I would feel we are not equipped to deal with this question of whether this rule ought to apply to personal property or not until we hear from the Department of Justice. If the Government is condemning property which includes real property and/or personal property and wanted to condemn it instead of seizing it and forcing a man into the Court of Claims, it seems rather foolish not to take care of that situation here.

I think this rule would have to be changed to make it clear whether it includes personalty or does not. It is vague on the subject now.

MR. PRYOR: I think this rule probably ought to say real property.

CHAIRMAN MITCHELL: That is on the assumption that we find there is no occasion at all for having a rule on condemnation of personalty.

MR. LEMANN: I see on page 51 of this material that the "World War Veterans Relief Act . . . provides that the Administrator of Veterans Affairs may acquire by condemnation or otherwise any hospitals, facilities and incidental personalty including 'vehicles, livestock, furniture, equipment and accessories'."

PROFESSOR SUNDERLAND: Suppose the Government wanted to condemn ships, it couldn't do it under this rule if it is limited to real property.

JUDGE CLARK: I brought up that provision. They thought the Veterans Administration did it and they didn't do it.

MR. LEMANN: That is no answer.

JUDGE CLARK: They apparently thought of that.

CHAIRMAN MITCHELL: Suppose we pass that up for the present. We have to have more information and I will jog up these fellows on the phone and see if they cannot report to us this afternoon.

MR. PRYOR: I take it that there is to be some kind of a specification of the kind of property that ought to go into this rule.

CHAIRMAN MITCHELL: Right. As it now stands it is subject to the interpretation that it relates to realty, because it says: "The complaint shall contain a caption as provided in Rule 10 (a), except that the plaintiff shall name as defendants the property, designated by quantity, lot, parcel or tract and at least one of the owners of some part of or interest in the property."

PROFESSOR MORGAN: You can take that all right.

CHAIRMAN MITCHELL: You couldn't say a parcel of personal property.

JUDGE CLARK: You could say a quantity.

MR. LEMANN: Don't we know that there are some statutes that authorize the taking of personal property? The Department of Justice didn't deny it. It is there. It seems to me we have that information before us. The cases are rare, but they exist.

I think our problem will be with that information whether we are going to restrict the application of this rule to exclude such cases.

JUDGE CLARK: I think Monte is correct. I want to ask this before we leave it. Suppose you define it, would you then have done all you should in the way of the exclusion of special acts? That is something we ought to think about a little. Do we need to say something separately that this does not apply to certain kinds of special proceedings anyhow, does not apply to the Atomic Energy for one? Or is it adequate without

mentioning it?

Well, I suppose in any event we ought to mention it in the footnotes we put out. Would it be sufficient to say: "Obviously [that is a great legal word] this does not apply to Atomic Energy."

MR. LEMANN: Why?

JUDGE CLARK: Don't press me why? I can't get along without the word "obviously."

MR. LEMANN: I am objecting to the statement not to the word "obviously," which is a wonderful word.

JUDGE CLARK: Would you need something special to exclude things like that?

MR. LEMANN: I think you would with respect to the Atomic Energy Act, assuming we don't restrict it to personal property. If we do exclude it, we don't need that exclusion, too. If we don't exclude it, we have to exclude the patent compensation board which provides for a review of their decisions by the Appeals Court of the District of Columbia.

MR. PRYOR: Suppose you said condemnation of real or personal property or any interest therein other than patent rights.

CHAIRMAN MITCHELL: We don't really need to do that, because, if the Government has a statute that allows it to take a patent right and have a compensation board with the right of the parties to appeal to the Court of Appeals or something, then

we have to see that this rule does not prevent the Government from following the other practice and permits the Government to choose to condemn under this procedure. We don't have to exclude this thing from the application of those cases because the Government may get some legislation that would enable it to choose the condemnation route instead of the board with appeal to the Circuit Court of Appeals.

MR. LEMANN: The Atomic Energy statute uses the word "condemn". If we have a general rule on condemnation, somebody may argue that our rule superseded the statute.

CHAIRMAN MITCHELL: You mean that a rule of procedure in case the Government chooses court condemnation proceedings would repeal the statute and allow the Government to do that.

MR. LEMANN: This Atomic Energy statute is a statute for condemnation.

CHAIRMAN MITCHELL: The question of the Government's power to proceed one way or another is a matter of substantive law. We cannot by rule of procedure say the Government cannot proceed as provided in the Atomic Energy law, but it must go into court. We couldn't do that.

MR. LEMANN: If we adopted a general condemnation statute applying to all kinds of property, you might make a very respectable argument that that rule would govern the procedure in which the Government must condemn property.

CHAIRMAN MITCHELL: I don't think that for a minute.

We can't apply a procedure providing that the Government cannot take property under the Atomic Energy law and must go into the district court and condemn.

MR. PRYOR: Your Atomic Energy law prescribes how the compensation shall be paid.

CHAIRMAN MITCHELL: It is nonjudicial except by appeal to the CCA.

MR. PRYOR: That specific legislation would control.

CHAIRMAN MITCHELL: His point is that we can change it by procedural rule.

MR. LEMANN: We have changed statutes on procedural matters. This is just a question whether it is procedural or not. Is your point so clear that it is not necessary to put in a section saying that nothing in this rule shall affect the provisions of this act?

CHAIRMAN MITCHELL: I think we might put it in a note and say that of course there are statutes that do not provide for judicial condemnation at all, such as the Atomic Energy Act, where the Government can do that. I cannot concede that we have the right by a procedural rule to say that the Government cannot do it according to the statute. That repeals the statute and allows some other kind of method.

PROFESSOR MORGAN: You would say, if they started to condemn in the district court, they have to use the statute.

MR. LEMANN: He says, if they are going to condemn but

not in the district court, these rules would have no application.

CHAIRMAN MITCHELL: That is right. We cannot compel them to go into the district court.

MR. LEMANN: Are we going to restrict this to real property? If we do, we won't be involved in this question.

CHAIRMAN MITCHELL: Don't we feel it should apply to personal property as the statutes allow condemnation of personal property, I understand. If the Committee feels that there are such laws, we should change this so it is not limited to real estate. We will find out this afternoon, if I can stir up the department to find out just what laws there are that allow for judicial condemnation in court of personal property.

MR. LEMANN: We know some of them right now from our Reporter's notes.

JUDGE CLARK: We probably know as much as we will know from them. The Nitrates Act is another one.

CHAIRMAN MITCHELL: Is that for judicial condemnation in the first instance?

JUDGE CLARK: It is hard to say. It says:

"The Nitrates Act . . . authorizes the President to purchase or acquire by condemnation not only real estate but 'materials, minerals and processes, patented or otherwise'", and so on.

CHAIRMAN MITCHELL: If it doesn't prescribe any non-

judicial procedure for condemnation, it requires the court condemnation.

JUDGE CLARK: Wouldn't you think so?

PROFESSOR MOORE: I rather think so.

JUDGE DOBIE: Is the war power requisitioning act gone?

PROFESSOR MOORE: Yes.

MR. LEMANN: When it says in the Nitrates Act on page 51 that the President is authorized "to purchase or acquire by condemnation", what method of condemnation does it provide? It isn't like the Atomic Energy Act which sets up a procedure. This Nitrates Act doesn't provide a procedure. If it simply says it can be done by condemnation, I don't see how you do it except under judicial compensation.

PROFESSOR MORGAN: It says real estate, materials, minerals, process and trade secrets.

CHAIRMAN MITCHELL: Suppose we agree now to change this thing to say condemnation of real or personal property and proceed on that theory and then in the notes--

MR. PRYOR: Or any interest therein.

CHAIRMAN MITCHELL: --then proceed in the notes to refer to those personal property statutes that provide for procedure out of the district court and say, of course they are not affected by the rules. Would that cover it?

JUDGE CLARK: I shouldn't think you would need to change

the main title particularly, "Condemnation of Property."

CHAIRMAN MITCHELL: No. Lines 4-5 would read: "for the condemnation of real and personal property under the power of eminent domain".

Then maybe (c) with respect to "Complaint" is not aptly worded.

MR. PRYOR: Don't you want to say "real or personal property or any interest therein"?

PROFESSOR SUNDERLAND: Isn't an interest therein property?

MR. PRYOR: I think you are right, but you would make it clearer.

JUDGE DOBIE: There is some question whether a trade secret that nobody else knows is property. We had that before us. Where a man breaches a confidence, is it a tort or has he taken property away?

PROFESSOR MORGAN: A trade secret is property.

JUDGE DOBIE: Scott says no. If you are working with me and I have a trade secret that is not patented or copyrighted, and you disclose it to Monte who is a rival, he says I have an action in tort for breach of confidential relationship, but property is not concerned.

PROFESSOR MORGAN: That is not like using it. If you used a trade secret, you would be using property.

JUDGE DOBIE: You are not taking away property, except

what was formerly a secret is now used by my rival.

JUDGE CLARK: Mr. Moore raises the question as to how detailed we should make changes, because as a practical matter, there are no cases and so far as we can discover nobody ever does it, except as they may do it incidentally to condemning real estate. We are going to try to build a procedure where there is none.

PROFESSOR MORGAN: I don't think you need a particular additional procedure, just so you see that it is within that description, within your complaint and things like that.

CHAIRMAN MITCHELL: I don't see anything except what is on the first page that we need to change.

JUDGE CLARK: I have two or three things to ask. In line 9 shall we say specific pieces of property, specific pieces of land?

MR. PRYOR: Specific pieces of property.

JUDGE CLARK: Or should we leave it as it is?

CHAIRMAN MITCHELL: I don't see much to change except in line 5 say "condemnation of real or personal property or interest therein"? In the complaint section use a word other than "quantity, lot, parcel or tract". I don't think there is much to be done anywhere else.

JUDGE CLARK: In line 5 we will make it "real or personal property". Do you want to add "or interest therein"?

PROFESSOR SUNDERLAND: Should it be "and" or "or"?

PROFESSOR MORGAN: Use "or".

MR. PRYOR: You use "or" in lines 29-30 where it says "title or other interests".

JUDGE CLARK: All right, "of real or personal property or any interest therein under the power of eminent domain".

JUDGE DOBIE: Do you need "or any interest therein"? A leasehold is property.

MR. PRYOR: You use the same wording down in 29 and 30.

CHAIRMAN MITCHELL: Isn't it a fact that you use it below enough so you don't have to use it here?

MR. LEMANN: Line 30 is a little different, because that speaks of the acquisition of the interest that the United States wants to acquire.

JUDGE CLARK: What is the final judgment?

CHAIRMAN MITCHELL: If you are condemning rooms in a building for two or three months, that is an interest in personal property. You don't have to say it. A lease is an interest in property, but it is realty, isn't it?

PROFESSOR SUNDERLAND: If it wasn't property, you couldn't condemn it.

CHAIRMAN MITCHELL: You could take it for nothing.

JUDGE DRIVER: I would be in favor of brevity in every instance.

JUDGE CLARK: Then in line 11 I suggest leaving out "public", since we are leaving out "public use" generally. That

occurs again in lines 23, 74, 78 and in other places.

PROFESSOR MORGAN: Do you think the description in 16 and 17 is what you want if there was personal property involved?

JUDGE CLARK: I think that we should consider now. That is the next thing.

MR. PRYOR: Before you get to that, are we agreed that we can bring into one condemnation suit property for different public uses?

CHAIRMAN MITCHELL: Charlie, I was doubtful about that. He satisfied me yesterday by pointing out that the court has power under the general rules to provide for separate trials.

MR. PRYOR: That is true.

PROFESSOR MORGAN: And they said they practically never did it unless they were closely connected.

CHAIRMAN MITCHELL: If you try to bring in a fort and a post office building in one suit, then the judge can separate it.

JUDGE DRIVER: You will get criticism on that if it isn't explained.

PROFESSOR MOORE: It does call attention to it in the note, Judge.

CHAIRMAN MITCHELL: The real reason they don't want it is they don't want to have to fight out the question whether

it is the same use or not. So they have a case for using those words and then it can be separately tried. Explain in a note that there have been cases which have arisen where there has been litigation over whether it was the same use or not. If the court has the right to separately try them, that takes care of it.

MR. LEMANN: On page 25 is the note Professor Moore referred to:

"Subdivision (b). This subdivision provides for broad joinder in accordance with the tenor of other rules, such as Rule 18. To require separate condemnation proceedings for each piece of property separately owned would be unduly burdensome and would serve no useful purpose. And a restrictuion that only properties may be joined which are to be acquired for the same public use would also cause difficulty. For example, a unified project to widen a street, construct a bridge across a navigable river and for the construction of approaches to the level of the bridge on both sides of the river might involve acquiring property for different public uses."

JUDGE CLARK: In line 15 and 16 I recommend that we say: "the property, designated by quantity, lot, parcel or tract in the case of realty and by a general descriptive phrase in the case of personalty".

MR. LEMANN: I thought of saying that except that "the plaintiff shall name as defendants the property to be con-

deemed described sufficiently for its identification. Where the property is real property it shall be designated by quantity, lot, parcel or tract."

CHAIRMAN MITCHELL: I would be satisfied to see it stand as it is if you put personalty up in subdivision (a). One you state at the start that personalty is included, then the complaint clause will do well enough.

MR. PRYOR: That is all right, but there is one suggestion made by my partner, Mr. Hale, that grew out of our experience in the Mississippi River condemnation cases, where they would file a petition (the Lands Division man yesterday said they had five suits on the whole Mississippi River project) of 75 to 100 pages long and a great many different tracts are described in the caption. His suggestion was they indicate the paragraph number of the complaint following the description of each tract of line. It is then much easier to find it.

PROFESSOR SUNDERLAND: He wanted the defendant who was claimed to be the owner to be connected up with that description, so you could tell who was concerned with that land.

MR. PRYOR: You could do it by putting the number of the paragraph after the description of the property or by the name of the defendant.

PROFESSOR SUNDERLAND: I thought what he was driving at was covered by "designate in each description the defendants that have been been joined therein."

demned described sufficiently for its identification. Where the property is real property it shall be designated by quantity, lot, parcel or tract."

CHAIRMAN MITCHELL: I would be satisfied to see it stand as it is if you put personalty up in subdivision (a). One you state at the start that personalty is included, then the complaint clause will do well enough.

MR. PRYOR: That is all right, but there is one suggestion made by my partner, Mr. Hale, that grew out of our experience in the Mississippi River condemnation cases, where they would file a petition (the Lands Division man yesterday said they had five suits on the whole Mississippi River project) of 75 to 100 pages long and a great many different tracts are described in the caption. His suggestion was they indicate the paragraph number of the complaint following the description of each tract of line. It is then much easier to find it.

PROFESSOR SUNDERLAND: He wanted the defendant who was claimed to be the owner to be connected up with that description, so you could tell who was concerned with that land.

MR. PRYOR: You could do it by putting the number of the paragraph after the description of the property or by the name of the defendant.

PROFESSOR SUNDERLAND: I thought what he was driving at was covered by "designate in each description the defendants that have been been joined therein."

MR. PRYOR: What he had reference to was the caption. You have several pages of description of various tracts of land. If there was some way of helping to locate that in the complaint, it would be helpful of course.

CHAIRMAN MITCHELL: You mean locate the owners in the complaint.

MR. PRYOR: Yes.

PROFESSOR SUNDERLAND: As our rules now read, you can list one hundred parcels of land and list forty defendants, and that is all you have to do. Then it would be up to the defendants to search all through those parcels and figure out which ones they are concerned with. I don't feel defendants ought to be obligated to do that. I think the Government ought to specify as to every parcel the defendants they claim are concerned with that parcel.

CHAIRMAN MITCHELL: That is line 25.

JUDGE CLARK: This is simply the part that names the parties.

MR. PRYOR: You are talking about the caption.

JUDGE CLARK: On that the Government wants to get something that is short and succinct.

PROFESSOR SUNDERLAND: My suggestion has to do with the next paragraph.

JUDGE CLARK: We have a lot of cases called In re 39.7 Acres of Land. That is a little difficult as a title. The district courts around our part of the country do that a

great deal. Then, when it gets to us we have a rule that we are supposed to name cases by names of some persons or someone, so that some of us in the Circuit Court will stick in John Jones v. James Smith, with the result that half of our reports refer to In re 39.7 Acres of Land and the rest refer to John Jones v. James Smith.

MR. PRYOR: In the caption it would be a very easy matter for the attorney preparing that complaint following the description of a particular lot or quarter section to put in parenthesis the number of the paragraph in the complaint that it deals with.

JUDGE CLARK: You don't want to put that in the caption.

MR. PRYOR: Why not? All you need is a figure in parenthesis following the description.

JUDGE CLARK: Then you are going to have your caption carrying a lot of baggage, aren't you? You are going to say United States v. 39.7 Acres of Land (see paragraph so-and-so).

MR. PRYOR: You don't have to say see so-and-so. He has the description of the property.

JUDGE CLARK: No, you don't want the description of the property, you want a tag end or symbol.

MR. PRYOR: The rule reads: "The complaint shall contain a caption as provided in Rule 10 (a), except that the plaintiff shall name as defendants the property, designated

by quantity, lot, parcel or tract". If he designates it, he has to describe it pretty much, not the metes and bounds of the description, but he would have to describe it in some way by reference to a governmental subdivision.

JUDGE CLARK: They don't. Look at page 40 for the form we put it in. This is to get away from Rule 10 (a). Rule 10 (a) provides for listing all the defendants and this provides a short cut as against 10 (a).

JUDGE DOBIE: United States v. 1000 Acres of Land in County So-and-So.

MR. PRYOR: That is all right.

MR. LEMANN: Your form is plainer than a technical analysis of your rule would indicate. If you look at the language you have for the caption, it doesn't appear that simple.

MR. PRYOR: If you followed the rule, you would put in some description of each tract by lot number or governmental subdivision. That is the way I would read the rule.

MR. LEMANN: That is the obvious conclusion from all the language under "Caption." What do you mean by putting this stuff in unless it goes in the caption? It says: "the property, designated by quantity, lot, parcel, or tract".

CHAIRMAN MITCHELL: I think that is too much for the caption. If you go back to the form, you see what was intended and that is controlling.

JUDGE CLARK: That may be. You understand that these have been somewhat of a growth. As a matter of fact, the Department of Justice was for getting away from 10 (a) in the caption. They want to make it a tag. You can make any other form.

MR. LEMANN: You could remove any reference to 10 (a) because you have a general statement that the rules do not apply where otherwise stated. You can say that the caption shall be sufficient if it does so-and-so.

MR. PRYOR: If your caption is going to be in accordance with this form, my suggestion about putting the number of the paragraph in has no relevancy at all, but, if your caption is going to be in accordance with the rule, it has.

JUDGE CLARK: Probably you have a point there. There isn't any question that the form states what we are after.

CHAIRMAN MITCHELL: Then the rule has to be changed. That is the way I would construe it, to put a pretty accurate description of the property in the caption.

PROFESSOR MORGAN: I think so.

CHAIRMAN MITCHELL: It would be in the caption as distinguished from the body.

MR. LEMANN: That is foolish.

CHAIRMAN MITCHELL: Have we a suggestion for modifying subdivision (1) "Caption" so as to make it clear that we don't mean an accurate description of the property?

MR. LEMANN: We are not really talking about the caption here, we are talking about the contents.

JUDGE CLARK: You could say something like this in line 16: "name as defendants the property by some general designation or by some generalized form of designation".

MR. LEMANN: As I understand it, you are really going according to the form. If you have 1000 acres that you want to condemn and they belong to twenty-five different people, you want to be able to say in the caption United States v. 1000 Acres of Land.

CHAIRMAN MITCHELL: And in what county.

MR. LEMANN: Would you name the owners in the caption?

JUDGE DOBIE: It says at least one of them.

MR. LEMANN: The form says "John Doe et al". That would be one defendant. Rule 10 (a) says that where you have a complaint you must name them all in the first pleading and then only name the first one in subsequent papers. Is that right?

JUDGE CLARK: Yes.

MR. LEMANN: If you followed 10 (a), you wouldn't follow the form on page 40, because that says "John Doe et al". You can't do that in an ordinary complaint. You have to put in all the "et als".

JUDGE CLARK: Lines 18 and 19 cover that, you only need to name the property generally and one of the owners of

of some part of it or some interest in the property. That is the way they have been doing it.

CHAIRMAN MITCHELL: There is another thing you must not forget and that is that we provided that, if all the owners are not known when you want to start the suit, you need to name only those who are known and then, before you bring a hearing on to fix compensation, you have to find out who the other fellows are, serve them and bring them into court. So you cannot have all defendants named, because the other rule says you only have to name those presently known.

MR. LEMANN: I would think the caption ought to be short and there is no reason to name more than one. The next point is: How can we describe the property in the caption?

MR. PRYOR: In referring to real estate and personal property you would want those words "lot, parcel or tract" taken out.

JUDGE DRIVER: That is right, it is confusing.

JUDGE CLARK: What use is the caption? The caption is a tag for people like the clerk or the parties so they can recognize what the case is going to be about.

MR. PRYOR: Why wouldn't it be sufficient to say: "shall name as defendants the property, designated by kind and quantity and general location"? You would want to say "kind" in there because it might be personal property.

MR. LEMANN: I think to be clear you ought to specify

that you need not subdivide the description. You ought to have express language in there that will permit a lump description.

MR. PRYOR: Suppose you are condemning both personal and real property. It seems to me the caption ought to indicate that.

MR. LEMANN: I agree, but I think we ought not to stop there. If we are going to permit a lump description, such as 1000 acres of land, I think we ought to say something like this: "The caption need not describe each separate tract to be condemned." I am not putting that in the exact language. We could further say: "It shall be sufficient if it refers to the aggregate quantity of property to be condemned with an indication as to the kind and nature of the property."

CHAIRMAN MITCHELL: And location.

MR. LEMANN: And location. It might be something like that, if we get what we want.

CHAIRMAN MITCHELL: In connection with the form that would be clear enough.

MR. LEMANN: I would think so. Can you take a whirl at that?

JUDGE CLARK: "designate generally by character, quantity or location".

CHAIRMAN MITCHELL: The location anyway. You should state what county it is in.

MR. PRYOR: "kind, quantity and location".

JUDGE CLARK: Suppose it is one Ford automobile, would you say located in the county of so-and-so?

PROFESSOR MORGAN: That is right.

CHAIRMAN MITCHELL: I wouldn't say that. If they were going after a particular car in such-and-such a garage, you might. I don't think we need to worry about personalty so much. Don't you think you have enough, Charlie, so that you can mull over it? This will have to go around to the Committee in mimeographed form anyway for final polishing.

JUDGE CLARK: Mr. Moore has it all down: "designated generally by kind, quantity and locality". And we will add what we have here as to one of the owners.

MR. PRYOR: Use the word "location" instead of "locality".

JUDGE CLARK: That would be generally satisfactory, would it?

MR. LEMANN: What do you think of rephrasing the form to say: "The caption shall be sufficient if it names".

JUDGE CLARK: That is good enough. "(1) Caption. The caption is sufficient if--" How do you have it?

PROFESSOR MOORE: I can fix it up.

JUDGE CLARK: All right.

MR. LEMANN: Now we could cover Mr. Pryor's first point, when we come to the next paragraph, and give some thought to whether we should put in a sentence as to a tag

of the defendant to each piece of property. Isn't that done in the body of the complaint? It ought to be done.

MR. PRYOR: It isn't always done.

PROFESSOR MORGAN: It isn't done.

MR. PRYOR: They describe the property, but you have to look up to see what your property is.

MR. LEMANN: Which one is yours.

MR. PRYOR: Whether you are interested or not.

MR. LEMANN: You get a fifty-page mimeographed complaint and wonder what your people are doing in it. They had ceased having an interest, but the record didn't clearly disclose it and they were put in.

Ought we not to put in a requirement in the body in connection with the contents that would require them to break it down a little bit?

MR. PRYOR: There ought to be.

MR. LEMANN: I suppose they will beef about it.

PROFESSOR SUNDERLAND: I should think as to each description there ought to be a statement of the defendants joined as owners thereof or of some interest therein.

CHAIRMAN MITCHELL: You have to limit that to those known at the time of the institution of the suit.

MR. PRYOR: That is right.

CHAIRMAN MITCHELL: What is your suggestion now?

PROFESSOR SUNDERLAND: I would add at the end of line

26 the language: "designating as to each description the defendants who have been joined as owners thereof or some interest therein."

CHAIRMAN MITCHELL: But it would have to be defendants known at the time.

PROFESSOR SUNDERLAND: No. If they are joined, they are known. I say "defendants who have been joined". Isn't that enough?

CHAIRMAN MITCHELL: You only name one of the defendants in the caption. You don't have anybody joined.

PROFESSOR SUNDERLAND: Where do we find out who are joined?

JUDGE CLARK: You don't find out until line 34 to 39.

PROFESSOR SUNDERLAND: I am talking about those who are joined. All I say is, if you join them, you have to identify the property with which you claim they are interested.

CHAIRMAN MITCHELL: I guess that is right, because 34 says "whose names are then known". That is covered then.

MR. LEMANN: Where are you going to put in your suggestion, Mr. Sunderland?

PROFESSOR SUNDERLAND: At the end of the 26th line.

MR. LEMANN: I would have thought it might come after 39 or perhaps after 49, because at 26 you are just talking about the property.

PROFESSOR SUNDERLAND: The description of the property.

MR. LEMANN: You are not talking about the defendants.

MR. PRYOR: We want to hook those things together.

PROFESSOR SUNDERLAND: That hooks the things together.

MR. LEMANN: I would think the logical place to put it might be after 39 or after 49.

CHAIRMAN MITCHELL: You can say: "all persons appearing of record and known to the plaintiff--" No.

MR. LEMANN: In line 49 add: "The body of the complaint shall identify each defendant with the property sought to be condemned."

CHAIRMAN MITCHELL: I think Sunderland's suggestion was really all right. Let's have the Reporter try to see if he likes that and we can change it by mail. He has made a point that those who are joined are then known and you are adding a clause at line 26 requiring the complaint to name for each man who is joined what particular piece of property he is involved in.

JUDGE CLARK: Will you read that again?

PROFESSOR SUNDERLAND: "designating as to each description the defendants who have been joined as owners thereof or who have some interest therein".

CHAIRMAN MITCHELL: That is all right. Take that.

PROFESSOR MORGAN: Where does that go?

PROFESSOR SUNDERLAND: At the end of line 26.

JUDGE CLARK: I want to make two or three small changes

that have come in from suggestions.

First, line 23 I would like to leave out "public".

Second, in line 29 insert after the word "title" the following: "possession". Line 29 will then read: "authorizes the acquisition of title, possession, or other interests".

Third, in line 43 add the words "or claim" after the words "to have", so that it would read: "all persons known to the plaintiff to have or claim an interest in the property at the time the action is commenced."

CHAIRMAN MITCHELL: We relieve the Government from the obligation of naming all the persons who have an interest in the property at the time of the institution of the suit only in those cases where the case comes under a statute which authorizes the immediate taking of title and possession. I am wondering why we need to limit it to the case where there is a statute authorizing the immediate taking of title and possession? Why do we limit it to a case of that sort? That is the case they are particularly interested in, but, nevertheless, why, if they want to start a suit and get it going, even if they cannot take immediate possession (they have an interest in getting their suit started right away and not have to look through the records and examine the title before they even start because the very fact that they cannot take title immediately or obtain immediate possession is an added reason to get the suit started quickly), should they be limited in that regard?

I don't see any reason why we say, starting in line 31, "the plaintiff need join as defendants only the persons having or claiming an interest in the property whose names are then known, but prior to any hearing involving that property", and so forth. Then he must bring in the other fellows.

JUDGE CLARK: I don't believe it is very necessary. Of course the way this arose was that that was all the Government asked for. We were proceeding very gingerly and trying to restrict the Government as far as it was willing to be restricted in the hope that the lawyers who were critical would like the restrictions. That was the only reason for that.

CHAIRMAN MITCHELL: I think the department fellows are asleep on that.

MR. PRYOR: Stick the words "in all other cases" in line 40.

JUDGE CLARK: You strike out from line 27 to the middle of line 31.

PROFESSOR SUNDERLAND: Wouldn't you put in the phrase: "At the commencement of the action, the plaintiff shall".

CHAIRMAN MITCHELL: "At the commencement of the action, the plaintiff need join as defendants only the persons having or claiming an interest in the property whose names are then known, but prior to any hearing".

I think the plaintiff ought to have the power to start a suit and name only the fellows they then know, whether they

want immediate title or possession or not.

JUDGE CLARK: That brings up the question that Mr. Pryor just mentioned. Then shouldn't we leave out the sentence in lines 40 to 45? We don't need that, do we?

CHAIRMAN MITCHELL: No, we don't need it. He is right about that.

JUDGE CLARK: That would make the rule shorter.

MR. PRYOR: Did you strike the words in line 21 that read as follows: "contain a short and plain statement", and substitute the word "state"?

CHAIRMAN MITCHELL: You mean: "state the authority for taking"?

MR. PRYOR: Yes, just primarily in the interests of brevity.

PROFESSOR MORGAN: Take out "public" in line 23.

MR. PRYOR: You have to take "public" out in the form on page 40.

PROFESSOR MOORE: That language parallels the language used in Rule 8 (a) (1).

JUDGE DRIVER: The general rule emphasizes brevity and clarity, but it might be worth while to continue this language since it is the same as used in the general rule, namely, "shall contain a short and plain statement".

JUDGE CLARK: It doesn't apply merely to the authority; it applies to the whole statement, that it shall be short and

plain, just as provided in Rule 8 (a).

MR. LEMANN: It is an admonition.

CHAIRMAN MITCHELL: It applies without repeating it here.

MR. PRYOR: The only thing you have to say is: "shall state".

JUDGE CLARK: Not necessarily, because here is a place where we modify the rule: "Contents. The body of the complaint shall contain". We don't take over 8 (a). Why shouldn't we repeat it?

PROFESSOR MORGAN: How is that going to read now, that whole paragraph?

CHAIRMAN MITCHELL: "The body of the complaint--"

PROFESSOR MORGAN: "The complaint". You don't need "body".

CHAIRMAN MITCHELL: All right, Charlie.

JUDGE CLARK: "The complaint shall contain a short and plain statement of the authority for the taking, the use for which the property is to be taken, a description of the property sufficient for its identification, and the interests to be acquired." Plus whatever we add to that.

PROFESSOR SUNDERLAND: Isn't the authority in every case a statute?

JUDGE CLARK: That is the idea; yes.

PROFESSOR SUNDERLAND: Why don't we say "statute

authorizing"? Why don't we say: "shall state the statute authorizing", if it is always a statute? That vague word "authority" doesn't tell you much until you look at the form and in the form a statute is named.

PROFESSOR MORGAN: Then you might say "specify" instead of "state".

PROFESSOR SUNDERLAND: "state" will do well enough.

MR. LEMANN: Then you will have to repeat "short and plain statement" later on. I don't think you would gain much.

PROFESSOR SUNDERLAND: That word "authority" is a vague word.

MR. PRYOR: Actually, in practice they do designate the statute.

PROFESSOR SUNDERLAND: Our form shows it is just a statute.

JUDGE DRIVER: In addition to a statute it could also be by executive action.

PROFESSOR SUNDERLAND: We wouldn't state any executive action.

JUDGE CLARK: The executive action in most of these cases was during the war and was by the Secretary of War.

PROFESSOR SUNDERLAND: Would we designate an executive action; is that what we contemplate?

CHAIRMAN MITCHELL: Suppose the statute provided that the President may authorize the Secretary of War to act.

PROFESSOR SUNDERLAND: Do we recite that?

CHAIRMAN MITCHELL: If the authority is part of an executive authority under some statute, you have to state the executive order.

PROFESSOR SUNDERLAND: Shouldn't our form state that, if we want to go beyond the statute? I don't believe anybody would understand that they have to go into the reference to the executive order.

MR. PRYOR: All they want is the citation of the statute. In all the war condemnations the department has cited the statute and then recited the authority of the Secretary of War.

JUDGE DRIVER: That was under the General War Powers Act.

PROFESSOR SUNDERLAND: Then shouldn't we say something more?

MR. PRYOR: The use of the word "authority" covers everything.

CHAIRMAN MITCHELL: If it is an executive order or statute or both.

PROFESSOR MORGAN: You might have to change the form.

MR. LEMANN: I move we retain it as it is with the word "authority".

JUDGE CLARK: We could say in the form: "and the authority for the taking and such executive action as may have

occurred", or something like that. That is over on page 41.

CHAIRMAN MITCHELL: I think that is surplusage. If it is a statute or executive order or both, the word "authority" covers everything. If it is a statute, that is what is meant; if it is an executive order, it includes that, too.

JUDGE CLARK: I agree here we needn't add any more. The question remains whether to add anything in the form.

MR. PRYOR: You could put that in parenthesis in the form.

MR. LEMANN: There will be many cases where the form would be illustrative. I wouldn't change the form.

MR. PRYOR: You could put in parenthesis any executive order necessary.

CHAIRMAN MITCHELL: We could amend the form in the bracketed part by simply saying "and any executive order".

PROFESSOR SUTHERLAND: I think that will make it clear.

CHAIRMAN MITCHELL: Well, let's get along. I would like to have settled whether or not we ought to allow this suit to be started without naming all the defendants and naming only those who were then known and, instead of requiring that that be limited to a case where the Government wants to take immediate title or possession. I think they ought to have the right to start the suit and name in the first instance only the then known owners.

MR. PRYOR: Those that appear of record as encumbrancers.

JUDGE CLARK: That is covered in 37.

JUDGE DOBIE: And anybody else not of record if they happen to know about them.

CHAIRMAN MITCHELL: Yes. "need join as defendants only the persons having or claiming an interest in the property whose names are then known".

MR. PRYOR: Actually or constructively.

MR. LEMANN: It means actual knowledge.

CHAIRMAN MITCHELL: The general tenure of the section is those then actually known, and we shall then add the defendants who constitute all persons appearing of record and all persons known to the plaintiff to have an interest.

MR. LEMANN: The department claimed that it must go to work very quickly and they might be able to ascertain only after much delay. This is a compromise. We say, "You can start this way, but before you get a hearing you must have this record searched."

JUDGE DRIVER: I just ask this for information. All of their emergency condemnations are now covered by declarations of taking under the act. Where there is a necessity for quick action they would be covered by these rules.

CHAIRMAN MITCHELL: I don't quite get your point. There are statutes which allow you to take title and possession

at once without having obtained a judgment in condemnation. You can seize it, provided you then institute a condemnation case, and their eyes are focused on that situation.

I say there is no occasion to limit that privilege to the case where they want immediate title or possession. They ought to have the right to start the suit and condemn and get the thing expedited, even though it is not a case of immediate title or possession.

JUDGE DRIVER: My suggestion was that perhaps the reason they were interested in that was that where there was need to acquire the title quickly, they have the power to do that under the declaration-of-taking statute.

CHAIRMAN MITCHELL: This would limit this right to a case where there was a statute that authorized the immediate acquisition of title or possession on the commencement of the action.

I thought that limitation was unnecessary. They ought to have the right to get the suit started and name at that time only those who are already known, even though they are not going to take immediate title and possession, and then add the others later on.

JUDGE CLARK: The specific proposal is to strike out lines 27 to the middle of 30 and start the sentence on line 30 as follows: "At the commencement of the action". Then strike out the sentence from lines 40 to 45.

CHAIRMAN MITCHELL: That is right.

MR. LEMANN: About the title companies, Mr. Mitchell, at first we had a lot of complaints from the title companies. They subsequently agreed to this language, as I recall it. I just wondered if we will start a new discussion if we tamper with it.

CHAIRMAN MITCHELL: This requires you sooner or later to go to the title company. They are not interested in when you do it, as long as they get the business.

MR. LEMANN: All they care about is what we have in line 37.

CHAIRMAN MITCHELL: Yes.

JUDGE CLARK: On line 37 you may remember that as the Department of Justice left they were worried about that, and they will come in with a suggestion so that they will not be required to go back to the Indians in a search in the states in the East.

CHAIRMAN MITCHELL: That is another point. That has nothing to do with what I am driving at.

JUDGE CLARK: That is quite right.

CHAIRMAN MITCHELL: Let's see if the suggestion is worth while. I think it is. I think the Department of Justice fellows will grab at it, because they have just not thought about it.

PROFESSOR MORGAN: Yes.

JUDGE CLARK: I don't see why this should not be amended.

CHAIRMAN MITCHELL: They are going to produce an amendment which will show the extent to which they will have to examine the records, which is a good point, I think.

PROFESSOR MORGAN: They make a point that in certain places the searches should not go back to the Indians.

CHAIRMAN MITCHELL: Or they can rely on the certificate of a title insurance company, or something like that.

MR. LEMANN: They are going to produce that suggestion this afternoon.

CHAIRMAN MITCHELL: Yes. They have always been like the old mare, swishing his tail off the dashboard, and they have said they shouldn't be required to make any search. I got angry last night because they were bringing that up again. They say, "Why don't you require us just to name the owner?" The reason is that, if they don't know who they are, they can't start the suit.

They have a pamphlet that shows the regulations as to the various kinds of searches they have to make in the Department of Justice, and they are going to propose an amendment to this rule that will show that the kind of search they have to make is the kind of search the ordinary, careful businessman makes when he buys property to erect a building on, let's say.

MR. LEMANN: Do they employ title companies?

MR. PRYOR: Lawyers Title Company of Richmond is patronized by them a great deal.

CHAIRMAN MITCHELL: The old law required the Attorney General to give an opinion on an abstract. He couldn't get the abstracts in time because the title company had a contract for the exclusive right to furnish the Government with abstracts and under the contract they had the business sewed up. So they would take time. I tried to get a bill through the Congress to allow the Attorney General in giving an opinion on the title to rely on the certificate of the title company, as would any ordinary businessman who would be putting up a building on a lot. That was busted up by LaGuardia who said I was going to drum up business for the title companies. That was in connection with this Supreme Court Building, and in that case we waited six months for the title search. Chief Justice Taft was continually stewing in my office about that.

Now they have a law permitting that.

MR. LEMANN: They claimed that the original draft was unfair because they thought they were going to lose business since it didn't require enough of a search of the title. On the other hand, the Department of Justice said the original draft was necessary to protect them. This was a compromise.

CHAIRMAN MITCHELL: It is not a compromise because they didn't agree to it. They wanted us to leave it to the

discretion of the Attorney General whether he would examine the title or not. We thought he should search the title. They said they always do. Then I asked, "Why do you object to making the search?"

JUDGE CLARK: You mean the abstracters who fought this agreed to something?

MR. LEMANN: I thought they had finally agreed to this changed language. This discussion has been proceeding for many years and I am a little vague, but I thought they said this was what they would accept.

JUDGE CLARK: Major Tolman consulted with various groups of them who thought this was satisfactory. Major Tolman was quite sure they wouldn't fight the rule.

CHAIRMAN MITCHELL: They like the clause "all persons appearing of record who have or claim an interest in the property" We are leaving that in.

MR. LEMANN: What is the language of the present statute which the Department of Justice says relieves them of going back to the Indians, as in your days?

CHAIRMAN MITCHELL: They say some statute has been passed similar to the one I tried to get passed and didn't, that allows them to take a certificate of title.

MR. LEMANN: Do we have that before us?

CHAIRMAN MITCHELL: They are going to bring it in.

MR. LEMANN: Another question that occurred to me in this discussion is this: Was this proposed draft sent to the

title companies?

MR. TOLMAN: It was sent to all the people on the list and that included the title companies.

MR. LEMANN: They have an association and it would be well to hear their kicks. It is possible they may say it is all right.

CHAIRMAN MITCHELL: My idea is that we probably won't bother to print and distribute this thing any more. We get no response from the bar. We ought to distribute copies to TVA, the Department of Justice, maybe the American Bar Association, Walter Armstrong (it might get him off our necks), maybe some of these title companies and a limited distribution to the fellows who have really done some work on it.

MR. LEMANN: I think the title companies' association would be a very good source to send it to.

CHAIRMAN MITCHELL: Here is the proposal. I propose to strike out lines 27 to the middle of line 30, and at line 30 to say: "At the commencement of the action", and so on. And strike out the lines--

PROFESSOR MORGAN: The sentence in lines 40-45.

CHAIRMAN MITCHELL: So that this privilege of starting a suit without naming everybody applies to every condemnation case, provided they get them in later.

Is there any objection to that?

[There were no objections.]

CHAIRMAN MITCHELL: What is next?

PROFESSOR MORGAN: Charles, in line 35 you were going to put in "final" before "hearing". I wanted to know about that.

JUDGE CLARK: We suggested in line 35 that be made to read: "to any final hearing involving the compensation to be paid for the property".

CHAIRMAN MITCHELL: Why do you say "final"?

JUDGE CLARK: This is the reason for what we are attempting to do, whether we meant it or not:

"This change is to meet the objection of the Committee on Federal Legislation of the New Jersey Bar Association that line 35 might be construed to include a hearing under subdivision (k) to obtain a deposit, and that a defendant so entitled might be unduly delayed in obtaining it." See page 16 of our abstract of comments.

CHAIRMAN MITCHELL: Why do you need "final"? Suppose you take testimony for ten days and then sit one more day.

JUDGE CLARK: Do we need "final"?

PROFESSOR MOORE: If we don't keep the word "final" in there, could the court make an order of distribution of some of the funds?

MR. PRYOR: Say: "but prior to any hearing for determination of the amount of compensation to be paid".

MR. LEMANN: Is it right to restrict it to hearings

on compensation? Suppose the fellow said, "You don't need my property. It is unnecessary." He wouldn't be brought in until you came to the point of compensation.

PROFESSOR MORGAN: If you want to raise a question as to the right to take it.

MR. LEMANN: I had a case where they wanted to take a road to a considerable width and the defendant said, "I don't think you need that much property. You have it improperly laid out and you are mutilating my property too much."

CHAIRMAN MITCHELL: The court held it was none of his business.

MR. LEMANN: We tried it before the jury and they brought in a compromise verdict, but that might be raised.

JUDGE DRIVER: I can't understand the point of the New Jersey Bar. How could one person who has an interest in one tract have a distribution of the deposit to him if it had not been ascertained who was the owner of the tract? How could he get a preliminary distribution, unless the other parties are brought in and have an interest in that property?

PROFESSOR MOORE: Might not the court make some distribution? It could hold a substantial part of the deposit back, but it could distribute a small percentage where it appeared fairly clear that the real owner was before the court.

JUDGE CLARK: Suppose the question involved a right of way, which, even if it existed, would get only a small

value. Would the entire amount be held out?

You may remember that one of Major Tolman's great points that never was appreciated by the bar fully was that an expeditious rule would help the property owners, it being not merely a case of helping the Government. It would help the property owners who cannot get their deposits. The funds are deposited and are lying in court and you cannot safely pay it out until everything is established. If you have an expeditious rule which allows the court to take care of the property owners, it is desirable and should not the court properly in the case we indicate order distribution to people who are needy, who have been put out of their homes, and so on, keeping such small amount as is necessary?

PROFESSOR MORGAN: It couldn't be over 30 per cent outstanding; couldn't he distribute the 70?

JUDGE DRIVER: I can see in some cases where there is a minor interest involved that is not clear where the court would distribute a substantial interest. If there was no definite showing of who was the owner of the property, the court would not make a substantial distribution until the ownership was established.

CHAIRMAN MITCHELL: He wouldn't hurt the man not served or named if he brings that fellow in before he even determines the compensation to pay that man, because he might distribute the whole deposit and the fellow who wasn't named in the first

instance would come in and have an award of compensation and, if there wasn't enough left to pay him, he wouldn't lose anything by it. He might have a little more litigation to get it back from the fellows who got it.

MR. LEMANN: There is a general admonition on page 10 that the court and counsel will expedite the proceedings for the distribution of money so deposited.

CHAIRMAN MITCHELL: I wonder why we say "final". A preliminary hearing that involves that question of distribution is of as much interest to them as the final hearing. Suppose the court is taking proof as to value and the unnamed person is not there and is not served and then he is brought in later and there is a preliminary hearing and that person produces his evidence.

JUDGE CLARK: I think this is to hit the situation where you might have a case running for six months to a year before a commissioner acts and this is to allow the distribution, or make sure you can allow the distribution, in advance.

You will notice over in that provision on distribution, particularly on page 11, we have a provision covering the case where there has been too much awarded to the defendant, the last sentence, lines 336-342. There is an endeavor here to get the money out into circulation.

JUDGE DRIVER: Why not approach the problem directly and say in line 35 after "hearing": "and prior to any hearing

other than one for partial distribution of a deposit"?

JUDGE CLARK: That may be one way of doing it.

PROFESSOR MORGAN: That would be much better. "final hearing" is bad business.

JUDGE CLARK: What do you think of it?

PROFESSOR MOORE: I believe that is all right.

CHAIRMAN MITCHELL: I don't know. The deposit has been made and one fellow claims title. The other fellow has a record interest and has not been served. Maybe the preliminary distribution involves a decision as to who is interested in the property, who is going to get the funds. Here is a fellow who has not been served and he claims he ought to get it.

JUDGE DRIVER: What I meant was that it could be done in the case of a small right of way that clouds the title to a small part of the property. I don't think in a majority of cases you are going to get the trial court to make a substantial distribution of the deposit until the interests are shown.

MR. LEMANN: Then why should we not be satisfied with the general admonition for speed? I was looking at the comments from the New Jersey Bar Association. In how many cases are deposits made for distribution in advance?

JUDGE DRIVER: In my district practically everyone that is brought by the Government is a declaration-of-taking-and-a-preliminary-deposit case. I cannot recall any that I had had that were otherwise.

MR. LEMANN: They are required by the statute to make a deposit.

JUDGE DRIVER: In the declaration-of-taking statutes where they take immediate title and possession they make a deposit. The removal cases have not involved deposits. The cases that I am speaking of now are those brought by the Government.

PROFESSOR MORGAN: Some state constitutions provide for deposits.

MR. PRYOR: Secured and paid.

JUDGE DRIVER: Our constitution does not. Ours provides that the value must be determined and the compensation paid before they get possession or title.

MR. LEMANN: The Government brings a suit and makes a deposit and then one of the defendants says, "I would like to get that deposit." Let's take a simple case where there is only one defendant, and he goes forward with an application. What does he do, file a motion to get it? What is the machinery?

JUDGE DRIVER: He could file a motion for a distribution of part of the deposit. If it isn't agreed what he shall be paid, then the jury or some tribunal must determine that.

MR. LEMANN: He cannot take it on account. Let's say you deposited five and I want ten and I say, "Give me the five

and we will argue about the remaining five."

JUDGE DRIVER: The final determination of the compensation to be paid may be less than the amount deposited. If he has received it, a judgment will be entered against him for the deficiency. The court would say, "In this case it is all right to distribute 80 per cent or 90 per cent." I think in some cases Judge Schwellenbach distributed 90 per cent of the deposit. I don't think they will usually pay it all out.

MR. LEMANN: The deposit isn't an admission by the Government that he is entitled to that amount.

JUDGE DRIVER: It is the estimated value of the property.

JUDGE DOBIE: The jury may find for less than that.

JUDGE DRIVER: Yes. For a long time we thought the landowners got the whole deposit in any event, but the decision of the Supreme Court now is, if it is less, then the landowner gets only the lesser amount.

JUDGE CLARK: I think that is correct.

MR. LEMANN: The landowner comes in and says the Government has deposited $5000 and he would like to get it. Then somebody says, "Wait a minute. You can't have a hearing on that because there is nothing to show that all the parties of record have been joined."

That is the argument. Then he gets a delay. Is that very likely to happen, or isn't it likely to happen in most

cases? Will the Justice Department by that stage in most cases be able to say, "Judge, we have joined everybody of record."

JUDGE DRIVER: They bring in an abstract or certificate of title. If the owner said, "I want to get 75 or 80 per cent of this deposit," I would immediately inquire as to who else was recorded as having an interest in this property and I would have to be shown who else has an interest. I would require either a certificate of title or an abstract. That is what would happen in a majority of the cases.

JUDGE CLARK: I am sorry we omitted one other objection which came from the Government, from Mr. Vanech, on this same objection. "He states that this language [particularly on line 35] might be interpreted to mean that the Government could not obtain certain orders in the early stages of the proceeding, notably an order of possession, before all the defendants are named. 'I am certain that this is not intended and in order to clarify its meaning it is suggested that the second sentence be changed to read as follows. [And then he has things that we have done.]

"'At the commencement of the action the complaint need name as defendant only the persons having or claiming an interest in the property whose names are then known, but the plaintiff shall add as defendants the names of all persons appearing of record or known to the plaintiff to have or claim an interest in the property [prior] to any hearing involving

the compensation to be paid for the property.'"

CHAIRMAN MITCHELL: He doesn't have the word "final".

JUDGE CLARK: No. Perhaps we can take out the word "final". That means that it isn't only a question of a hearing on the deposit involved. Simple orders, as orders of possession, may be involved.

CHAIRMAN MITCHELL: That is taken care of by the words "hearing involving the compensation to be paid for the property." So that is all right.

MR. LEMANN: That is his suggestion?

CHAIRMAN MITCHELL: The department has it the way we have it except for the word "final". They don't have to join this person before determining the necessity for taking, only before determining compensation. So he may not be joined until after it has been decided that there isn't a need. If he isn't joined, he cannot be cut off from raising the issue. If they didn't join him and he found he wasn't joined and he said, "Boys, you don't need the property," and he was told by the Government, "We are sorry, this was decided by Judge X a month ago," he can say, "That doesn't bind me."

PROFESSOR MORGAN: Doesn't it bind him if they are unknown owners and if it has been published?

CHAIRMAN MITCHELL: This fellow?

MR. LEMANN: I am supposing he has a record interest.

PROFESSOR MORGAN: The record may not be knowledge or

constructive knowledge with reference to the United States Government and you were to say, "That was reasonable notice," if you follow the notion that Holmes had in Tyler v. The Judges, that practically the seizure of the property was notice to everybody who had any interest in it and all they could have would be a reasonable time after seizure to come in.

MR. PRYOR: Suppose there was an error in the search, and for that reason he wasn't joined. He comes in and claims he owns that property and there is no necessity for its taking. He would certainly have a right to do that. He could do that by intervention.

PROFESSOR MORGAN: I think it is debatable on the constitutional question. I am just thinking about this notion that your condemnation is in rem and all you have to do after that is give what the Supreme Court would call reasonable notice or reasonable means calculated to give notice.

JUDGE CLARK: Would it do too much harm if we left that a little blank? Of course we are not saying what the effect of these things is, we are saying what the Government shall do and what the court shall do, and so on.

MR. LEMANN: Eddie is right in his constitutional doubt. If you could cut this guy off constitutionally from raising an issue as to the necessity of the taking without his ever knowing anything about the proceeding, without having him joined as a defendant, without ever having him named at all,

although his name appears of record in a proper title search, if that is the possible result, we ought to stop and consider whether we want to do that.

JUDGE CLARK: We wouldn't do that either way. All we are saying is what the court shall do and the Government. Before they go to the hearing on the compensation the Government must join them.

Suppose at the hearing on the compensation a new man turns up and he says, "My constitutional rights are being taken away." The court then will say, "I have to hear you."

We are not prohibiting the court from hearing him. We are stating a procedure and I wonder whether it does any harm if we state it as we have done, leaving the constitutional rights to be taken care of if and when raised.

CHAIRMAN MITCHELL: You could clear the whole thing up by saying you have to serve him and bring him in before you have any hearing to the compensation that is being paid for that property. You could add to that that when he is brought in that way, he should have the right to raise any question he is interested in. If they do not serve him, why shouldn't he when he is brought in have that right? They are required to do that before they take testimony on the award. He should then have the same right as any other fellow who has been served. He has twenty days to answer, doesn't he? He ought to have it. I think he does. If you bring him in, the time

for bringing him is fixed by this rule, but when he comes in, there is nothing in this rule that says he can only be heard on matters that relate to his compensation.

MR. LEMANN: Except as to the distribution of this deposit. I should suppose that the question of necessity and compensation ordinarily would be determined at the same time by the jury or the court. You would try the whole case and not try it piecemeal.

I am just trying to think that one out. If that is so, then any hearing on the issue for compensation would practically involve a determination of necessity. I wouldn't think you would try it separately. You would try the whole thing at one time. This fellow is not in there. The case is tried by the jury and the compensation is fixed. Then he turns up with a claim shown of record. Well, you couldn't say he would have had to be brought in because that was a case involving compensation and your limitation required him to be made a party. Is that the answer?

JUDGE CLARK: There are two answers. The judge cannot pay out money except very cautiously and, if he pays out too much, the act provides for recovery. The defendant can act within twenty days after the service upon him. It isn't the commencement of action.

Look at line 168 on page 6. He can "state all objections and defenses to the taking of his property". Then, if

he doesn't do that, he does waive, and so on, except as to the compensation. That means that no defendant can be expected to act except within twenty days after he has notice and then he can make all defenses.

MR. LEMANN: We are talking about the fellow who has not been served. We are talking about how much time the Government shall have to search the record. That is what we are talking about. If he has never been served, his twenty days have never run.

JUDGE CLARK: If he is served on the morning of the hearing, they have to take the chance that he may raise objections within twenty days. That is their funeral. That is the chance the Government has to take.

CHAIRMAN MITCHELL: They do the contrary. They have the privilege of going ahead and seizing the property and they have the property without having already served him.

MR. LEMANN: We are making this applicable to cases where we do not have this taking by paying a deposit. Your motion is to take it out. This would apply to cases where they wouldn't have any right to take the property until the thing has been decided, if we adopt your proposal.

CHAIRMAN MITCHELL: There is an implication that he is getting all the rights he is going to have if he has a right to contest the award. That is the inference that Charlie says we draw from the other rules. When he is brought in, the

rules expressly say he has twenty days in which to answer and raise all defenses. We are saying that the court might say, in interpreting page 2, that he is through as to anything that has occurred except as to any hearings the court has held with respect to the question of the value of the property. The general rule that he has a right to answer and raise all questions as to the taking, and so on, is out of the window as far as he is concerned. I admit that. I am wondering whether we could phrase it another way and say: "prior to the determination of the value of the property or any other question he wants to raise".

MR. LEMANN: Could you put it this way: "prior to any hearing involving final distribution of compensation or necessity for use"?

CHAIRMAN MITCHELL: Add: "or value of his property".

MR. LEMANN: "Or value of his property".

CHAIRMAN MITCHELL: That isn't quite it. We are willing to have a controversy between some other man and the Government as to those things, but you wouldn't want to bar the court from trying the question as to another man whether they are asking too much for this property and that they don't need it or whatnot.

MR. LEMANN: Put in: "final distribution of compensation".

CHAIRMAN MITCHELL: Why not say: "when he is served

he shall have the right to raise all the questions which he is allowed under subdivision so-and-so"?

MR. LEMANN: What we are really fighting about is when the Government must join him, how much time they should have to search the record and bring him in. That is what we are really debating about here.

CHAIRMAN MITCHELL: We don't care how much time they take or have, providing nothing that he does hits him until he is brought in and has a chance to answer. That is all we are interested in. We are confining it now by implication to allowing this man later joined to litigate only the question of his compensation. There is an implication there that he cannot do what the other fellows have done, put in an answer and question the authority to take.

MR. LEMANN: Page 6 preserves his rights.

JUDGE DRIVER: Much of the criticism that has come up has been against the lag between the time the Government takes the property and deposits its estimated value and the final determination of compensation, where a landowner is put out of his home or farm and he has to wait month after month to get his money to buy another one. There should be a method to narrow that gap. After the Government has acquired possession and title to the property, they are not so much interested in expediting the proceedings.

JUDGE DOBIE: Or who gets the money.

JUDGE DRIVER: They are not interested in that. In deposit cases there should be some method put there to make the Government proceed and bring in the other parties.

MR. LEMANN: That was the purpose of the admonition on page 10, Judge Driver, I take it, line 336. What we are discussing now is when the record search should be made.

JUDGE DRIVER: My point is that there should be a definite time fixed where the Government has to come in.

MR. LEMANN: A time limit in days.

JUDGE DRIVER: I don't know. It may be difficult to work out as a matter of mechanics. If you say they must come in before final hearing, they have control of the litigation, they determine when the final hearing shall be, and they can go on month after month and not search the records and bring in the other parties unless there is a definite time limit put on them for doing it.

MR. LEMANN: The defendant might bring the case on for hearing.

JUDGE DRIVER: But you might have one defendant served for five hundred or one thousand acres. The others could intervene, I suppose, if their land was taken away from them.

MR. PRYOR: The fellows who haven't been served.

JUDGE DRIVER: Yes.

CHAIRMAN MITCHELL: Of course, if property was taken away and the Government took possession and ran off with it,

the fellow we are talking about wouldn't have to be served at all. He would know. He would have full notice of what the Government had done and he could jump right in without being served at all and put his answer in immediately and ask for a trial.

JUDGE DRIVER: That is true when there is somebody in possession, but where there are thousands of acres of ranch land, you wouldn't know for some time, until you put the cattle on the range next spring.

MR. LEMANN: If he doesn't know it and they take the land and he never had an opportunity to learn about it, he could come in with his claim against the Government and his rights would be preserved. You wouldn't have to worry so much about it.

JUDGE CLARK: If you don't go on that basis, we will have the Government on our necks again. If you say they must complete their search in some particular time, they would go back to the necessity of acquiring these camps and barrack sites and how long it would take? Of course, the matter of searching the record in the New England states is a difficult one.

JUDGE DRIVER: You give the court some discretion for extending that.

MR. LEMANN: The court would have that under the general rule. I wonder if you should say that the court shall fix the time in which the Government shall join all the record

owners.

JUDGE CLARK: My point goes a little beyond that. You are making another restriction that could be burdensome and does it do enough good? The latter is the real question. In the first place, the Government has moved in. That is the way they do it, so that the question of immediate action by the Government has already passed. They have gone ahead under the declaration of taking and constructed the barracks and whatnot. That being accomplished, what advantage is there over the general one that no matter how late this man is served he can raise whatever questions are open to him?

Do you get any advantage by putting in a provision that the Government must have joined everybody within sixty days?

MR. LEMANN: You might argue why put the provision in that everybody should be joined. Why not go back to the first proposal and say that they just join the people they know?

JUDGE CLARK: And bring the other in before--

MR. LEMANN: You say the other guy is protected because he can assert his rights later on. If we put that aside, I think we would have the title people on our necks if we went back to that, yet you could apply your argument to that logically.

JUDGE CLARK: I think you have to make, shall I say,

a gesture to the constitutional rights, yet at the same time in wartime the Government goes ahead directly.

MR. LEMANN: Mr. Mitchell wants to strike out lines 27 to 31.

CHAIRMAN MITCHELL: I am not sure about that. The question is: Is it right to limit them to those cases where they take possession immediately, and that is full notice? The guy gets wind of the fact that the Government has taken actual possession.

I withdraw my suggestion as to lines 27 to 31 and 40 to 45. Let it stand. We might get into trouble over that. I would strike out the word "final" in line 35.

JUDGE DOBIE: We all agreed on that.

MR. LEMANN: It is not in there yet.

CHAIRMAN MITCHELL: I have a draft of what the Reporter wants to put in. He wants to put in "final" after "any" in line 35. It reads: "prior to any 'final' hearing involving compensation to be paid for the property the plaintiff shall add as defendants all persons appearing of record and all persons known to the plaintiff to have or claim an interest in the property."

As it is drawn, it prevents the court having any hearing as to compensation for any other property. If we strike out the word "final", we could say: "prior to any hearing involving the compensation to be paid for the property

the plaintiff shall add as defendants all persons appearing of record and all persons known to the plaintiff to have or claim an interest in the property."

In other words, the idea I am trying to get over is that he must be joined (before any person having an interest in any property that is sought to be taken shall be joined and served) before there is a hearing on the compensation to be paid for the title.

MR. LEMANN: Would you object to putting in "or the necessity for its taking"?

CHAIRMAN MITCHELL: I wouldn't object to that. That would satisfy you, wouldn't it?

MR. LEMANN: Yes.

MR. PRYOR: There might be other defenses than the question of necessity. The fellow might claim that the statute they are operating under doesn't give them power to do this.

JUDGE CLARK: I still don't think we should put that in. What is that going to mean from the Government's end, since the question of necessity or appropriateness of taking, appropriate right of taking, as to the whole project comes up immediately? This would mean that they could not act on that, and I should think there might be difficulty in getting possession.

MR. LEMANN: Until they had a record.

JUDGE CLARK: We shouldn't do that. If we do it,

we are simply knocking out this idea that they don't have to make the record search before they start the condemnation.

CHAIRMAN MITCHELL: They can start it, but before they try any issue or question as to the right or the extent of the property they need as to any defendant, there is no judgment that will bind him on that until he is brought into the case, and he has to be heard.

I would like to get rid of the implication that the only thing left to a party that they have not looked up and have not located, when he is served, at that stage of the game is the question of compensation. I want that implication removed. I think if they do not see fit to name him and serve him, when he is served he has a right to put in an answer and as far as his own property is concerned he had a right to litigate any question that is involved.

MR. PRYOR: Make it read something like this: "prior to the trial of any issue respecting any specific property the plaintiff shall add as defendants all persons appearing of record and all persons known to the plaintiff to have or claim an interest in the property."

MR. LEMANN: It wouldn't cover the objection of the New Jersey Bar Association which started the argument that unless you added something this: "provided the court may make a partial distribution of any deposit which does not cut off the rights of any person not named as defendant", you would cause

delays in distribution of the funds.

MR. PRYOR: You mean deposits with respect to the other properties.

MR. LEMANN: It is the deposit with respect to this property.

JUDGE DOBIE: They won't know what it is going to be until the fellow is brought in.

MR. LEMANN: The New Jersey Bar Association says, if you don't do anything about it, you are holding up the distribution of the deposit for a long time.

JUDGE DRIVER: Suppose you had a large condemnation suit involving a tremendous amount of property. On one tract they would wish to make a partial distribution. Well, I would ask, "Can you show me who has an interest in that?"

"Yes, here it is."

The court should be able to make a partial distribution on that showing without waiting for them to make the search on the whole tract.

CHAIRMAN MITCHELL: He could make the distribution low enough so there would be enough left to take care of any values ascribed to the other property.

JUDGE DRIVER: Yes, I think so. In many instances they separate the deposits. They don't make a lump deposit for the whole thing. In Oregon they are required to make separate deposits for each separate tract.

MR. LEMANN: Could we say that we must within sixty days make defendants all persons shown of record unless the court should extend the time?

JUDGE DRIVER: Judge Clark has a very good objection to that. I think it is difficult to make a specific time limit because of the varying size and complexity of these condemnation suits. Sixty days may be ample in one suit but not in another one.

MR. LEMANN: They could go to the judge and make a showing and get an extension. It is very hard to frame language that is applicable to every case, but the Judge would have no trouble in dealing with the particular case and, if they needed more time, grant it.

JUDGE CLARK: I don't believe that there would be a condemnation in the East that they could possibly do in sixty days. The ordinary title search around New Haven requires two weeks, if you want to get it on one small lot of land. Of course we have an archaic system, that is true; but try to change it. Try to get anything like the current system and you will have everybody on your neck, because title searching is a vested interest. That is the kind of thing we are up against. Add together a half dozen property owners and you get into a substantial project.

MR. LEMANN: Say you take a year to get a title search (is that pessimistic enough), if we adopt the modified

language here suggested, you would be postponing your hearing on any issue relating to compensation or necessity of taking or sufficiency of authority for perhaps a year, because you would be putting in language that said you should not have a hearing on those issues until they had made all record owners defendants, even if it took a year to find that out. You would then have that difficulty. So, on the whole, it seems to me to be a risk inherent in this situation about making record owners parties.

There must be some time to make them parties. We started out by saying, "Do that at the beginning." They said, "No, we cannot."

Then Mr. Tolman and Judge Donworth hit on this language in conferences as something that would suit everybody. Now we have objections to that. We all agree "final hearing" is out. So we said we will put in issues involving compensation. I added that we should put in issues involving necessity. And Mr. Pryor says there may be other issues. If we put them all in and say the record owners must be brought in before hearings are held to any one of these issues and it will take a year to get the title search made, we are up against the difficulty anyway.

Maybe the best plan is to put in a time limit and leave it to the judge with an admonition for expeditiousness.

JUDGE CLARK: It does seem to me we are making something

which really takes care of itself. That has reference to the implication that was suggested that the unknown defendant has given up some rights. I have never understood how there could be an implication whatsoever, because the later proceedings dealing with the answer is so explicit. You cannot have an implication of something that is explicitly stated in the rule.

MR. LEMANN: How would you make it read?

JUDGE CLARK: I would make it: "prior to the hearing on compensation".

JUDGE DOBIE: Leave the rest to the court.

JUDGE CLARK: Leave the rest to the court and the rule. The rule just states a time that the Government must act. The Government then acted. The rest of the rule provides that, when the man comes in, if he has any question as to the original taking (and, as we all know, the possibility of any question there is very slight practically; there isn't much chance there, just a theoretical chance), he then can make whatever objection he has. As I see it, you cannot shut him out, and the rule does not try to do that, because the provision on the answer so clearly says that he can raise the objection then.

MR. LEMANN: But suppose we said "hearing on compensation": (a) How much delay would that permit in the searching of the record before you could fix the compensation?

JUDGE CLARK: It might be most anything. It could

be quite a while, I suppose.

MR. PRYOR: Even adopting your idea, which may be entirely right, wouldn't it be better to say: "prior to any hearing involving compensation to be paid for any specific property involved in the action the plaintiff shall add as defendants all persons appearing of record and all persons known to the plaintiff to have or claim an interest in the property"?

CHAIRMAN MITCHELL: That was one of my suggestions.

JUDGE CLARK: What is it that you have added?

MR. PRYOR: I am bringing in the thought that the people who are to be brought in are the people who have some interest in the specific piece of property that they cannot have a hearing about.

CHAIRMAN MITCHELL: In other words, they can have hearings and awards of compensation on other properties involving other persons in the tract.

MR. PRYOR: That is right.

CHAIRMAN MITCHELL: This is not clearly drawn. How about that?

MR. LEMANN: That certainly ought to be made explicit. It may be implicit, but it ought to be made explicit.

MR. PRYOR: It ought to be clarified that way.

JUDGE CLARK: That is the intent.

CHAIRMAN MITCHELL: If you read it carefully, you will note you are a little vague about it.

PROFESSOR MORGAN: Can't you fix the New Jersey Bar Association objection if you say: "determining the total amount to be paid"?

[The meeting adjourned at twelve-fifty o'clock.]

TUESDAY AFTERNOON SESSION

February 3, 1948

The meeting reconvened at one-fifty o'clock, Chairman Mitchell presiding.

CHAIRMAN MITCHELL: Just to point up the thing and to get us back on the problem, I have a rough draft I dashed off just now, referring to line 34 in the printed draft where it says, "but prior to any hearing". I make this report. I don't know whether it is any good or not, but it expresses the general idea I have in mind: "but prior to any hearing involving the compensation paid for a particular property or right to take it the plaintiff shall add as defendant all persons appearing of record or all persons known to the plaintiff to have an interest in such property."

PROFESSOR MORGAN: "that property"; don't use "such". I thought that was a forbidden word.

CHAIRMAN MITCHELL: "that property." I will start over again because you lost the thread. "but prior to any hearing involving the compensation to be paid for a particular tract or the right to take it [because they may litigate the question whether they have a right to take it generally and there is always a question whether they are asking for more than they need] the plaintiff shall add as defendants all persons appearing of record and all persons known to the plaintiff to have or claim an interest in that property. The person so

added and served may answer and raise any questions affecting his property [that is the question of the right to take or the size of the piece they need or whatnot, or compensation] which he might have raised if originally named. Nothing herein shall require the court to meanwhile refrain from ordering such a partial distribution of the deposit as the facts may warrant."

That is to hit the part that New Jersey objected to. It knocks out the implication: All they can do when they come in is quarrel about compensation. It gives him the same rights. If he hasn't been served, he ought to have the same rights to answer or to litigate any question in so far as his own property is affected by that.

PROFESSOR MORGAN: I agree with that.

MR. LEMANN: You will have to change somewhat the language on line 40. If you have abandoned your suggestion that the language on lines 27 to 30 be deleted, that will require a change. Have you abandoned that suggestion?

PROFESSOR MORGAN: That is abandoned.

CHAIRMAN MITCHELL: I was in doubt whether I ought to ask to have the thing broadened out to have this right of subsequently naming people in any condemnation case, instead, as the rule now does, under laws that allow immediate seizure.

PROFESSOR SUNDERLAND: Shouldn't that provision you have just read be extended to cover the case of a man who has not been served and isn't served and notified at all? He

has a right to come in and intervene.

CHAIRMAN MITCHELL: He loses his right if he defaults.

PROFESSOR SUNDERLAND: He has never been served.

MR. PRYOR: He has a right to intervene regardless of these rules.

CHAIRMAN MITCHELL: There wouldn't be any judgment that would worry him any. The Government may have seized his property, but there cannot be any doubt that a man who has never been served or even named would have a right to come in at any time.

JUDGE DOBIE: I don't think you need to put that in.

MR. LEMANN: If he had never been made a party, he could intervene.

JUDGE CLARK: Could the Government get an order for possession before the persons are added?

CHAIRMAN MITCHELL: That is a good point. I am afraid I have slipped on that.

MR. LEMANN: Doesn't the statute provide for that?

JUDGE CLARK: Because the statute so provides, that is why I think this is ambiguous. This seems to me to go against the declaration of taking.

MR. LEMANN: In what way?

JUDGE CLARK: Before you can get a determination of the right to take it, all the parties must be added.

MR. LEMANN: The right to take it but not the taking.

You can physically take it.

CHAIRMAN MITCHELL: Your point is well taken. You can say here: "Nothing herein shall require the court meanwhile to refrain from ordering a taking or ordering such distribution of the deposit as the facts may warrant."

PROFESSOR MORGAN: They have it. We are not trying to prevent them from taking it. We are saying he can raise the question as to the right to take it.

MR. PRYOR: The statute provides for the taking.

CHAIRMAN MITCHELL: They might not. They can have a condemnation, but they may not ask for or be allowed to take immediate possession. His point was that I have drawn this thing so that the clause "prior to any hearing involving the compensation to be paid for a particular tract or the right to take it--"

MR. LEMANN: "--the right to condemn it".

CHAIRMAN MITCHELL: Well, hold on. "the right to condemn it" would be the thing you contested in an order for immediate possession.

JUDGE DRIVER: Say: "would acquire".

PROFESSOR MORGAN: Why not "the taking", because that is what the statute allows them to do? It allows them to take it right away. Suppose that the person purported to go under that statute and was entirely outside of it. I suppose when the defendant came in, he could raise the question, and that is

all this does.

JUDGE CLARK: If you have the further provision that the Chairman read about making all persons defendants, do you really need to throw in this ambiguity? You have all the protection now, not only in the subdivision as to the answer, but you have it explicitly stated here.

CHAIRMAN MITCHELL: "Nothing herein shall require the court meanwhile to refrain from ordering [making an order] allowing the Government to immediate--"

MR. PRYOR: Part one is good, where you say that the court cannot determine anything as to the compensation to be paid until that time. Then stop there. Don't add the words "or the taking". The taking part is covered adequately by the provision subsequently made for the answer.

CHAIRMAN MITCHELL: Yes, you are right about that.

JUDGE CLARK: And if you have that in, you do not need your final sentence that you read there, that nothing shall prevent the taking.

CHAIRMAN MITCHELL: "the court meanwhile to refrain from ordering such distribution of the deposit as the facts may warrant."

MR. LEMANN: "of any deposit made".

Did you refer to "the deposit"?

CHAIRMAN MITCHELL: What I refer to are the deposits made by the plaintiff in regard to compensation. That will

have to be enlarged a little, but this gives the idea.

I leave in the clause limiting this procedure for naming the interested parties to the cases where the Government's procedure is under a statute authorizing acquisition immediately and deposit.

MR. LEMANN: In lines 319 to 326 you have a more specific reference to deposit and maybe you could tie in that proviso there.

CHAIRMAN MITCHELL: I don't know whether it would be the better place. Where does that appear?

MR. LEMANN: Lines 319 to 326.

CHAIRMAN MITCHELL: You can say: "deposit as provided in rule so-and-so". Then it would read:

"Whenever a plaintiff proceeds under a statute of the United States which authorizes the acquisition of title or possession or other interests upon the commencement of the action, the plaintiff need join as defendants only the persons having or claiming an interest in the property whose names are then known, but prior to any hearing involving the compensation to be paid for a particular property the plaintiff shall add as defendants all persons appearing of record and all persons known to the plaintiff to have or claim an interest in that property. The person so added and served may then answer and raise any question affecting his property."

MR. LEMANN: You said "persons", didn't you?

PROFESSOR MORGAN: "Any person so added".

MR. PRYOR: "Any defendant so added".

CHAIRMAN MITCHELL: "The persons so added--"

MR. LEMANN: Why not say "Any person"?

CHAIRMAN MITCHELL: "Any person so added and served may then answer and raise any question affecting his property which he might have raised if originally named. Nothing herein shall require the court meanwhile to refrain from ordering such distribution of a deposit as the facts may warrant."

MR. LEMANN: Wouldn't you have to expand your language in line 45, because you are a long way from where you start out, and say: "In all other cases"? You are a long way from the cases to which you have applied this proposition several sentences back. You have added several sentences.

CHAIRMAN MITCHELL: "In all other cases the plaintiff shall join as defendants all persons appearing of record", and so on.

MR. LEMANN: You will find that the reference, "In all other cases", will not be too plain. That can be handled by breaking it down to another paragraph.

CHAIRMAN MITCHELL: Make it read: "In all other cases upon the commencement of the action plaintiff shall join as defendants all persons appearing of record", and so on.

MR. LEMANN: "In all other cases" takes you back to line 27, but you have put in a lot of new material.

MR. PRYOR: You could say: "In all other cases upon the commencement of the action", using the same phraseology used before.

CHAIRMAN MITCHELL: I think that is right.

MR. LEMANN: You could cover my point by saying: "When the plaintiff is not proceeding under a statute of the United States authorizing".

PROFESSOR MORGAN: "not proceeding under such a statute".

CHAIRMAN MITCHELL: It is all one paragraph. You start out by saying, "Whenever a plaintiff proceeds under a statute of the United States, so-and-so and so-and-so shall happen. In all other cases the plaintiff shall at the commencement of the action join as defendants all of the persons", and so on.

MR. PRYOR: If you transpose that language and use the same phraseology as above, that will do it.

CHAIRMAN MITCHELL: How would you transpose it?

MR. PRYOR: "In all other cases upon the commencement of the action the plaintiff shall join", and so forth.

CHAIRMAN MITCHELL: That is the way I read it.

JUDGE CLARK: We put in "title, possession or interest" in line 29.

CHAIRMAN MITCHELL: I have just made a suggestion here, but we haven't voted on it yet.

JUDGE CLARK: All right.

CHAIRMAN MITCHELL: I tried to make it clear that this defendant who has not been served or named, when he is named, will have just as many rights as he would have had if he had been originally served. The point of the New Jersey Bar Association was with respect to the delay of partial distribution of the deposit.

JUDGE DOBIE: I think that covers it. If it doesn't read too smoothly, we can polish it up.

CHAIRMAN MITCHELL: It has to be polished up. The point is whether it satisfies our minds on it.

JUDGE DOBIE: I think so.

CHAIRMAN MITCHELL: It satisfies my mind about the fear I had of the implication, because we say he has to be named before his compensation award, that that limits him when he does come in to contesting that one issue. I think there was an implication there that might cause trouble, even though the rule later on broadly says that anybody who is served will have twenty days to answer.

JUDGE DOBIE: I believe the average judge would proceed along those lines anyhow, but I believe it is well to put it in there.

CHAIRMAN MITCHELL: What is your pleasure? Do you want something like that drawn up by the Reporter?

MR. LEMANN: I so move.

JUDGE DOBIE: I second it.

CHAIRMAN MITCHELL: That is carried then. Where are we now, Charlie?

JUDGE CLARK: These are the small changes we made. We added "possession" after "title" in line 29.

In line 42 we have made that read: "all persons known to the plaintiff to have or claim an interest".

JUDGE DOBIE: Do lines 40 to 45 stay in?

CHAIRMAN MITCHELL: Yes.

JUDGE CLARK: Now we are down to subdivision (3).

PROFESSOR MOORE: Substitute in line 52 the word "deposit" for the word "file".

CHAIRMAN MITCHELL: The clerk says if you file it, he has to enter each copy in the docket.

PROFESSOR SUNDERLAND: What does the word "deposit" mean? It doesn't mean anything.

MR. PRYOR: It is really a deposit.

CHAIRMAN MITCHELL: Why don't we say: "supply the clerk with at least one copy"?

MR. LEMANN: Deposit is a sort of legal term.

CHAIRMAN MITCHELL: "supply the clerk".

MR. LEMANN: "furnish".

PROFESSOR SUNDERLAND: The record will never show what that notice was.

CHAIRMAN MITCHELL: This is with respect to the extra

copies:

"In addition to filing the complaint with the court, the plaintiff shall file at least one copy thereof for the use of the defendants and additional copies at the request of the clerk or of a defendant."

PROFESSOR SUNDERLAND: I see.

JUDGE DRIVER: Down in line 60 we use the word "deliver" in connection with the notices, why not use the same word here?

PROFESSOR SUNDERLAND: Where we say "deliver" it seems to me that notice will never get on the record at all.

MR. LEMANN: You don't like the word "deliver" in line 60, but why not use it in line 52?

PROFESSOR SUNDERLAND: That is all right.

JUDGE DOBIE: "deliver at least one copy thereof for the use of the defendants and additional copies at the request of the clerk or of a defendant."

JUDGE CLARK: The suggestion has been made you should drop one copy for every department in the clerk's office. It is covered that anybody who wants a copy should get it. You shouldn't deposit bales of paper with the clerk.

MR. LEMANN: Why is that?

JUDGE CLARK: It says: "additional copies at the request of the clerk or of a defendant." I understand the mere printing or mimeographing of some of these cases gets to

be quite a thing.

MR. LEMANN: It is just as easy to mimeograph a hundred as five or ten.

JUDGE CLARK: It is covered, I should think.

CHAIRMAN MITCHELL: In subdivision (3) you say "file" and in d (1) "Notice" you say "deliver".

JUDGE DOBIE: Do you need "prepare and"?

JUDGE CLARK: I don't see any reason for "prepare and". Leave out "prepare and" in lines 60 and 65. I don't think this should be filed, the complaint is filed. The notice is given to the clerk or delivered or whatnot.

MR. PRYOR: I don't see the significance of the words "and in lieu of summons". It is in lieu of summons, but why say so? We are prescribing procedure.

JUDGE CLARK: Let me add a little more to that. I think we have been gilding the lily anyway and that occurs in the same way in the last sentence on lines 66 to 69.

I will say, however, that members of the Committee thought we better have it in so that there wouldn't be any misunderstanding. This is the equivalent of the summons.

At any rate, part of my query was: Do you still think the last sentence is necessary. Mr. Brossard now suggests that we make it read:

"The delivery of the notice and its service have the same effect as the delivery and service of the summons as

provided in Rule 4."

PROFESSOR SUNDERLAND: Rule 4 doesn't provide for the effect.

CHAIRMAN MITCHELL: The delivery as provided by the rule, not the effect.

JUDGE CLARK: We don't say that it shall have the effect provided in Rule 4.

PROFESSOR SUNDERLAND: What do we say?

JUDGE CLARK: "The delivery of the notice and its service have the same effect as the delivery and service of the summons as provided in Rule 4."

We never state the effect. We pretend we never state the effect of the rules.

PROFESSOR SUNDERLAND: That meant the effect to me.

MR. LEMANN: If you took out the word "as", would that cover your difficulty?

MR. PRYOR: Don't you think you can leave out the words "in lieu of summons" without losing anything?

CHAIRMAN MITCHELL: If you are going to strike out the clause about the delivery having the same effect as the summons, then leave out "in lieu of summons", because we have a general requirement that all these rules apply.

MR. PRYOR: We are providing for a notice here instead of providing for the issuance of service.

CHAIRMAN MITCHELL: Every lawyer should know that is

a substitute, but I am wondering whether he might think this notice is some procedure that is hooked onto the summons.

MR. LEMANN: We don't need both the last sentence and the words "in lieu of summons" so we ought to choose between them, and the last sentence is more explicit.

I move we retain the last sentence and strike out the words "in lieu of summons".

JUDGE CLARK: You mean the last sentence as we have revised it, Monte.

CHAIRMAN MITCHELL: We strike out the words "and in lieu of summons" in lines 58 and 59, and the two uses of "prepare and" as being unnecessary. The words "prepare and" in lines 60 and 65 are striken out.

JUDGE DOBIE: That is right.

CHAIRMAN MITCHELL: And the last sentence will read as follows:

"The delivery of the notice and its service have the same effect as the delivery and service of the summons provided in Rule 4." Maybe that should be "required by Rule 4."

PROFESSOR MORGAN: "under Rule 4." Make it: "service of the summons under Rule 4."

MR. PRYOR: That is all right.

CHAIRMAN MITCHELL: That is all right. That will read: "the same effect as the delivery and service of the summons under Rule 4." That hits Edson's point.

PROFESSOR SUNDERLAND: That is all right.

CHAIRMAN MITCHELL: All right, Charlie, what is next?

JUDGE CLARK: Now we go to d (2) and in line 74 we take out "for public use". In line 78 we take out the word "public".

In line 85--

CHAIRMAN MITCHELL: --after the word "proceed"--

JUDGE CLARK: We make that read: "to proceed to hear the action and fix the compensation therefor."

CHAIRMAN MITCHELL: After the word "proceed" in line 85 insert the words "to hear the action and".

MR. PRYOR: In line 74 you are striking out the word "public"?

JUDGE CLARK: "for public use".

In line 78 we are striking out just the word "public".

JUDGE DOBIE: Between "to" and "fix" you are adding the words "hear the action and".

CHAIRMAN MITCHELL: That is right. After the word "proceed" on page 3, line 85, insert the words "to hear the action and".

JUDGE DRIVER: Our clerk has raised this point. The word "signature" on line 87, do you want the attorney for the plaintiff to sign in longhand all the hundreds of notices, or wouldn't the name be enough? "The notice shall conclude with the name of the plaintiff's attorney and an address".

MR. PRYOR: It is all right to require it for the original.

JUDGE DRIVER: You haven't provided for an original notice.

MR. PRYOR: There should be a return of some kind.

JUDGE DRIVER: He should sign at least one of them.

JUDGE CLARK: I wonder if the name might not be a good idea.

PROFESSOR MOORE: I think it is a good idea.

CHAIRMAN MITCHELL: Yes, otherwise he has to sign a whole batch.

JUDGE DOBIE: "name or signature".

PROFESSOR MORGAN: Under Rule 11 the signature shows good faith. You don't have to have that guaranteed here.

JUDGE DRIVER: The attorney has to sign the complaints.

PROFESSOR SUNDERLAND: In regard to that notice, as No. (1) reads there is no notice on file in the clerk's office; is there?

CHAIRMAN MITCHELL: There would have to be one with the return of service.

PROFESSOR SUNDERLAND: Until the return comes back there is nothing on the record to show what the notice was.

JUDGE CLARK: What use is it anyway? You don't have a summons on file.

CHAIRMAN MITCHELL: Until it is served and returned.

MR. PRYOR: Oh, yes. In our state we call it a notice. The original isn't on file until the return is made.

JUDGE CLARK: The notice isn't going to tell anybody anything.

PROFESSOR SUNDERLAND: That is what we rely on.

JUDGE CLARK: After the service is made you hook it onto it.

CHAIRMAN MITCHELL: The court will not proceed with the case as to a defendant until the notice of proof of service is filed with it. You are talking about wanting the notice to be filed before it is served.

PROFESSOR SUNDERLAND: Just to make a record of what it was.

CHAIRMAN MITCHELL: It has to be filed with proof later. That is your record. And they won't go on with the case until it is filed with the return.

PROFESSOR SUNDERLAND: That is true.

JUDGE CLARK: That is all we have on that subdivision.

CHAIRMAN MITCHELL: In lines 76 and 97, page 3, subdivision (3) (i) shall read:

"The notice shall be served in accordance with Rule 4 (c), (d), and (f), except that copies of the complaint need not be served."

JUDGE CLARK: Rule 4 (f) is added so that it is

clear that the territorial limits for service of a notice is coextensive with that of a summons.

CHAIRMAN MITCHELL: Yes, I read it in its changed form.

MR. PRYOR: Strike out the words "the provisions of".

CHAIRMAN MITCHELL: Now we come down to lines 100 to 116. We have included a reference to Section 57 of the Judicial Code, Title 28. That section has a lot of things in it that do not fit this case and it is a bad practice to refer to the statutes in order to find out what the procedure is. So I think the second alternative is what we want there.

MR. PRYOR: The second alternative does not require an order of the court.

CHAIRMAN MITCHELL: Maybe we should require it. I don't believe the reference to the statute as establishing the rule is good. You may be familiar with that statute. That has a lot of things in it about time of the reopening, within a year, a lot of stuff that may confuse them.

JUDGE DOBIE: Subdivision (ii) makes explicit, or rather the alternative for (ii), what is contained in that section of the Code. It spells it all out.

CHAIRMAN MITCHELL: It is a little different.

MR. LEMANN: There is a good deal of that statute on page 29 in the notes of this draft. It calls for six weeks of publication, which we would not adopt. Then it requires the

court to make an order. This seems to me to be important, because some of our critics have spoken of it. It is compulsory upon the plaintiff "to make personal service upon a defendant whose whereabouts are known, even though he is outside the territorial jurisdiction of the court". Some of the criticisms have said if you know his address, why shouldn't you mail him a notice and not merely allow a newspaper publication?

CHAIRMAN MITCHELL: This alternative requires mailing, line 124.

MR. LEMANN: The alternative does.

CHAIRMAN MITCHELL: The only point I have had in mind about this matter of publication was that our original draft did not require any showing on the part of the defendant that a fellow's address was unknown or whatnot before you could serve by substitute service. This way, this alternative at the bottom of the page, was intended among other things to provide for it.

I raised the question whether, when you filed information with the court that you didn't know where a fellow was, what his address was or that he was absent from the state, it wouldn't be wise to put a clause there that on such a showing the court would make an order for publication. That is a judicial finding that the fellow is a nonresident or his address is unknown and you can publish. If you don't have a finding but just a certificate from a lawyer and a collateral attack

is made on the judgment, is the fact to be taken as true that the address of the fellow was unknown?

In most of the cases I know about under state practice where you have substituted service, you require the plaintiff to make a showing justifying the service and then you get an order from the court that is in effect a finding of fact that prevents a collateral attack, because otherwise the collateral attack opens the way to attack the lawyer's certificate or his statement; but, if there is a finding in the order for publication, the situation is different.

MR. PRYOR: Couldn't you still have your collateral attack just as the defendant can claim that in fact he was a resident of the state?

CHAIRMAN MITCHELL: I am thinking of cases where his address is unknown. I think if you are a resident of the state and your address is unknown, publication is due process of law. But the general question as to whether an order of the court for publication or substituted service isn't a desirable thing to prevent a successful collateral attack on the judgment on the ground that the lawyer's statement was untrue is what I am raising.

MR. LEMANN: The order of the court would usually be perfunctory.

CHAIRMAN MITCHELL: It is perfunctory enough.

PROFESSOR MORGAN: Does the state practice in New York

JUDGE CLARK: Pages 28 and 29 provide that a court shall make an order and that this order shall be served in accordance with the practice prescribed in 28 U.S.C. Section 118.

CHAIRMAN MITCHELL: The order itself is in lieu of the statute. It is like a citation, I think. That wasn't a mere order.

JUDGE DOBIE: Section 57 requires an order.

JUDGE CLARK: If you require an order, you are getting away from simplicity, which is what you wanted. You are getting the procedure of the first alternative and not that of the second one. I suppose it would mean that in any condemnation case of any size you would get a court order.

CHAIRMAN MITCHELL: Why would you get it if the rule says you can serve by publication if the plaintiff's attorney files a certificate stating that the defendant is a nonresident or his address is unknown?

JUDGE CLARK: Maybe I didn't understand what you were suggesting. As alternative No. 2 was written, it doesn't require an order, but I thought you were recommending a change to provide for an order.

CHAIRMAN MITCHELL: I was asking whether it wouldn't be the safer course to require an order which amounts to a finding that the lawyer's statement is true and fortifies the service against a collateral attack. Suppose the lawyer merely

files a statement that the defendant is a nonresident or his residence is unknown and nothing else happens, and on the strength of that he goes and publishes. Now, if a collateral attack is made on the judgment, that statement of the attorney can be disputed. If he can show by evidence that the fellow did know or the plaintiff did know where the defendant was or knew his address, he can set aside the judgment as void. But suppose the court makes a finding of fact on a showing like that, I am wondering whether the court by making an order would fortify the judgment against the collateral attack on the ground that the fellow's address was in fact known.

PROFESSOR SUNDERLAND: There would have to be a showing as to the character of the search that was made to find out where he did live.

JUDGE DOBIE: It would be pretty perfunctory.

CHAIRMAN MITCHELL: The judge might ask him if there was such a search and if he is satisfied with it and makes an order--

PROFESSOR SUNDERLAND: Would an order based on the mere conclusion of the attorney and his certificate without any showing of what he did be enough to support an order?

CHAIRMAN MITCHELL: It is a finding of fact if the judge thinks his certificate is honest and true; isn't that what it amounts to? In most of these substituted service statutes, wherever you find them, the plaintiff just can't go

in and file some paper that he doesn't know where the defendant is and get away with it. He has to go to court and get an order.

JUDGE DOBIE: That is safer. In the Western District of Virginia, where it is hard to get to a judge sometimes, it might be difficult to carry that out; but I think that is inherent in that.

JUDGE CLARK: It seems to me though that the practice gets to be perfunctory and I wonder if it adds anything to the validity of the order and whether in a collateral attack the court wouldn't say it was perfunctory and go behind it and set it aside. It would be considered a pure formality.

CHAIRMAN MITCHELL: Why do they provide for an order in all these statutes? It is very unusual not to have it. That was what attracted my attention to this.

JUDGE CLARK: I suppose they think there is some validity to it. People probably do think there is some safety factor in doing that. Why is it safer?

JUDGE DOBIE: If you have a finding of fact by a judge, wouldn't that be on appeal all right unless it is clearly erroneous?

PROFESSOR MORGAN: It is purely ex parte. You don't have the other party there.

PROFESSOR SUNDERLAND: The finding of the court is not good unless it is based on a showing which indicates that.

PROFESSOR MORGAN: It doesn't add anything and doesn't bind the defendant who hasn't been in the case at all. If the lawyer merely states that after due diligence he cannot locate the defendant, the court won't accept that. He will ask, "What did you do?"

The attorney makes an affidavit generally that after diligent search he cannot find the person's address.

CHAIRMAN MITCHELL: Let's drop it. I know for a fact in most statutes for substituted service that I have ever had anything to do with there have always been requirements for a showing to the court and for an order. I supposed there was something in that order that fortified the service against a collateral attack.

PROFESSOR SUNDERLAND: It does if there is evidence before the court that that order has been based on honest testimony. The New York case held that the mere statement of due diligence did not mean anything. You have to state what was done, where you looked and what sort of inquiries you made.

MR. PRYOR: If the court makes an order, at that stage of the game it is ex parte.

PROFESSOR MORGAN: It didn't do any good in the New York case.

PROFESSOR MOORE: It does this much good: They can attack the truth of the statements in a collateral attack, but

if the attack is made on the record, then I think the recital in the order will make your judgment valid.

PROFESSOR MORGAN: I don't think it will be any better than the affidavit on which it was based.

CHAIRMAN MITCHELL: I just brought it up and we will now drop it.

MR. LEMANN: The statute as set out on page 29 has a requirement that the order "be served upon the person or persons in possession or charge of the property, if any there be."

CHAIRMAN MITCHELL: That is one thing we want to avoid. If you require by a rule that they shall be served on anybody in possession of the property, then you get into a horrible mess. That business of service on persons in possession is a hopeless thing. So many things, fence posts, cattle or pigs roaming around, are held equivalent to possession and notice of right. I think it is wise, as the rule does, to eliminate that. You can provide for posting on the premises, but when you say service on persons in possession, I have known so many of these adverse possession cases where they litigated whether the cattle on the premises was possession and you get into a very dangerous field. I don't see any point in requiring the Government to post a notice on the premises.

CHAIRMAN MITCHELL: There is no such provision.

PROFESSOR MORGAN: There is none for filing a lis pendens.

JUDGE CLARK: We are suggesting that we more or less assumed it was substantive law and at least not a matter for procedural rules such as these.

CHAIRMAN MITCHELL: A lis pendens is a thing filed in a land records office and, in the first place, you have to have a state law that provides for filing a Federal lis pendens. What is the rule in an ordinary case in the Federal courts where you are fixing the title of land? The law provides that a lis pendens shall be filed if a state law permits.

PROFESSOR MORGAN: The Lands Division say they file it in most cases, except where they take immediate possession and then the possession is notice to everybody.

Then there are some states that say any action involving real estate serves as notice to everybody, and so on.

JUDGE DRIVER: Someone from the Department of Justice told me in some states they wouldn't accept the lis pendens. There is no provision for it under the state law.

CHAIRMAN MITCHELL: And I think that in titles out West that I ever had anything to do with (I used to examine a lot of titles out West when I was a young man) they always required a certificate from the clerk of the United States court. It wasn't a land record at all. It was a certificate from the clerk of the United States court that there was no action pending or judgment filed.

JUDGE DRIVER: I used to practice in Washington where

abstracters except proceedings in the Federal court and we had to get it.

PROFESSOR MORGAN: We used to file right away in Minnesota in any action of that kind.

CHAIRMAN MITCHELL: The Minnesota statute provides for searching things that are pending in the Federal courts. The Minnesota statute had some clause in it that where there was an action pending in the Federal court, those papers could be filed in the Office of the Register of Deeds in the form of a lis pendens. There are Federal statutes that say, if the state law permits it and you don't file it, the judgment in the Federal court is not a lien against the real estate.

JUDGE CLARK: Don't you think we should continue not to do anything specifically here? It is a matter of what the state law provides. The department has such a policy.

CHAIRMAN MITCHELL: If they don't want to protect themselves, we don't need it.

MR. LEMANN: I see there is provision in the statute, too, which states if you know where the defendant is, you serve him wherever he is. That is better than mailing a notice. Serving him of course is more effective than mailing.

PROFESSOR MORGAN: Do you have a phrase here allowing service outside the state in place of publication?

JUDGE DRIVER: The last paragraph of the second alternative.

CHAIRMAN MITCHELL: That requires you to mail it and serve it personally. Here in the second alternative you provide: "a certificate of the plaintiff's attorney, stating that he believes the owner is not a resident of the state, and that he has mailed a copy of the notice to him at his last known address". Then say that in lieu of publication you can serve him personally. But the way you have it worded where you make personal service outside the state in lieu of publication, you also have to mail it to him. What is the use of that? Am I right?

JUDGE CLARK: I didn't think that was intended here. As a matter of fact, Mr. Chairman, this is mostly your provision. Perhaps this was what you intended. I thought I meant it as a complete alternative.

CHAIRMAN MITCHELL: I don't think I drafted it. I don't recognize it.

MR. LEMANN: Couldn't you cover your point, Mr. Chairman, on line 155 by saying: "in lieu of publication and mailing"?

CHAIRMAN MITCHELL: That is the point. Suppose you check that and find out if it is worded in the rule as now drawn that, if you serve personally outside the state, you mail it to him as well. If that is the way it reads, amend line 155 by saying: "in lieu of publication and mailing". Check that. It is too small a thing to waste time on here.

JUDGE CLARK: We want to be sure of what you have decided. In the first place, we are using the alternative.

CHAIRMAN MITCHELL: The Committee agrees to that.

JUDGE CLARK: What were some of the small changes we had on that?

PROFESSOR MOORE: In line 156 somebody asked what "complete when made" meant.

MR. LEMANN: Lines 143 to 145, I was going to raise that question myself: "Service by publication is complete upon the date of the last publication." The language in 156 was to bring out the point that, if you elect to serve instead of publishing, your service is effective there.

JUDGE DRIVER: Someone in commenting in the series of questions objected to the word "owner" in lines 118 and 123. Is there a definition to include lessee?

CHAIRMAN MITCHELL: We were talking about an owner of any interest therein.

MR. PRYOR: Why not use the word "defendant"?

MR. LEMANN: In lines 118, 123 and 130.

CHAIRMAN MITCHELL: He isn't a defendant. He may not know his name. If you know his name, he is John Smith, defendant; if he is an unknown person, you have an unknown defendant.

MR. LEMANN: It says in line 100: "If persons have been made defendants under the designation 'Unknown Owners'"--

MR. PRYOR: I think defendant is the better word.

CHAIRMAN MITCHELL: You say an owner of an encumbrance.

Would you say it might include an owner of an encumbrance?

MR. PRYOR: It might include him.

JUDGE CLARK: Here are some matters of detail. These are questions raised by Mr. Brossard.

CHAIRMAN MITCHELL: Are you passing to something new?

JUDGE CLARK: This is on the same order. This is on the small things. You have used the word "owner" all through here.

PROFESSOR MORGAN: I think your criticism of Mr. Pryor's suggestion is applicable to this thing. This whole first sentence talks about persons whose names are unknown. Then you say unknown owners may be served by publication. It says: "Unknown owners may be served by publication in like manner by a notice addressed to 'Unknown Owners.'"

You cannot talk about the address of an unknown owner, if you don't know the person or don't know his address. The first sentence applies, however, where the owners and addresses of the owners are known.

MR. LEMANN: You refer to line 117.

PROFESSOR MORGAN: Lines 117 to 139 and then the sentence from 139 to 142. That sentence takes care of unknown owners.

MR. LEMANN: You say 117 refers at least to known defendants.

PROFESSOR MORGAN: Lines 117 to 139 do.

MR. LEMANN: You could use the word "defendant".

JUDGE DRIVER: I don't think there would be any mistake as to what you mean by unknown owners in 139.

MR. PRYOR: "If a defendant is not a resident of the state" should be the way 117 should read.

MR. LEMANN: I would prefer defendant.

CHAIRMAN MITCHELL: That is agreed to.

JUDGE CLARK: Mr. Pryor made the change I was going to make: "be" to "is". That will read: "If a defendant is not a resident of the state or if his place of residence is unknown".

MR. LEMANN: We haven't finished with this point as to line 139 where it says "unknown owners".

PROFESSOR MORGAN: I think that is all right.

PROFESSOR SUNDERLAND: There is one point on line 95. If we take the alternative beginning with line 117 with the heading "By Publication," then the heading at line 95 should be "Personal Service." As it reads now, "Of notice," it doesn't apply in lieu of our revisions and our choice of the alternative provision. (i) should be "Personal Service" and (ii) should be "By Publication."

JUDGE CLARK: I guess that is right.

MR. PRYOR: Line 94 should read: "Service of Notice" and line 95, "Personal Service."

PROFESSOR SUNDERLAND: That would probably be better.

JUDGE CLARK: I have one or two small things more. In line 122, change that to read: "stating that the plaintiff believes the defendant is not a resident of the state and that he has mailed a copy of the notice to the defendant at his last known place of residence".

JUDGE DOBIE: "the defendant" for "him". That's in line 125.

CHAIRMAN MITCHELL: That is right.

JUDGE CLARK: Couldn't we say "him" in line 130, because there the reference is clear.

CHAIRMAN MITCHELL: On line 130 strike out "such owner" and substitute "him".

JUDGE CLARK: On line 137 strike out the word "may".

CHAIRMAN MITCHELL: And add an "S" to the word "direct".

JUDGE CLARK: That is all. We don't want to change certificate to affidavit.

MR. PRYOR: You are making an insertion in the last paragraph about the manner of service.

JUDGE CLARK: Yes. In line 155, in accordance with Mr. Vanech's suggestion we will take out "and is complete when made" and substitute "in the manner as provided in subsection (d) (3) (i)." That will then read: "may be made in lieu of publication in the manner as provided in subsection (d) (3) (i)."

His comment is as follows: "The wording is not sufficiently clear as to what type of service is intended and then, too, a question might be raised as to when service is 'made'. In order to eliminate any doubt as to the meaning of this paragraph, it is suggested that the language appearing after the word 'publication', in line 155, be stricken and there be inserted in its place "in the manner as provided in subsection (d) (3) (1).'"

MR. PRYOR: Shouldn't it go up ahead? "Service of the notice outside the territorial limits of the state in which the district court is held in the manner as provided in subsection (3) (d) (1) may be made in lieu of publication.

CHAIRMAN MITCHELL: Are we talking about Rule 4?

MR. PRYOR: Indirectly we are saying that.

PROFESSOR MORGAN: Why not say: "personal service outside the territorial limits"?

MR. LEMANN: The statute says it must be done; this says it may be done; and Armstrong says we should require it.

MR. PRYOR: You mean require personal service outside the state?

MR. LEMANN: We know that service by publication is a pretty ineffective service. If I own land in Iowa or another state and if you get service by mail, that is not perfect, either. We haven't required registered mail.

My heart is starting to bleed for these absentee

owners and I am wondering why not give them a little bit more protection. After all, there is not much trouble involved in sending a notice out and having the marshal serve it where he is. This is, of course, a foreclosure-in-rem statute. It says that wherever practicable it must be served upon the absent defendant or defendants wherever found.

We know the point has already been commented on and I don't really see why we should not do it. What is the reason they shouldn't do it?

PROFESSOR MORGAN: I haven't any, except I know it isn't common.

MR. LEMANN: Publication isn't worth much.

CHAIRMAN MITCHELL: Read the alterations on lines 152-156.

MR. LEMANN: Change lines 152-156 to read as follows: "Wherever the place of residence of a defendant is known to the plaintiff, personal service of the notice shall also be made upon the defendant wherever found. Such service when made shall be in lieu of publication and is complete when made."

CHAIRMAN MITCHELL: Have you limited it to people outside the state? That is what you are talking about.

MR. LEMANN: "in lieu of publication and mailing".

JUDGE DRIVER: Shouldn't that be limited to the United States? Try to serve him beyond the Ural Mountains.

MR. LEMANN: Yes. We should say: "Whenever the

place of a nonresident defendant residing in the United States is known".

JUDGE CLARK: What is the significance of the word "also", Monte?

PROFESSOR MORGAN: You don't want the word "also".

MR. LEMANN: Where did I put in the word "also"?

JUDGE CLARK: You said: "personal service shall also be made".

MR. LEMANN: "also" should come out.

MR. PRYOR: Don't you have to change line 117? "If a defendant is not a resident of the state, or if his place of residence is unknown". That "be" should be "is".

MR. LEMANN: We have changed that.

MR. PRYOR: I didn't know whether we changed that second one or not: "is unknown to the plaintiff". Then you go on and provide for published notice. If you put in the provision you just suggested, shouldn't that be: "If the defendant is not a resident of the state and his place of residence is unknown to the plaintiff"?

MR. LEMANN: I think you are right. I think that ought to be inserted in line 118 in addition to the other change.

JUDGE CLARK: I want to raise a very technical question. Can you ever make personal service, by definition, outside the state?

MR. PRYOR: Nearly all the state statutes provide for personal service outside the state.

JUDGE CLARK: Mr. Vanech refers back to (d) (3) (i) and (d) (3) (i) refers to Rule 4 and Rule 4 says you can only make service in the district, except where service runs throughout the state.

MR. LEMANN: Your criticism is that personal service is a word of art and ought to be restricted to service within the state. I don't believe that is sound.

JUDGE DOBIE: You make personal service anywhere you find a man.

JUDGE DRIVER: You are really giving notice. You cannot give jurisdiction, but you give him notice that an action is pending within the jurisdiction of the court.

JUDGE DOBIE: That is the old question about claims in rem, which have to be pre-existent. That does not apply to condemnation cases. There you get a claim by virtue of the proceeding. I have quite a discussion of that in my book.

JUDGE CLARK: Mr. Moore is raising a question that I haven't thoroughly gotten yet about the use of the disjunctive in line 118.

PROFESSOR MOORE: You have to keep it in the disjunctive because some of the defendants may be residents of the state and you do not know where they are residing and you have to serve them by publication.

MR. PRYOR: I suggested the change, but your point is well taken.

JUDGE CLARK: That is line 118.

MR. LEMANN: We are changing lines 117 and 118 to read: "If the defendant is not a resident of the state and his place of residence is unknown to the plaintiff".

CHAIRMAN MITCHELL: It is "or".

MR. LEMANN: No.

CHAIRMAN MITCHELL: It is in line 119. That is what Moore is referring to.

MR. LEMANN: We are trying to fit it in with what I suggested.

JUDGE DRIVER: With your suggestion now, Mr. Lemann, you would have to both publish and have personal service on an owner who is outside the state and where his address is known.

MR. LEMANN: That is correct.

Another way of doing it would be to start line 117 by a provision that: "If a defendant is not a resident of the state, but his place of residence is known, then personal service of the notice shall be made upon him outside the territorial limits of the state in which the district court is held, and such service is complete when made." Then go on with your other provision.

JUDGE CLARK: Then, if you are going to follow that

scheme, you want to take the last provision, lines 152 to 156, up into No. "(i) Personal Service," and say: "Wherever the place of residence is known", and then start out.

Then in "(ii) By Publication," make that: "when the residence is unknown", and that would be the only requirement. It doesn't need to be stated whether in or outside the state.

MR. LEMANN: Except for the fellow outside the United States where you might know his residence, but you might not be able to serve him.

JUDGE CLARK: That is in addition to what you put under "Personal Service."

CHAIRMAN MITCHELL: You have the right idea.

MR. LEMANN: I agree with the principle. All we can do at the moment is agree on the principle and leave the wording to you.

CHAIRMAN MITCHELL: If you have that fixed up, let's pass on.

JUDGE CLARK: I should think that takes us down to "Answer." Are we down to "Answer"?

CHAIRMAN MITCHELL: Let's see. Of course the matter in the brackets comes out because that had to do with the first alternative which we have rejected. Line 160, "a defendant shall serve his answer", how does that read?

PROFESSOR MOORE: "a defendant shall serve and file his answer". Strike out lines 161, 162 and all of 163 except

the word "as" and it will read: "a defendant shall serve and file his answer as in Rule 5 (b) and (d)."

JUDGE CLARK: "shall file and serve his answer as provided in Rule 5 (b) and (d)."

PROFESSOR SUNDERLAND: Why wouldn't it be all right to serve his answer by leaving a copy with the clerk? Here he has to file it with the clerk and then hunt up the attorney's office and serve him there.

PROFESSOR MOORE: You can serve by mail.

JUDGE CLARK: In the original rule we called for service on the attorney. Should we make it different here?

PROFESSOR SUNDERLAND: Here we are dealing with large areas.

MR. LEMANN: If you didn't serve it on the attorney, you might have trouble with service on the United States and it seems to me this is a good place to have service on the attorney. This permits you to serve the United States attorney.

PROFESSOR SUNDERLAND: My only question was whether you couldn't put a copy in with the clerk and let the attorney go get it.

JUDGE DRIVER: The clerk would have to notify the attorney that it was there.

PROFESSOR SUNDERLAND: He would know what he had cooking.

MR. LEMANN: If we required it in the other cases,

I don't think we ought to make a distinction here.

CHAIRMAN MITCHELL: Line 157 will read: "Within twenty days after the service of notice upon him, a defendant shall serve and file his answer as provided in Rule (b) and (d)."

JUDGE CLARK: In line 169 take out the words "for public use".

JUDGE DOBIE: All three words.

JUDGE CLARK: "taking of his property."

In line 171 take out "nevertheless" as unnecessary.

In line 172 insert after the word "evidence" the words "at the hearing".

In line 172 it will then read: "present evidence at the hearing as to the amount of the compensation due [illegible] for the property". That means you have to insert the words "for the property", delete the word "him" in line 173.

MR. LEMANN: How about putting in "at the hearing" before "evidence"? "may present at the hearing evidence".

JUDGE CLARK: I guess that is all right.

Insert a sentence in the middle of line 174 as follows: "Notice of the hearing shall be given to all defendants who have appeared in the action.

And in place of the last sentence beginning in line 174 substitute the following: "No other pleading or motion asserting any additional defenses and objections is allowed."

MR. LEMANN: Would it be all right to say: "No other pleading or motion is allowed"?

CHAIRMAN MITCHELL: He wants to strike out "asserting any additional defenses and objections".

MR. LEMANN: Just say: "No other pleading or motion is allowed."

PROFESSOR MORGAN: But you certainly can make motions.

JUDGE DOBIE: Certainly "additional defenses and objections" qualifies "motion".

PROFESSOR MORGAN: You need this clause. It is like an answer. If he waives his answer, it doesn't mean that he could not make a motion for partial distribution later.

MR. LEMANN: You want to take the comma out after "motions".

JUDGE CLARK: The whole provision is on page 5 of our listed of suggested changes, if you have it before you:

"A defendant waives all defenses and objections not so presented, but he may present at the hearing evidence as to the amount of compensation due him for the property, and may share in the distribution of the award. Notice of the hearing shall be given to all defendants who have appeared in the action. No other pleading or motion asserting any additional defenses and objections is allowed."

That was done because the Department of Justice raised the question that we did not make it clear.

CHAIRMAN MITCHELL: I am wondering whether "due" is proper. It may not be due at all.

MR. PRYOR: "as to the amount of compensation".

JUDGE DRIVER: It isn't due until it is determined.

CHAIRMAN MITCHELL: That is what I mean, "the amount of compensation due for the property" is the wrong way to say it. "the compensation to be paid for the property".

JUDGE CLARK: Strike out the word "due".

JUDGE DOBIE: What line is that?

CHAIRMAN MITCHELL: In line 173, page 6: "the compensation to be paid".

MR. PRYOR: Might it not be better to say: "as to the value of the property"?

JUDGE CLARK: This may be more consistent with what we said before. We talked about the "amount of compensation". That is what we have been talking about, "amount of compensation".

MR. PRYOR: Here you are talking about evidence of value.

CHAIRMAN MITCHELL: I think"the amount of compensation to be paid for his property" is all right.

JUDGE CLARK: I should think so. "the amount of compensation to be paid for his property".

CHAIRMAN MITCHELL: Are there any other suggestions on that paragraph?

Then, let's get along. We have no changes in (f).

JUDGE CLARK: I don't think we have anything to suggest on (f).

MR. PRYOR: Brossard suggests striking the words "of this Rule" in line 198 and 202.

JUDGE DRIVER: That also appears in line 184.

MR. PRYOR: Yes.

JUDGE CLARK: That is all right. If we start doing it, we want to be consistent. I should think that is all right. In lines 184, 198 and 202 strike out the words "of this Rule".

MR. PRYOR: Also in lines 190-191.

PROFESSOR MORGAN: The trouble is that in line 187 you have Rule 5 (b) and then, when you talk about subdivision (d) here, you don't know what you are talking about, whether you are talking about this rule.

JUDGE CLARK: We did this in the original rules quite a good deal. We used subdivision so-and-so of this Rule.

JUDGE DOBIE: You need it on that page unquestionably. There is a reference to 5 (b). Leave it in in line 190 where you have subdivision (d) and you don't know whether you are talking about 5 or this rule.

MR. PRYOR: Leave it alone.

MR. LEMANN: The answer need not say how much the fellow thinks he should be paid. He need not say how much compensation he is entitled to. You don't need to set up anything

about that.

MR. PRYOR: He doesn't have to file an answer at all.

MR. LEMANN: On line 165 we say: "The answer shall identify the property in which the defendant claims to have an interest, state the nature and extent of the interest claimed, and state all objections and defenses to the taking of his property."

I see that one suggestion here was that he be required to state the amount of compensation claimed.

CHAIRMAN MITCHELL: He may not know what he is going to ask for until he has his experts all trained.

PROFESSOR MORGAN: He is not likely to put in an answer without an attorney and I never knew one who didn't claim enough.

CHAIRMAN MITCHELL: In line 196, page 6, it says: "he shall file additional copies on the request of the clerk". It ought to be: "he shall furnish [or supply]". Some clerk said he didn't want to be entering these things in the docket.

Strike out the word "file" in line 196, page 6, and substitute "furnish".

[There was a brief recess.]

JUDGE CLARK: I think we are down to (g) now.

JUDGE DOBIE: "Substitution of Parties."

JUDGE CLARK: Does anybody have anything on (g)?

If not, we have some suggestions. In line 209 change

"shall be" to "is". It will then read: "the plaintiff is not hereby required to give any notice to any person or to have any person substituted as a party."

PROFESSOR MORGAN: Is that a good use of the word "thereby"? It means for that reason, doesn't it?

JUDGE CLARK: Let's take out "thereby".

PROFESSOR MORGAN: "is not for that reason required to give any notice".

CHAIRMAN MITCHELL: Strike out the word "thereby" in line 209.

MR. PRYOR: Do you need the words"after the commencement of the action"? If he died before, the question wouldn't come up.

JUDGE DOBIE: You don't have service before the commencement of the action, do you?

JUDGE CLARK: To have the thing operate the death must occur after the commencement of the action before publication.

MR. PRYOR: If he were a defendant and he died before the commencement of the action, he wouldn't be a defendant.

JUDGE CLARK: Then you don't want to say, "after the service of a notice". You would simply say, "after service".

MR. LEMANN: Or "after service of a notice or service by publication".

PROFESSOR MOORE: On service by publication you

have to have the substitution geared to the commencement of the action, not to the time publication is completed, because with respect to lots of people you won't know whether they died between the time suit was commenced and the time publication service was effected. That is why that clause is in there. It does sound a little queer.

MR. LEMANN: I don't get your point, Mr. Moore.

PROFESSOR MOORE: The abstract of title will show the record owners down to the commencement of the action. As to some of them the plaintiff will never know where they are and will proceed to serve by publication, and as to those it should not make any difference whether they have died after the commencement of the suit. If the Government was required to substitute parties up to the time publication was complete, I don't see how in many cases they would ever know that.

MR. PRYOR: There isn't any action as to the man unless he is served with notice somehow.

PROFESSOR SUNDERLAND: The filing of the complaint commences the action.

MR. PRYOR: But not as to this fellow.

PROFESSOR MOORE: I should think the suit was commenced as to him.

MR. LEMANN: Commencement of the action means the filing of the complaint.

CHAIRMAN MITCHELL: And he is made a defendant and

made a party.

MR. LEMANN: Would it be going too far to say: "dies or becomes incompetent after the commencement of the action"? That would be the simplest one from the plaintiff's standpoint.

JUDGE DOBIE: Cut out "after service of a notice", and the rest. Just say: "If a party dies or becomes incompetent or transfers his interest after the commencement of the action".

MR. LEMANN: That would protect the Government.

CHAIRMAN MITCHELL: Here you say if he dies after the commencement of the action, but suppose he hasn't been served and gotten any notice of the case at all, then you go on to say that in that case you don't have to have any service on anybody.

MR. LEMANN: I think that needs some change anyhow.

CHAIRMAN MITCHELL: The whole point about this is that, if you have already served a party who later dies, you are not required to reserve his representative. However, here is a man who never has been served at all, according to our draft, and you say if he dies before he is served, you don't have to substitute or serve his representative, or give him any notice.

MR. LEMANN: What does the plaintiff have to do in an ordinary suit?

MR. PRYOR: It is up to the plaintiff to make sub-

stitutions.

MR. LEMANN: If he doesn't make substitution?

PROFESSOR MORGAN: He would have to make the substitution within two years.

MR. LEMANN: If the case is at issue and called for trial, it would develop that somebody had died and the plaintiff would have to name the new parties.

[Mr. J. Edward Williams and Mr. Charles H. Smith, representatives of the Lands Division, Department of Justice, joined the meeting at this point.]

MR. WILLIAMS: We have attempted to redraft the section on the matter of completing the parties and I would just like to preface the reading of the draft by saying that I encountered a great deal of difficulty, of course, in trying to indicate in words what we decided on in our Regulations for the Preparation of Title Evidence in Land Acquisitions by the United States, depending on the conditions of the records, the local practice and, of course, the value of the property that is involved. Those regulations apply to the varying situations we are confronted with throughout the country.

I thought that commencing on line 27, that part of the sentence which runs through half of line 30, ending with "other interests" could be eliminated, so that we would start the new sentence with the word "Upon".

CHAIRMAN MITCHELL: In other words, instead of limiting

this privilege of starting the suit without naming all the parties to cases which proceed under a statute which has to do with immediate possession, you want it in all other cases.

MR. WILLIAMS: Yes, also it is probably just as important for the purpose of enabling us to get a lis pendens notice. If we can't do that, our search has to be done over again and there is considerable delay.

We do have to proceed with speed and do have to get an order of possession. So this language is drafted with the purpose of insuring all persons having an interest in this property being impleaded as defendants before any action is taken in the matter of compensation.

We think that is perfectly fair, because the eventual security is obtained.

Would you like to have me read this, or does everybody have a copy now? I found great difficulty in the use of the words "reasonably diligent". It was a case of whether "reasonably" would refer to the period of the search and "diligent" would refer to the type of search we made once the period is determined upon, but I have in mind that this would enable the court to inquire into the reasonableness of the search, if for any reason he was not satisfied or a question was raised or if he were to look upon the requirement as jurisdictional. At that time our attorneys would inform the court that they are either obtaining the title certificates of

XYZ Title Company or they have an abstract down to the original source, a patent of the United States, or they have made a search in the records for a certain number of years, which is the practice in that community, and so on, depending upon the situation as we find it and the local practice.

We have a different situation in Texas, Louisiana, New Jersey, Georgia and many other states. We simply cannot indicate by any rule or regulation the number of years required for a search. You have executory devices and other instruments that might have been created many years beyond the normal periods of a search.

I feel that something along this order would be helpful. If you gentlemen would want me to describe what is set forth in our regulations, I would be very happy to do so, and I would be happy to have you set that forth in this rule if you could do that. I would be willing to have you set it out at length if you felt it was proper, although I don't feel it is proper.

I don't think you would want to incorporate by reference our regulations, because they would be subject to change at any time.

This is our practice. In embarking upon a project, of course, we contract for the title evidence in the first instance. The title evidence that we use for direct purchase serves us in condemnation. We never know when we contract for

the title evidence whether we are going to direct purchase or condemnation. We cannot have and should not have a different rule and different abstract and different title evidence for direct purchase than we would have for condemnation. That is why, without limitation, a complete search of the records would throw an undue burden on the condemning parties and would delay, in certain circumstances, needful public works.

I believe this language will not do that. I don't see how anybody will be missed by this method. We must keep in mind that we fail to implead them at our peril and, if anybody has property taken without having an opportunity to be heard and without receiving notice, he is going to get his compensation that he is entitled to under the Constitution. And it seems to me those safeguards are sufficient for all practical purposes.

CHAIRMAN MITCHELL: Do you ever in your search look at the tax records and see who is paying taxes on the property?

MR. WILLIAMS: Yes, sir; that is one of the first things we do.

CHAIRMAN MITCHELL: That is provided for in your regulations.

MR. WILLIAMS: I believe so. I am sure it does on the form of the abstract certificate which we require. Abstracts always have the taxes shown and on Schedule "B" of our certificate of title there is shown, along with the mortgagees and

judgment creditors, the tax liens.

Of course that is the first thing that a title examiner would notice. If he finds the taxes paid by Mr. A, whereas the title appears to be in Mr. B, both parties would be impleaded as defendants.

JUDGE DOBIE: In your suggestion here you say: "claiming an interest in the property whose names are then known". Wouldn't it be better to name only the persons who are then known to have a claim or interest in the property?

MR. WILLIAMS: That is perfectly all right. The intention is clear, but I believe it would be an improvement.

MR. LEMANN: This would be a relaxation from the langauge of this draft. This would go back to some language that was previously debated during the six or seven years we have been talking about the condemnation rule. These words "reasonably diligent search of the records" I am quite sure appeared in some preceding drafts.

CHAIRMAN MITCHELL: I don't think so. The original draft that caused all the trouble was a draft that simply prescribed that you include names of all known persons, and we thought that implied known by reason of the fact that they had a record interest, but the bar and the title companies assumed that, when we said known, it didn't mean you had to search the records to complete your knowledge at all, and they tore us to pieces, because they said we didn't require any search of the

record.

I don't think we said anything about any search of the records in the draft. Where the trouble arose was in the language I outlined.

MR. LEMANN: We have said the same thing sometimes in the discussions on some draft. Mr. Tolman, do you recall that?

CHAIRMAN MITCHELL: This is the Preliminary Draft of Proposed Amendments in 1944 with 71A in it:

"The complaint shall name as defendants all owners of and parties interested in the property sought to be taken, if known, and all others shall be made defendants under the designation of 'Unknown Owners.'"

There wasn't a word as to whether your knowledge would have to be completed by a search of the records. That was where the row started.

MR. PRYOR: This is all right if you add the other part that you suggested about the rights of the people who are subsequently brought in.

CHAIRMAN MITCHELL: We will present that to him before we leave that and see if he likes that.

JUDGE CLARK: Going back to the one we had in 1936, that was substantially the same.

CHAIRMAN MITCHELL: Then our second draft of 1944 did not contain 71A.

JUDGE CLARK: It did not.

CHAIRMAN MITCHELL: We never had anything about any search of the record.

MR. LEMANN: I am quite sure we had that. At one time we looked up the different state statutes as to parties required to be parties defendants. Either in one draft or in some document we had this formula about reasonable diligence in examining the record. If I had time to read through the correspondence, I would make a considerable wager we discussed it. I am very vague about the extent of the discussion.

CHAIRMAN MITCHELL: I am afraid we might have trouble with this thing where you say "reasonably diligent search of the records, considering the type and value of property involved".

MR. WILLIAMS: We order our title evidence from recognized title companies and we do not know to what extent they make a search of the records, that being one of the fallacies of this kind of a rule, because our attorneys could not tell the court there had been a search of the records. You would have to call the attorney for the title company and many times those examiners are not attorneys. Also, many times those certificates express legal conclusions, even though they are guised in the form of insurance. Those are difficulties that present themselves on a matter of this kind. Anything that will give us some reasonable opportunity to vary the search as conditions warrant would be helpful.

CHAIRMAN MITCHELL: I know, but there is the proposition of wording it in such a way as to require you to make a search that the careful businessman makes when he is acquiring property.

MR. WILLIAMS: I thought "a reasonably diligent search of the records" would just about cover what a prudent businessman, an ordinary layman, would do if he were turning this matter over to a title company or an abstract company. That is what the attorney would do.

You cannot insure against an examiner missing someone when he examines the records.

JUDGE DRIVER: Should we append a note setting forth what the Committee regards as "a reasonably diligent search of the records"? The courts would be inclined to follow the interpretation of the Committee here as to what is required.

MR. WILLIAMS: I might illustrate one of our problems. In the State of Oklahoma we are acquiring hundreds of miles of easements for transmission-line purposes. Those easements would cost us for the average landowner, running across his farm without damaging it (he can cultivate and crop it), an average of $50 a tract. Our abstracts would cost us $250. Our local attorney down there said, "If you will send down somebody from Washington to watch my office and handle some of my business for me, I can run through those records and save $30,000 in abstract fees." And we did that. Our man is a competent

attorney down there. He has a fine record with us on direct purchases and condemnation cases. We have perfect confidence in his search of the records, and there is no doubt but that he can satisfy any court as to the accuracy of his search. That is what we are doing in that instance.

I think it is entirely unreasonable in those circumstances to ask the Government to spend $250 for an abstract of title for an interest in the title that we are only paying $50 for. That is magnified many times throughout the country where we have the construction areas for dam sites and where we need a right of way or an area for a spoil disposal area. To require us to do that is unreasonable, particularly when you keep in mind that nobody can be hurt by this, because, if we have taken anything unlawfully, they have a cause of action against us.

JUDGE DRIVER: In the case of the Hanford site you had a large number of lots where the value was $4 or $5 a tract. Your abstracts would cost you many times more than that.

MR. WILLIAMS: We had that many times. Under those circumstances, I feel in fairness to the Government there should be a little discretion, always keeping in mind that we are going to use reasonable diligence, and the court can always, under this rule, inquire into the extent to which our search has been made. If he is not satisfied, he can go into it in detail.

This might be considered jurisdictional and, if he

is not satisfied, we could complete a search that would be satisfactory to him.

JUDGE CLARK: See if you like this any better. This is what I suggest for consideration: "There shall be named as defendants all persons having or claiming an interest in the property whose names can be ascertained by a search of the records of the extent commonly made by diligent searchers of title in the vicinity."

CHAIRMAN MITCHELL: I think you will curry a little favor with the title companies if you made a provision in there that you should make a search of the record and that you can rely upon the certificate of a reliable title company. They would be pleased with that.

MR. WILLIAMS: They would.

CHAIRMAN MITCHELL: The word "reasonably" will cause them to shy a little bit. You might be content with just the word "diligent".

MR. WILLIAMS: This morning I spent quite a bit of time with James Sheridan, who is the Executive Secretary of the American Title Association, who was leading the opposition to the other bills.

CHAIRMAN MITCHELL: What did he think of your draft?

MR. WILLIAMS: I didn't have this exact language. I had: "shall name as defendants the persons having or claiming an interest in the property whose names are disclosed by a

reasonable search of the public records, considering the type and value of the property involved."

He didn't want to express his opinion, although he thought it was all right. He wanted to check with his people about it.

On the matter of the objections in Congress to the jury bills which we discussed yesterday, he pointed out that that jury bill had exactly the same title as the bill which was objectionable, namely, to expedite the payment of awards. The opposition was organized against one bill and got in on the other bill, because the titles were identical. He said the title companies would favor anything that would be in favor of the expeditious handling of the case.

CHAIRMAN MITCHELL: I don't see that it is their business.

MR. WILLIAMS: No, except their people in opposing the other did oppose this bill.

JUDGE DOBIE: The Conformity Bill?

MR. WILLIAMS: Yes.

JUDGE DOBIE: The question came up here this morning, outside of the Nitrates Act and the Atomic Energy Acts, do you know of any other acts that provide for the condemnation of personal property?

MR. WILLIAMS: Yes, there are several. I asked Mr. Smith to come along with me today. He spent some time looking

up the acts and the methods of acquisition.

MR. SMITH: Mr. Williams gave me several citations, which I think were furnished here yesterday afternoon. We had those citations checked. The question goes back to the powers contained in the Second War Powers Act, Title 2, which authorized the condemnation of real property and such personal property used therewith and located thereon. There has been a trend in the Helium Gas Act and the Nitrates Act which seems to indicate that the condemnation of a plant, land and processes, which would mean personal property, or in connection with helium the condemnation of leases, gas leases, which would be personal property, is permitted.

So, after consideration of those matters, I think the situation is that we did not have an opportunity to make a list of any other acts. In examining these acts, however, Mr. Williams and I thought it might be wise to propose a further amendment to the rule. Where the rule merely says the acquisition of property, we might say "real property and, when authorized, personal property used in connection therewith", limiting it, of course, to where there is a statutory authorization for it.

From a reading of those acts it is apparent that these processes can be acquired from people who do not have an interest in land. They would be acquired separately other than in connection with the acquisition of land. We wouldn't be interested in the acquisition of those by a condemnation

proceeding. They would have to be requisitioned.

Some of the acts provide that, if such rights are taken, the owner can bring suit in the Court of Claims.

JUDGE DOBIE: The Atomic Energy Act does that.

MR. SMITH: Yes, there is a section in regard to patents that requires the owners who have been deprived of patents without license to bring suit in the Court of Claims against the Government.

One of the other acts which I read referred to the requisition of aircraft designs which are submitted to the Secretary of War and the Secretary of Navy in competition. If they are kept by the services, the owner or inventor may bring suit for the value thereof in the Court of Claims.

JUDGE DOBIE: Is there no provision made there for a voluntary adjustment? Suppose the man said, "That is not a very valuable thing. If you give me $500, I will call it a day." Could the Government give him $500 and take a settlement?

MR. WILLIAMS: Yes, if there is a proposition.

CHAIRMAN MITCHELL: Let me ask you this. Do you find any statutes relating to the acquisition of personal property against the will of the owner, not by purchase, that contemplates that the proceeding to take it and pay for it shall be brought in the form of a condemnation suit in the United States district court, or do all those statutes relating to personal property either require the owner to resort to the Court of Claims or, as

I understand it, in some cases provide for some arbitration commission to fix the value, with the right of an appeal directly to the Circuit Court of Appeals?

MR. SMITH: I have noticed this in two or three of the statutes I read, that there were cases where just a taking of personal property (and no real property) was involved and they indicated that the remedy of the owner who had been deprived of his personal property was in the Court of Claims. Then in a number of statutes which authorized, among other things, the taking of land and livestock and things like that which are used on the land, for example, the World War Veterans Relief Act, 38 U.S.C. 438j, there is this provision:

"The Powers of the Administrator of the Veterans Administration. The Administrator is authorized to provide decent hospitals and facilities on sites now owned by the Government or on sites to be acquired by purchase, condemnation, gift or otherwise, to include the necessary buildings, auxiliary structures, mechanical equipment, approach work, roads and trackage facilities leading thereto, sidewalks abutting hospital reservations, vehicles, livestock, furniture, equipment and accessories." Those last classes of property are obviously personal property and, while the Administrator is authorized to condemn them, it appears his right to condemn would only be in connection with the condemnation of land with which they would be used. I don't believe it was the purpose of the law

to authorize the Administrator of the Veterans Administration to acquire by condemnation--

CHAIRMAN MITCHELL: --personal property disconnected with the realty they are taking.

MR. SMITH: That is right. Unless they were on the land and being used in connection with the land at the time he started the condemnation, that would be true.

CHAIRMAN MITCHELL: To put it another way, you have not been able to find any statute that contemplates the institution by the Government of a condemnation case in the United States district court, such as we are dealing with, involving personal property, unless it is personal property connected with or used in connection with the land you are trying to condemn.

MR. SMITH: I think I can say that the history of the Condemnation Section of the Department of Justice would indicate that such a proceeding had never been attempted.

MR. WILLIAMS: That is true.

CHAIRMAN MITCHELL: Have they condemned ships?

MR. WILLIAMS: They were taken by requisition.

CHAIRMAN MITCHELL: And, if you can't settle, they resort to the Court of Claims.

The Maritime Commission took a lot of ships under that procedure at the beginning of the last war and, if they couldn't agree on compensation, the owner was relegated to the

Court of Claims.

JUDGE CLARK: I sat on a separate tribunal that was set up to establish principles which the Maritime Commission could use in paying for ships. We suggested a formula whereby these owners and the Commission could get together and settle.

CHAIRMAN MITCHELL: We ought to put some word in this rule to indicate that it does apply in condemnation cases that involve real property. You do have cases in the district court where you do take personal property by condemnation proceedings in connection with land as a part of a general setup.

Let's get back to this draft.

JUDGE CLARK: Here is a suggestion from Mr. Moore.

CHAIRMAN MITCHELL: Mr. Moore's suggestion is as follows: "by such a search of the public records--"

You used the words "public records". Is that a better way to do it than just "records"? We are talking about public records.

"by such a search of the public records as a prudent businessman would require under the circumstances, considering the type and value of the property involved".

I would like your draft better if you struck out the word "reasonable".

MR. WILLIAMS: That would be all right. I had in mind more or less the duration of the search, the period of time covered by the search by the use of "reasonable" as opposed

to the diligence of the search.

CHAIRMAN MITCHELL: You would be right if you didn't qualify the word diligence by the words "considering the type and value of the property involved".

MR. WILLIAMS: I thought requiring a diligent search for a reasonable period would cover it. Then I thought somebody would say you have to spend three days searching rather than making a fifty-year search. I had in mind a search for a reasonable period of the history of the title.

On our lowest valued land we require a twenty-five-year search; for the most inexpensive, simplest temporary use of land of low value, a forty-five-year search, plus an additional search if anything turns up in that period that shows a need to go further back. We would like our searches to go back to the United States patent, but we can't do it in the eastern states. Out West we insist on that. If the patent isn't there, we won't pay for it. Of course we have litigation on those questions. The original patent may now involve valuable oil land. We just concluded one in the Supreme Court not so long ago, involving Section 36. The dispute was whether the United States owned it or Wisconsin owned it under the Enabling Act, and it resolved itself into a question whether that one section was surveyed at the time Wisconsin was added to the Union as a state. The Court held it had not and, therefore, the title remained in the United States. Incidentally, a bill

is pending in Congress to convey that to Wisconsin, the same as with the offshore oil.

CHAIRMAN MITCHELL: What do you gentlemen have to say?

MR. LEMANN: I am getting my notes together. Back in 1945 Mr. Williams submitted a request that we put in the rule the statement that the attorney for the plaintiff shall exercise reasonable diligence. That was where I got my recollection that it had appeared in the discussion before. You went on to say that the title people would object, though, since there was no reference to a search of the record.

Then the Chairman went on to say that in certain states you were required to name everybody shown on the record and the Connecticut and Minnesota statutes were mentioned.

CHAIRMAN MITCHELL: The Minnesota statute is predicated on naming persons of record and that means everybody on the record.

MR. WILLIAMS: The problem is simple out there because you can go back to the Government patent in any case, and none of those patents out there go back to 1800. That kind of law works very well and requires you to make a complete search back to the government patent. However, here in the East it is a different thing.

CHAIRMAN MITCHELL: The point has just been made that out in Chicago during the great fire in the last century

all the records were burnt up, but some title company has some private records.

MR. WILLIAMS: Chicago Title and Trust Company has the records prior to the fire. They are the only records available.

MR. LEMANN: I asked back in 1945: "Suppose somebody says that 'reasonable diligence' means going to the records, that it is not reasonable not to go to the records. What would you say to that?

"Mr. Williams: We would say, of course it is reasonable to take that position.

"Mr. Lemann: Then your 'reasonable diligence' phrase brings you right back to the public records where we have it now.

"Mr. Williams: Yes, it would; but it wouldn't be so restrictive as the language you now have."

I was quite sure we went over this, but maybe we ought to reconsider it because we can all get new light on it. I was pretty sure we had gone over this suggestion. This language, which you now have, however, is more limited. You conceded that the "reasonable diligence" language would require you to search the records.

MR. WILLIAMS: Unquestionably it would.

MR. LEMANN: I think if we read this over, we would find that at that time we came to the conclusion that we would

make them out in anybody who was shown by the records to have an interest, which is the way it is now. Perhaps that is too stiff.

MR. WILLIAMS: We are criticized because we throw in too many people rather than too few. The more people we put in the more complicated it is for the court to determine the distribution of awards. They all have to be disposed of. Title evidence has to be produced. Our attorneys prepare petitions for these people and we have to explain to the court why we have to put these people in.

Just because there is some defect in a conveyance or a granting clause in the deed we bring them in to completely foreclose any action in the future. We look on our condemnation cases as a quiet title action. Many times the lands involve titles that are so bad we cannot approve the title by purchase; therefore, we condemn, yet there is no contest on value, and we quiet the title in that way.

CHAIRMAN MITCHELL: I was talking about trying to get a bill through to get the Attorney General the power to rely on the title companies, and yesterday someone from your division said that had been passed.

MR. WILLIAMS: Mr. MacLeod made that statement. It is a modification of Revised Statute 355.

CHAIRMAN MITCHELL: If we had that and described what kind of a title certificate you can rely on and stuck that

in here, would that cover it?

MR. WILLIAMS: It doesn't go that far. It says that the Attorney General can use the abstract to indicate the evidence of title.

MR. LEMANN: How much relief would this language give you with respect to this difficulty you spoke of before, of throwing in everybody who might claim an interest? It says: "all persons having or claiming an interest in the property whose names can be ascertained by a reasonably diligent search of the records". If you used that language, you would still be up against the same problem. If you found these people with a possible technical claim, you would be required by this language to put them in.

MR. WILLIAMS: We would put them in, but we would limit the period of our search in accordance with our regulations, depending upon the type of property involved or the state where the property might be situated. We wouldn't in certain places go back to the original grant from the Crown.

MR. LEMANN: How much difference is there between a "reasonably diligent search of the records" and a search of the records that is accomplished with "reasonable diligence"?

MR. WILLIAMS: It is a question of how far back a prudent lawyer should go in making the search. We feel that our regulations for the use of title companies and other agencies of the Government indicate a reasonable assurance that we will

pick up the persons who have an interest in the property.

MR. LEMANN: Do you specify the period?

MR. WILLIAMS: Yes, sir.

MR. LEMANN: Could you read it to us?

MR. WILLIAMS: We can; yes, sir.

MR. LEMANN: We started out by saying, "Join everybody who is known." Then the title companies jumped on us. We then said, "Join everybody who is shown on the records."

PROFESSOR SUNDERLAND: The diligence of the search does not apply to the type of search but to the period of time that the search should be made for.

MR. WILLIAMS: That is right. Our searches are made by title examiners who give us certificates of title or abstracts of title. Those are furnished by the title companies. They are then in turn examined by our attorney and from those abstracts or certificates he selects his parties.

As to the period of search in general--

CHAIRMAN MITCHELL: As to the original thirteen states it says eighty years.

MR. WILLIAMS: --our regulation reads as follows:

"As to all acquisitions except those mentioned in paragraphs (2) and (3) of this subsection c [those refer to the original thirteen states, 'low value' lands' and specific types of easements], the abstract shall, whenever possible, begin with some undisputed source of title, such as an original

grant or patent from the sovereign. If it is shown to be impossible or impracticable to begin with such grant or patent, the abstract shall begin with the earliest available record and there shall be furnished:

"(a) Proof that there has been an original patent or grant of the land in question from the sovereign, or, if this proof cannot be supplied, a showing that a local statute provides for the running against the state of a statutory period for obtaining title by adverse possession and a compliance with subsection c of section 7; and

"(b) A certificate of the abstracter that no reservations, limitations, encumbrances,or defects are known to him to exist in the title, except those specifically set forth, and that abstracts having a beginning point no earlier than the one submitted are accepted by competent attorneys in the community."

That is the general rule. First, the exception now as to the land within the original thirteen states:

"The abstract shall begin at as early a date as is practicable and in any event at least eighty years prior to the date of the abstracter's certificate, unless it is shown to be impossible because the title records are lost or destroyed, or are otherwise permanently unavailable, in which event the requirements of paragraph (1) of this subsection c shall apply."

Those are the other certificates I mentioned as to

periods of search in general. Now, as to "low value lands," that comes out of the Revised Statute 355.

"'Low value lands' are defined as those lands as to which (a) the average value of the land or interests to be acquired under a single option or contract of sale does not exceed $10 per acre, (b) the total value of the land or interests to be acquired under a single option or contract of sale does not exceed $3500, and (c) no money in excess of $2500 is to be expended for the construction of buildings, works, or other improvements (except roads, trails and fire protection improvements) on the land or interest to be acquired. The abstract shall begin with a deed or other instrument transferring title recorded at least forty-five years prior to the date of the abstracter's certificate and shall be supplemented by:

"(a) All instruments antedating the period covered by the abstract which are disclosed by instruments recorded within the period of search and which contain reservations, exceptions, restrictions, limitations, or other rights or interests or impose conditions or liens possibly outstanding or affecting the title; and

"(b) A copy of the patent, or evidence of the issuance of the patent, showing any mineral or other reservations if the United States is the source of title; or

"(c) A certificate of a proper officer showing a grant or the issuance of a patent and any other documents

required to divest the state's title, noting any mineral or other reservations if a state is the original source of title."

The fourth exception to our general rule is with respect to specific types of easements.

"In the acquisition of easements for telephone and telegraph lines, power transmission lines, channel excavation, relocation of utilities such as fire-alarm systems, water mains and pipes, pipe lines, railroad spurs for temporary use in transporting materials for construction purposes, access roads, easements of ingress and egress, roads and highways, spoil disposal, intermittent flowage easements (estimated frequency of flooding less than five years), borrow pit, and easements of the same general character and type, the abstract shall begin with a deed or other instrument transferring title recorded at least twenty-five years prior to the date of the abstracter's certificate and shall be supplemented by the documents required in subparagraphs (a), (b), and (c) of the preceding paragraph. [These are the temporary easements and that is what our search requires.] Abstracts relating to easements other than those herein identified costing less than $3500 upon which no improvements in excess of $2500 are to be erected, must be prepared in accordance with the requirements contained in paragraph (3), subsection (c) of section 4. In the acquisitions of easements other than those of the character herein set out in which the easement is to cost in excess of $3500 or improvements costing

$2500 or more are to be erected thereon, the abstract must be prepared in accordance with instructions contained in paragraphs (1) and (2) of subsection (c) of section 4."

That requires the complete abstract upon those temporary easements where there is going to be some valuable improvements erected.

Then we go on with:

"Records lost or destroyed"

"Wills and probate proceedings"

"Title by descent"

"Foreclosure proceedings"

"Sales by receivers, execution sales, tax sales, divorces and other judicial proceedings"

"Sales by trustees and others in a fiduciary or representative capacity"

"Search for liens of judgments and decrees of Federal courts"

"Special assessments for improvements, school districts, and so forth"

Those are the limitations on the period of search that we feel adequately protect the United States, and we have been working under these instructions for years now.

JUDGE DOBIE: It worked out all right.

CHAIRMAN MITCHELL: What do you think about this statute that authorized the Attorney General to take a certificate of title?

MR. LEMANN: That statute sets up a standard of value

of property and type of property, $10 an acre as they have adopted in their manual. On quick reading it seems to be a statute for the relief of the Attorney General by saying he need not be so particular in his approval of properties, "low value" property specifically, and gives him a disposition to waive defects that he doesn't think are important, if the property is of little value.

MR. WILLIAMS: If later on outstanding improvements are to be erected, we will acquire those outstanding interests by condemnation.

MR. LEMANN: Then it permits the Attorney General to rely on the title company certificate.

MR. WILLIAMS: As evidence of title.

MR. LEMANN: If you take this language "whose names can be ascertained by a reasonably diligent search of the records, considering the type and value of property involved", what you mean is that in determining whether it is reasonably diligent you take into account the type and value of the property. If it is cheap property, it is diligent to do less than if it is an expensive piece of property.

MR. WILLIAMS: We have a different standard.

MR. LEMANN: What would you think of a rule to show everybody of record within a period of X years, maybe eighty years, and then a proviso (in order to gild the lily) that anybody who was left off wouldn't be prejudiced and his rights

would be preserved?

MR. WILLIAMS: That wouldn't be satisfactory from our standpoint. We would go beyond that because in Illinois, for example, our patents go back far beyond eighty years. In Indiana it is the same way. We bring those titles back to the patent. Of course, if we use a title certificate, we do not know how far back they go because they are insuring us against loss and, if a name is missed and we don't include them in the condemnation proceeding and we have to pay, we look to the title company to reimburse us.

There is very little difference between the insurance policy and a limitation of liability.

CHAIRMAN MITCHELL: One trouble with this thing, it seems to me, is this: You say the question whether the search is a reasonably diligent one depends upon the type and value of the property involved. There is a third factor, the original source of the title. If you have a tract of land in Minnesota or Illinois, that came from the Government, all that vested title. Do you go back to that no matter what the type of the property is?

MR. WILLIAMS: Not necessarily on our temporary easements; we wouldn't go back that far on those.

CHAIRMAN MITCHELL: I see.

MR. WILLIAMS: That is why, if you are going to indicate a specific number of years, you have to designate the

smallest number of years to cover those acquisitions, because it wouldn't be fair to make us go back eighty years, or so, for a driveway through a man's land for one year.

MR. LEMANN: You might say eighty years where the fee is involved and thirty years where an easement is involved. That would be at least certain. The fundamental difficulty is that any reasonably experienced lawyer would go back further with certain kinds of property than with other kinds. If we examine the title of a built-up square in New Orleans, we never go back more than fifty to eighty years. If we had a piece of vacant land in the country that they were examining for an airport or an airfield, we would go back to the original grant, because we don't know how long that property has been in possession.

MR. WILLIAMS: That is the problem we are faced with. In California we have some 500,000 acres for the Navy Department that we are acquiring for experiments in the firing of new missiles. That area lies in the Great American Desert. Claims have been filed there for many years. There are potentially 1800 mining claims aside from the original owners of the fee of the land, and most of that land is patented in the United States. Title reports reflect every one of those claims. Whether or not the claim is valid to the extent of entitling the holder to compensation is dependent upon whether he has satisfied the requirements of the statute. If he spent

$100, he is entitled to a right that is transferable; if he spent $500 and did certain things, he is entitled to a patent. We have referred those claims to the Department of the Interior. We think there will be about 200 valid claims out of those 1800 claims. We have impleaded in our condemnation case every one of those 1800, because the title company has shown them as having claims of record. When we get the determination from the Department of the Interior that those claims are not valid and have never been proved up and the statute has never been complied with, we are then dismissing as to those.

Under the circumstances it is completely unreasonable, it seems to me, to require us to attempt to get service particularly in California. You know the difficulty in getting service out there and the conditions that have to be met to publish against unknown owners. You have to make a complete showing of inability to get service.

MR. LEMANN: We would wipe out conformity requirements.

MR. WILLIAMS: I am only pointing out the difficulties we would have. We would never get that condemnation case completed if we had to run down those miners to the ends of the earth and their lawyers. That is the way we are proceeding in that case.

MR. LEMANN: Could we use some phrase like "making defendants all owners and claimants indicated by the public records" instead of all elected claims? We have to say all

parties owning an interest in the property as indicated by the public records.

MR. WILLIAMS: That comes back to our original problem here of meeting a situation we find in the original thirteen states of going back to the original grant.

MR. LEMANN: Would that language mean you could take the public record as the basis for determining who owned it?

MR. WILLIAMS: If you would say the last owner appearing of record, or something like that, it would be a simple thing.

MR. LEMANN: You would think that might be all right, as shown by the public records showing the last owner. That would be all right, would it?

MR. WILLIAMS: That wouldn't be sufficient for us. We wouldn't rely on that. We could go to a city like St. Paul or a state like Illinois and find the last grantor in a deed to lot 14 in block 6 and say that that man is the owner. We have to search the record and find unsatisfied mortgages and other things of record.

MR. LEMANN: We are simply wrestling with the problem of making parties at this time. Our problem in that regard probably would be much less than you in practice would desire before you paid out money. We might require you to do much less than you would do. All we are dealing with is the question of who shall be named parties in order to give a fair

opportunity to be notified to all people who might reasonably be thought to be interested.

MR. WILLIAMS: If you want to establish a minimum, we have no objection at all.

MR. LEMANN: Minimum here is too strong; it is really a maximum.

MR. WILLIAMS: If you meant the last owner appearing of record, that would be easy to comply with. That could be dug up in a hurry. That would not mean it would be necessary for us to get an abstract or certificate of title.

MR. LEMANN: Could we say all persons appearing of record as last owners of the property and all persons who may be known to have any interest in the property?

MR. WILLIAMS: Then you are leaving it up to the discretion of the pleader, known to him, I assume.

MR. LEMANN: The known part is but not the unknown part.

MR. WILLIAMS: We have no objection to putting in the last grantee of any deed of record. There wouldn't be any point to putting that point in.

CHAIRMAN MITCHELL: There would be just as much row about that as when we did not say anything about the public records.

The language submitted by you reads:

"Upon the commencement of the action, the plaintiff

need join as defendants only the persons having or claiming an interest in the property whose names are then known, but prior to any hearing involving the compensation to be paid by the plaintiff for the property all persons having or claiming an interest in the property whose names can be ascertained by a reasonably diligent search of the records, considering the type and value of property involved, shall be named as defendants. All others may be made defendants under the designation 'Unknown Owners.'"

Suppose you have learned about somebody that has a claim or an interest in the property by letter or word of mouth and then have his name before you as a claimant, yet your search of the records does not disclose his claim. You haven't provided for putting him in.

MR. WILLIAMS: I had that in, but I struck it because I didn't want to repeat persons known. I would be happy to put it in again.

CHAIRMAN MITCHELL: What we mean is the names of any persons who meanwhile have been learned of as having an interest or whose interest can be ascertained by a reasonably diligent search. That makes it complete and would allow you to leave out a fellow whom you had heard about who had some interest in the property.

MR. WILLIAMS: There is no objection to putting that phrase in. As a matter of fact, I had it in there. If you

want to repeat it, it is all right.

CHAIRMAN MITCHELL: We will make a note of that and see whether we ought not to include it. I won't try to phrase it right now.

Another thing, Mr. Williams, is the change we made in this which you do not know about. Do you have a copy of the draft that we proposed?

PROFESSOR MOORE: Yes. Shall I read it to him?

CHAIRMAN MITCHELL: Just let him look at that. If you don't like it, we would like to know why.

MR. WILLIAMS: You might cure that in the sixth line of the draft I submitted, after the word "property" insert the words "whose names are known or whose names can be ascertained by a reasonably diligent search of the records".

JUDGE DRIVER: That is on the sixth line.

MR. WILLIAMS: Yes.

This is all right, except as to the suggestion of "all persons appearing of record". We have the same objection there.

CHAIRMAN MITCHELL: We have broadened it out a little bit, so that the fellow who hasn't been named at first, when he does bob in, is not foreclosed as to his own property.

MR. WILLIAMS: We considered that, but we thought that was adequately covered by the provisions on service, because he wouldn't be served until he was named as a defendant

and then his time for answer would run.

CHAIRMAN MITCHELL: You have adopted the suggestion I made and then withdrew, that we strike out that limitation of this privilege of starting a suit without naming everybody. We struck out the limitation that that privilege only exist where the condemnation is under a statute which authorizes the acquisition of title upon commencement.

MR. WILLIAMS: I don't see any justification for limiting it to that purpose, because before ascertaining compensation they are completely brought in and nobody would be hurt.

CHAIRMAN MITCHELL: Then we would have to strike out lines 40 to 45.

MR. WILLIAMS: Yes, that is repetitious.

CHAIRMAN MITCHELL: What do you members of the Committee have to say further to Mr. Williams about his draft?

MR. PRYOR: I think the word "public" should go in preceding the word "records".

CHAIRMAN MITCHELL: I was knocked out on that by the situation in Illinois where there aren't any public records for the situation before the Great Fire. There is a set of records available, but that is not public.

Is there anything else that anybody wants to ask these gentlemen before they go?

JUDGE CLARK: Are we clear about the real and personal

JUDGE CLARK: I thought it came to this: Whether we should say broadly "real or personal property" or something like that, or "real property and personal property connected therewith where authorized by statute"; whether it will be a limited group of personal property or leave it at large.

CHAIRMAN MITCHELL: You have to leave it at large in view of what he said.

JUDGE CLARK: The Helium Gas Act and the Nitrates Act are all broad in their language. All I can say is that the language as you look at it is very broad. I don't know that I can say that the Department of Justice cannot construe them limitedly.

MR. LEMANN: Looking at what you showed me, how can it be stated that those statutes do not set up a machinery for the Government to acquire those properties by condemnation?

CHAIRMAN MITCHELL: We can make the beginning of the rule clearly apply to personal property and, if there is a statute that authorizes the acquisition of the personal property either in connection with the land or separate from it, you then have a rule on it.

MR. SMITH: There are two concepts. One is by bringing a formal action, first. The other is to take the personal property and requisition it and then the owner can bring an action under the Tucker Act for compensation in the district court or the Court of Claims.

MR. LEMANN: Your idea is that you take the property and let the Government be sued by the owner.

MR. SMITH: There are two concepts. One would be to go out and take it.

MR. LEMANN: Without express statutory provision? You have to have an appropriation act, but you don't think you have to have an express statutory provision.

CHAIRMAN MITCHELL: You have a statutory provision but no provision for a condemnation suit.

PROFESSOR MORGAN: He can requisition it, but, if the statute said they could condemn it and they tried to requisition it, it would be an illegal taking.

MR. SMITH: What I meant to say is that there can be a condemnation by a formal proceeding and there can be a condemnation without a formal proceeding, leaving the owner to claim in the Court of Claims.

MR. LEMANN: You could call the second method a seizure and not a condemnation.

MR. SMITH: The Constitution seems to apply equally to the condemnation and to the seizure.

CHAIRMAN MITCHELL: The Department of Justice has brought in here a draft that does precisely what I suggested once and got cold feet on, which was to strike out lines 27 up to and including half of line 30 on page 2 and have the sentence start with "Upon the commencement of the action", as

the Government's draft does, and also strike lines 40 to 45 up to and including the word "commenced". In view of the fact that nobody appears to object to it, I will renew my suggestion if you care to agree to it.

JUDGE DRIVER: I move it be adopted.

MR. PRYOR: I second the motion.

CHAIRMAN MITCHELL: Are there any objections?

[There were no objections.]

CHAIRMAN MITCHELL: Then the motion is carried.

I think we have to consider whether the Government's draft proposed here ought to provide for the inclusion of the names of persons whom they meanwhile learn about and who have an interest in the property.

MR. WILLIAMS: Couldn't that be taken care of by my suggested revision? Do you have my draft before you? That will take care of the point.

JUDGE DOBIE: What was the suggestion?

MR. WILLIAMS: In the sixth line of my typewritten draft after the word "property" at the beginning of the line insert the words "whose names are known or".

CHAIRMAN MITCHELL: You should say "whose names are meanwhile ascertained" so as to fill that gap. We should put in the names of the people who are ascertained since the commencement of the suit.

MR. WILLIAMS: Anything along that line is perfectly

agreeable to us.

CHAIRMAN MITCHELL: Are you satisfied with the proposal as to the nature of the record search that has to be made? If nobody has any suggestions or additions to that, all in favor say "aye"; opposed. That is agreed to.

Now where are we, Mr. Reporter? We finished up with (f) and we were working on (g).

PROFESSOR MORGAN: What about the changes we made this morning?

CHAIRMAN MITCHELL: We are retaining the changes that we made this morning.

PROFESSOR MORGAN: We are retaining those.

CHAIRMAN MITCHELL: He has approved them so that they can come in and make all the defenses they have and make an answer.

MR. LEMANN: Does the last vote carry the language that Mr. Williams presented today?

JUDGE DRIVER: Not precisely.

CHAIRMAN MITCHELL: Yes, it uses the language he has proposed, except I have suggested adding something to take care of the names ascertained between the date of the commencement of the suit and later on in the proceedings.

MR. LEMANN: You are leaving in "considering the type and value of property involved"?

CHAIRMAN MITCHELL: Yes. Nobody suggested any changes

in so far as this draft defines the character of the search.

PROFESSOR SUNDERLAND: Could we put in "considering the prevailing local standards of good practices"?

CHAIRMAN MITCHELL: There is a better one in the rulings of the department if you want it. It says something about a search which sets forth a title competent in the locality.

PROFESSOR SUNDERLAND: Why wouldn't that be the thing to put in? That is a fairly definite standard.

MR. LEMANN: It seems to me in a way that there is much ado about nothing. All we are talking about is who shall be named as defendants. If they leave anybody out and it turns out he has an interest, his rights cannot be affected under the Constitution.

PROFESSOR SUNDERLAND: It may cost him some money.

MR. LEMANN: It will cost them a lot of expense and headaches and it would be an abnormal case for them to do it. I would have voted for this three years ago. The result then was to accept nothing except the records. I am not sure it makes enough difference to continue the discussion.

CHAIRMAN MITCHELL: I have been thinking of defending it against the criticisms of the title companies and the American Bar Association. The House of Delegates of the American Bar condemned it and so did members of Congress.

Here we have the interest of the Government vitally

concerned, to be sure, with getting all parties named, or else they do not have the title. We can show the title fellows and the Congress all the stuff in the regulations that they follow, which are very stiff and do the business without any requirement. On top of all that, the Government hasn't taken anything away from the fellow anyway and cannot injure his rights.

I think you can make a case on that all together.

MR. LEMANN: I assume we will circularize this to the title companies and ask them to state what objections they may have.

PROFESSOR MORGAN: I don't care so much about those birds myself. They are just after business.

MR. LEMANN: They are very vocal and at least we would want to hear their objections.

PROFESSOR MORGAN: I could overrule them; that is the answer.

CHAIRMAN MITCHELL: We might have some trouble before House and Senate Judiciary Committees. I propose to send it to them and to a limited number of people like the TVA and the Department of Justice, who have shown an active interest in this thing, not a general distribution to the bar. But we will take that up when we get to the end of this.

We are down to (g). Let's see how much more we have.

JUDGE DOBIE: A little more than half.

CHAIRMAN MITCHELL: Unless you have something more

to suggest, Mr. Williams, you don't have to stay, although we will be glad to have you remain if you wish.

MR. WILLIAMS: There may be one or two things under the second alternative under "By Publication," starting with line 117 on page 4. We prefer that alternative.

CHAIRMAN MITCHELL: That is the one we adopted.

MR. LEMANN: Mr. Williams, we did add a mandatory requirment that where the owner was a nonresident of the state and you knew his address, you must cause him to be personally served outside the state.

MR. WILLIAMS: By the marshal?

MR. LEMANN: Yes.

MR. WILLIAMS: Can we use registered mail service?

MR. LEMANN: No. We had a criticism that we ought to require that. Publication is often ineffective. The statute in the first alternative makes that requirement, that there should be personal service if feasible. I wanted to call it to your attention.

MR. WILLIAMS: I think the rule should indicate what kind of personal service.

CHAIRMAN MITCHELL: We have. It refers back to Rule 4. If a man is outside the state and his name and address are known, we don't allow you, under our change today, to publish or mail to him, you must send the thing into the other state and make a personal service by marshal or somebody else.

JUDGE DRIVER: Is that in accordance with the general rules? For instance, suppose the man is 400 miles from the marshal, can you get a deputy sheriff to serve him?

PROFESSOR SUNDERLAND: You could get an order of the court.

JUDGE DOBIE: The court can designate an individual.

PROFESSOR MORGAN: Sure, under the general rules.

CHAIRMAN MITCHELL: Is there anything else?

MR. WILLIAMS: Yes, the language appearing in lines 82 to 86.

CHAIRMAN MITCHELL: What page?

MR. WILLIAMS: Page 3: "and that the failure so to serve an answer constitutes a consent to the taking and to the court to proceed to fix the compensation therefor."

CHAIRMAN MITCHELL: We have: "hear the action."

PROFESSOR MORGAN: We say: "hear the action." And we have substituted "name" for "signature" in line 87. You don't have to sign the thing.

MR. WILLIAMS: The language appearing in lines 152 to 156.

PROFESSOR MORGAN: We have changed that.

MR. WILLIAMS: You have changed that?

CHAIRMAN MITCHELL: We provided that it is compulsory instead of permissive. That is what we are talking about. If he is outside the state and you know his name and his address,

you cannot rely on mail and publication, you must arrange to serve him personally.

MR. PRYOR: Providing he is in the United States.

JUDGE CLARK: The suggestion, as I understand it, is not defined by the rule number that Mr. Vanech suggested in his letter, but is for personal service and transferring this sentence into (3) (i) on "Personal Service."

CHAIRMAN MITCHELL: Aren't you going to refer to Rule 4?

PROFESSOR MORGAN: It does refer to Rule 4. We put it in Rule (i) and that refers to Rule 4.

JUDGE CLARK: The second sentence should not refer to those provisions because those provisions limit the service to service within the state.

PROFESSOR MORGAN: But the method of service.

JUDGE CLARK: Yes.

MR. WILLIAMS: On page 5: "Answer. Within twenty days after the service of notice upon him". You are striking the material in the brackets because you are taking the second alternative.

PROFESSOR MORGAN: Yes. We struck out all that stuff.

CHAIRMAN MITCHELL: You may be interested in knowing that we provided the tribunal shall stand wherever Congress has so specified, whatever they specified will stand, and where

they haven't specified any, it shall be a trial by jury if either party asks for it, and, if not, then a trial by the court. No commission.

PROFESSOR MORGAN: Commissioners are all out.

MR. WILLIAMS: That is gratifying. I think that is a distinct forward step.

CHAIRMAN MITCHELL: Gentlemen, do you want to go on with the hearing, with our work, tonight for a little while and see if we can't get some more done?

JUDGE CLARK: Perhaps we can get down as far as (i). There may be some discussion when we get to (i).

CHAIRMAN MITCHELL: I think we can finish by noon tomorrow, even if we don't do anything tonight. I suggest we meet at nine-thirty, and we will finish inside of two hours.

PROFESSOR MORGAN: We ought to do it in that time, I should think.

[The meeting adjourned at five-fifteen o'clock.]

WEDNESDAY MORNING SESSION

February 4, 1948

The meeting reconvened at nine fifty-five o'clock, Chairman Mitchell presiding.

JUDGE CLARK: In (g) there were two questions that came up that we had to settle. Mr. Moore has written a redraft which I think covers the points and covers not only the first sentence but also the second sentence, which was somewhat involved, and it covers it in shorter fashion. Let me read it. This is for the whole subdivision.

"If a defendant dies or becomes incompetent or transfers his interest after his joinder as provided in subdivision (e) of this rule, the court may order substitution of the proper party upon motion and notice of hearing. If the motion and notice of hearing is to be served upon a person not already a party, service shall be made as provided in subdivision (f) of this rule."

CHAIRMAN MITCHELL: What does that do?

JUDGE CLARK: The main thing is that it makes the crucial time the joinder of the defendant as a party, which was what we were really interested in.

CHAIRMAN MITCHELL: What constitutes a joinder, the mere naming of him as an additional defendant or the service?

PROFESSOR MOORE: The naming.

PROFESSOR SUNDERLAND: When you commence the suit

and you name him, he is then joined.

JUDGE CLARK: That is right.

PROFESSOR SUNDERLAND: When you find out later and name him, he is then joined.

PROFESSOR MOORE: The action will be considered as an in rem suit from the time the plaintiff names the defendants.

PROFESSOR SUNDERLAND: Aren't unknown owners joined by the naming of them as unknown owners?

JUDGE DRIVER: Not as individuals.

PROFESSOR SUNDERLAND: He is joined sufficiently so you will get a judgment against him.

PROFESSOR MOORE: Not as an unknown owners. Suppose the record showed someone having an interest, you couldn't name him as an unknown owner.

PROFESSOR SUNDERLAND: If you bring that person in as an unknown owner and get a judgment, it is binding against him.

CHAIRMAN MITCHELL: At the start of a condemnation case we would start the proceeding and publish and have some unknown owners. Then later we discover who the unknown owner is. Does this rule require the Government to name the man who is discovered or can it go right on and forget about him and take his property without his knowing it? That isn't a possible situation under this rule, is it?

JUDGE CLARK: Doesn't the Williams' draft cover it?

CHAIRMAN MITCHELL: The one you had?

JUDGE CLARK: The one that had the insert in it. Add not only the people whom you find from searching the record, but add the people who have become known to you in the interim.

CHAIRMAN MITCHELL: I suggested that change with the word "meanwhile".

JUDGE DOBIE: We have that in there. If they learn about them later, they bring them in.

JUDGE CLARK: That was to be done, whatever the exact wording was to be.

CHAIRMAN MITCHELL: That was my suggestion, that this draft of his about joinder should provide where you start without naming a fellow, you should name everybody who is discovered in the meanwhile.

PROFESSOR MORGAN: He suggested: "whose names are known or can be ascertained by a reasonably diligent search of the records".

JUDGE CLARK: You suggested, Mr. Chairman: "whose names had been learned in the meanwhile".

CHAIRMAN MITCHELL: "and are discovered by reason of the search of the record".

PROFESSOR MORGAN: That is right.

CHAIRMAN MITCHELL: That is all right. That takes care of that point.

JUDGE CLARK: Let me read this again for the benefit

of those members of the Committee who had stepped out.

CHAIRMAN MITCHELL: Read it again for the benefit of those members.

JUDGE CLARK: Mr. Moore has written up what he suggests as more apt and shorter than our present subdivision (g).

"If a defendant dies or becomes incompetent or transfers his interest after his joinder as provided in subdivision (e) of this rule, the court may order substitution of the proper party upon motion and notice of hearing. If the motion and notice of hearing is to be served upon a person not already a party, service shall be made as provided in subdivision (f) of this rule."

JUDGE DOBIE: That is shorter and clearer.

CHAIRMAN MITCHELL: The subdivision (e) in the first reference is about the answer. Isn't that an error?

PROFESSOR MOORE: It should be (c).

JUDGE DOBIE: That sounds good.

JUDGE CLARK: Yes, it is (c).

CHAIRMAN MITCHELL: Subdivision (b).

JUDGE CLARK: No, (c) (2).

JUDGE DRIVER: Is the implication here that they must make substitution if death or incompetency occurs before joinder, that they must then substitute?

PROFESSOR MOORE: Before joinder he isn't a party.

PROFESSOR SUNDERLAND: I suppose they are not in at

all before joinder, so they have to go after a living or competent person.

JUDGE DRIVER: What I had in mind was that they start this action with a few people named, then they make their search and discover other owners and they name them. Suppose someone has died between the commencement of the action and the joinder, the joinder of these additional parties. Suppose there is a death in there or an incompetency, must they then substitute?

MR. PRYOR: They would join the personal representative.

JUDGE CLARK: I think the joinder occurs at the commencement of the action if he is named.

PROFESSOR MORGAN: Suppose he is not named.

CHAIRMAN MITCHELL: Then what?

PROFESSOR MORGAN: Then those who are discovered would have to be named by their representatives or heirs.

JUDGE DRIVER: The thought I had in mind was with reference to the mechanics of the thing as they operate from my own personal knowledge. They would make a search of the records and until they find out who are the additional parties there is necessarily a lag between the time that they do examine the records and find out who should be named and then get their papers drafted and filed.

PROFESSOR MORGAN: There would be a decree of heirship. They might never discover the death of this individual.

JUDGE DRIVER: Where is the line where they can cut off and say, "Here is the point where we will examine the record and we can stop at that point and we won't have to examine it again after we have drafted our pleadings and filed them, so we don't have to go back to see if there have been any changes in the record in the meanwhile or that anybody has died."

PROFESSOR MOORE: It was our first thought that the abstract would show who the parties were at a certain time. They would have to name those people, to protect themselves, as defendants, and that would be the cutoff point. The suit would be in rem as to each named defendant.

JUDGE DRIVER: That is right. But what about the time lag between the date of their title certificate and the abstract and the date they have their pleadings filed? Perhaps a week or so.

PROFESSOR MOORE: What is the practice now?

JUDGE DRIVER: I think they handle it by lis pendens and then have the search up to the date of the lis pendens. I don't know that it is anything that we should take much time on.

JUDGE CLARK: We are not interfering with the lis pendens.

PROFESSOR MOORE: There are a number of jurisdictions where your question is very pertinent, because they do not allow

the filing of a lis pendens or these people do not file them.

JUDGE DRIVER: It is a problem for them to work out in those special cases. You cannot provide for it by rule.

MR. PRYOR: What you read was a substitute for all of (g)?

JUDGE CLARK: Yes.

MR. PRYOR: Would you mind reading it again?

PROFESSOR MORGAN: I would like to hear it again.

JUDGE CLARK: "If a defendant dies or becomes incompetent or transfers his interest after his joinder as provided in subdivision (c) of this rule, the court may order substitution of the proper party upon motion and notice of hearing. If the motion and notice of hearing is to be served upon a person not already a party, service shall be made as provided in subdivision (f) of this rule."

You will notice that this is not compulsory. This does not assume to say what the rights are. This is a procedural way of doing things the court may order.

CHAIRMAN MITCHELL: Is the two-year limit expressed in Rule 25 to apply here?

PROFESSOR MOORE: That was what we cut out, a reference to Rule 25.

CHAIRMAN MITCHELL: I am wondering whether, unless you exclude it specifically, it is not included by your general catch-all clause. That would mean you would have to dismiss

a condemnation suit if you didn't substitute within two years and start a new one against the fellow who escaped that way.

MR. PRYOR: Where you have a special section in this condemnation rule dealing with the substitution of parties, I would think it would on its face show that it was controlling as against the general rule.

JUDGE CLARK: We could put that in the note, that obviously this excludes Rule 25.

CHAIRMAN MITCHELL: I am satisfied with a note on it.

PROFESSOR SUNDERLAND: Shouldn't you make that read (d) (3)? (d) (3) is the only one that covers service, and it is such a long rule.

JUDGE CLARK: All right, (d) (3).

CHAIRMAN MITCHELL: Is there any objection to that wording for subdivision (g)? If not, it is adopted.

We are now up to "Dismissal of Action" on page 9.

JUDGE CLARK: We have a suggestion of detail. I think there might be some questions about the whole business.

CHAIRMAN MITCHELL: We better take up the substance first. Does anyone want to attack the thesis, background and thesis, of these dismissals? That has given us a great deal of trouble.

One of the problems is that the Government claims (and certainly has a great deal of basis for it) that we cannot make any provision making a charge for what they may have

done. That is covered by substantive law. If it isn't covered by substantive law, then they do not have to pay for it. If the Government dismisses and has made the owner a lot of trouble, we have no authority to require that the Government pay that fellow's damages or attorney's fees. It takes an act of Congress to do that.

JUDGE CLARK: I think they have said that there might be a claim in the Court of Claims.

CHAIRMAN MITCHELL: There would have to be an act of Congress permitting it.

JUDGE DRIVER: If we have no control over dismissal by the Government in a condemnation suit, why bother with the rule? I was impressed with the criticism of the rule that it could permit the Government to go up to trial and have the defendant come in with high-priced witnesses and then have the Government dismiss without prejudice and have it turn around and do it again the next day.

MR. PRYOR: At the end they say, "upon the dismissal, costs and reasonable attorney's fees to be fixed by the court."

I was faced with that thing in the case where we did a lot of work and the Government talked about dismissing the case. We had several talks with expert witnesses and had made several trips to Ames.

CHAIRMAN MITCHELL: That imposes a liability on the Federal Government that does not exist today.

MR. PRYOR: It is obviously unfair.

JUDGE DRIVER: Suppose the plaintiff came in on the morning of the trial and the Government came in with a request for a continuance. Can't the trial court grant terms on a continuance? Are its hands tied? If it isn't, then the court in its discretion could impose terms for dismissal at too late an hour.

JUDGE DOBIE: Could you include costs in those terms?

JUDGE DRIVER: I don't think so. I think you could say, "If the Government will deposit $100 to defray the expenses that will be placed upon the defendant, the unfair burden placed upon him, I will grant this continuance [or dismissal]."

JUDGE DOBIE: I think you can impose terms if certain things have to be done as a result of the delay, as to who shall pay for them.

CHAIRMAN MITCHELL: Refusal to dismiss won't help you any. Suppose you go to the court and the Government comes in and says, "We want to dismiss this condemnation case." Suppose the defendant spent some money on witnesses and lawyers.

The court then says, "I won't allow you to dismiss the case unless you pay for the expenses that the defendant has incurred."

He can't force the Government to go on, and the only thing he can do is to say, "I will dismiss your case, but before I do it, I will award damages to the defendant to reimburse him

for his expenses."

That imposes a liability on the Federal Government that doesn't exist by law today.

In the case of subdivision (c) that is different. We provide by this rule a thing that never existed before, that, if the Government has during the pendency of the case taken possession or occupied the premises--

PROFESSOR MORGAN: --taken any interest--

CHAIRMAN MITCHELL: --taken something and used it, there is then an existing liability by the Government to pay compensation for what it took, even if it wants to quit. We are not imposing an additional liability on the Government.

PROFESSOR MORGAN: We are saying, "You cannot have rescission."

CHAIRMAN MITCHELL: That is a dubious clause. It transfers jurisdiction from the Court of Claims. I hope we get by on the legality of that, but I am doubtful about it. If somebody raises the question, I am not sure we will get by.

JUDGE DRIVER: If it can't be remedied in any way, it should be explained in the note why we are making this provision. Nine out of ten of the judges and lawyers who are not as familiar with it as you gentlemen are will seriously object to that provision.

CHAIRMAN MITCHELL: You are right. The note ought

to cover very fully why we do not permit costs in dismissals by the Government.

PROFESSOR SUNDERLAND: The note might be a notice to Congress to do something about it.

CHAIRMAN MITCHELL: We might point out that it is very unfair.

JUDGE CLARK: There has been an objection made, which I think is sound, as to the meaning of the word "or". Two or three have said you should take whichever date is latest, but that is not what was intended here. I think we should insert: "whichever first occurs".

We suggest in line 274 after the words "be awarded him" we add the words "has begun, whichever first occurs". It will then read: "be awarded him has begun, whichever first occurs".

CHAIRMAN MITCHELL: Do I understand that you are through with your main problems and you are going into details?

JUDGE CLARK: I thought you had talked the gentlemen down. This is a fairly important detail.

MR. PRYOR: I think his speech was pretty effective.

PROFESSOR MORGAN: Suppose you put this in the way we want it and the Government says, "We will take our dishes and go home," and they don't want to play; what are you going to do about it? You can give a judgment against them, but let's see you collect it.

JUDGE DRIVER: That is right.

PROFESSOR MORGAN: We are right back in the same predicament.

CHAIRMAN MITCHELL: If there is a judgment, Congress usually appropriates money to pay it.

PROFESSOR MORGAN: You enter a judgment against them and the Government appeals. They can appeal from a default judgment.

CHAIRMAN MITCHELL: You are talking about subdivision (c).

PROFESSOR MORGAN: Considering the fundamental question, we would like to make them pay costs and reasonable attorney's fees if they dismiss after they have once begun the action even if they do not take an interest. Suppose we put it in, how is anybody going to enforce it?

JUDGE DOBIE: Have they a general appropriation for things like that? They had a contempt case in a labor case in which they wanted us to take testimony for a week. We referred it to a master and they entered into a stipulation that whichever party lost would pay the master's fee. They said they had an appropriation. They didn't object to it. The question of our power never came up, whether we could make them pay for that master's fee.

JUDGE DRIVER: I think you have a little different situation in (3) than in the matter of costs. There has been

a starting of a condemnation case. There has been a taking to the extent of taking title in the first instance and, if they attempted to abandon, the court would have jurisdiction to enter a judgment against them.

CHAIRMAN MITCHELL: At least we are not creating a new liability on them. We are transferring it from the Court of Claims to the district court and conferring on the district court the right to hear a claim that it had never had jurisdiction to hear before.

JUDGE DRIVER: My point is: Hasn't the Government invoked the jurisdiction of the district court when it takes property and follows it up by a condemnation proceeding in the court and then tries to abandon it? This refers to those cases where there has been a taking of possession.

CHAIRMAN MITCHELL: We think we will get by with it, but I am not so sure about the dismissal.

Charlie, I didn't mean to interrupt. Go back to what you are doing with subdivision (1).

JUDGE CLARK: This is a fairly important detail. As it reads, I take it that the Government could dismiss, taking the latest of these three dates in the disjunctive. It should be clear that it is the earliest. In order to achieve that result we will put in--

CHAIRMAN MITCHELL: I don't understand what you mean by the earliest.

JUDGE CLARK: Whichever one of these three conditions is earliest.

JUDGE DOBIE: They come at different times. They are going to dismiss at the time of the earliest one.

JUDGE CLARK: They can only have permission to dismiss up to the time of anyone having occurred.

JUDGE DOBIE: Whereas, as it is now, they can do it up to the time of the latest one.

JUDGE CLARK: That is it.

JUDGE DOBIE: What are you going to do?

JUDGE CLARK: "before any hearing to determine the compensation to be awarded him has begun, whichever first occurs, the plaintiff may dismiss the action as to that defendant [instead of "him"] without an order of the court".

Shall I read the whole section?

JUDGE DRIVER: Please.

JUDGE CLARK: "(1) As of Right. At any time prior to acquisition from a defendant of (1) title or a lesser interest, or (2) possession of the property, or (3) before any hearing to determine the compensation to be awarded him has begun, whichever first occurs, the plaintiff may dismiss the action as to that defendant without an order of the court, by filing a notice of dismissal setting forth a brief description of the property as to which the action is dismissed."

CHAIRMAN MITCHELL: It isn't well worded because it

doesn't occur. You dismiss before it occurs and you say "whichever first occurs".

JUDGE CLARK: That is right.

CHAIRMAN MITCHELL: That was what puzzled me.

MR. LEMANN: The word "acquisition" covers (1) and (2), but it does not apply to (3), so you will have to rephrase it.

JUDGE DOBIE: Put "acquisition" under (1) and (2).

CHAIRMAN MITCHELL: It isn't prior either.

JUDGE DOBIE: Wouldn't it be all right to put "acquisition" under (1) and (2) and leave out (3)?

MR. LEMANN: You can do it by saying: "at any time prior to (1) the acquisition from a defendant of the title or lesser interest, or (2) possession of the property, or (3) before any hearing has begun to determine the compansation to be awarded him, whichever occurs first".

CHAIRMAN MITCHELL: Why not say that the plaintiff can dismiss any time if there has been neither an acquisition of title or possession or hearing?

PROFESSOR MORGAN: Why don't you avoid that by saying that the plaintiff may not dismiss at any time after (1), (2) or (3)?

CHAIRMAN MITCHELL: That doesn't give him the right to dismiss.

PROFESSOR MORGAN: Then put another sentence in saying

that otherwise he may dismiss without an order of the court.

CHAIRMAN MITCHELL: I suggest we let the Reporter thrash it out and we will have a look at the draft when it is mailed around to us. I would say to dismiss as a right if there has been neither an acquisition of title or interest or possession or hearing.

JUDGE CLARK: I think that would do it.

CHAIRMAN MITCHELL: We have put over the idea. Let the Reporter take a crack at it and when he distributes the draft, we can look it over.

Is there anything else on paragraph (1)?

JUDGE CLARK: No. I have something on (2).

In subdivision (2) page 9 we suggest at line 282 the insertion after the words "in part" of the following: "and either before of after any taking or judgment". The line would then read: "in part, and either before or after any taking or judgment, without an order of the court".

Both Messrs. Swidler and Monaco suggested that the present provision for dismissal by stipulation is too restricted. We have a query as to whether a court order is not desirable where a judgment has been entered.

The redraft, incidentally, adopts Mr. Monaco's suggestion.

As to the query we raise, whether it is desirable after a judgment has been entered to have it done only with the

approval of the court, with a court order, I don't know whether it is necessary or not.

The query we present would be this: If we make this addition, ought they to have power to get rid of the thing even after judgment of the taking has been entered? Then should the stipulation be adequate in itself or should the stipulation be confirmed by court order?

MR. PRYOR: There should be an order of the court to take it off the docket.

CHAIRMAN MITCHELL: Title is vested in the Government by the judgment, how do you get that back?

JUDGE CLARK: If you have a rule with the force of statute that says the stipulation will do it, you can do it.

JUDGE DOBIE: Wouldn't the effect of dismissal negative everything that had been done?

CHAIRMAN MITCHELL: It ought to. My question is whether we had adequately done that.

JUDGE CLARK: That is by act of the parties alone.

MR. PRYOR: I think there ought to be an order of the court based on the stipulation.

PROFESSOR SUNDERLAND: The court would have to vacate the judgment.

CHAIRMAN MITCHELL: Vacate the judgment operating to transfer the title.

JUDGE CLARK: The main problem is that there ought

to be a way to get rid of the case after judgment is entered; therefore, we think we should broaden the thing to make clear that you can do it after judgment has been entered. The next question is how you should do it.

MR. PRYOR: The order of the court would be necessary to vacate a judgment.

CHAIRMAN MITCHELL: It is merely a question of whether it can be done without such an order.

MR. LEMANN: Mr. Swidler wants to insert "at any time" after the word "part". Mr. Morgan makes the point: Why do you say "also" in line 281? I said that it was because this was an additional dismissal to that in the preceding paragraph. Then it occurred to me that it is a joint dismissal. Why wouldn't it be better to rephrase it to say: "An action may be dismissed in whole or in part without an order of the court as to any person or property by filing of a stipulation of dismissal signed by the plaintiff and the defendant affected thereby"?

JUDGE CLARK: Would you do it after judgment without a court order?

MR. LEMANN: It wouldn't disturb me.

MR. PRYOR: You cannot vacate a judgment by stipulation.

CHAIRMAN MITCHELL: There is one thing you would run up against if you didn't get a court order. You wouldn't find

an attorney in the government service who would proceed on the theory that he had a right to reconvey the property.

MR. LEMANN: You could cover that by saying: "any time before judgment".

MR. PRYOR: The suggestion is to do it before and after.

PROFESSOR MORGAN: If they want to do it afterward, why can't they use the ordinary method of obtaining a court order to vacate the judgment?

JUDGE CLARK: Don't you think we ought to put something in here? That would mean any time before judgment the parties should do so-and-so. Shouldn't we add that they may do it afterwards with the approval of the court?

PROFESSOR MORGAN: If we go in and stipulate that the judgment shall be set aside--

PROFESSOR SUNDERLAND: That isn't a dismissal.

PROFESSOR MORGAN:--without costs to either party, wouldn't that do it?

JUDGE CLARK: Of course, in these actions, the action is not concluded when the judgment is entered at the taking. It is an intermediate judgment. I don't suppose we are dealing with a final judgment. There is a judgment of taking and then they have the later proceeding.

PROFESSOR SUNDERLAND: It really isn't a judgment at all.

JUDGE CLARK: Yes, it is.

PROFESSOR SUNDERLAND: It is an interlocutory order.

JUDGE CLARK: Call it what you will. Under our procedure orders are judgments and judgments are orders.

CHAIRMAN MITCHELL: I think the rule as it is worded includes the vacation of a judgment of taking and a judgment of awarding compensation. You cannot say that this only relates to a preliminary judgment, unless you say so in your rule.

You see, that is not a dismissal by the plaintiff, it is a dismissal by both parties. I think you ought to provide for the order of the court to vacate the judgment. The title of the land is left in the air, because the question arises at once if another purchaser comes along: Has the Government lawyer a right, after the Government has title to the land, to convey it back by stipulation? And it is a serious question. If the court orders it on a showing of good and sufficient reasons and actually vacates the judgment by order, why then that is conclusive; don't you see?

JUDGE CLARK: Mr. Moore just suggested to me that perhaps it might be safer to spell it out. Make the whole title "Dismissal of Action, Vacation of Judgment" and definitely limit this to before any judgment is entered and put in another provision for the vacation of a judgment.

Would you rather do that?

CHAIRMAN MITCHELL: Isn't that the better way to do

it?

MR. LEMANN: As a practical matter, do you often have occasion to dismiss a proceeding and vacate a judgment by consent?

CHAIRMAN MITCHELL: It is a rare thing, but it might happen. The judgment might be entered and there is a row about the amount of compensation and the fellow may say (and there might be a question of whether they have taken too much), "If you vacate the judgment and dismiss the case as to this piece of property, I will accept your award on what is left." That is a possibility.

MR. PRYOR: The government agency might determine they do not want that particular piece of property after they have gone through all the proceedings.

CHAIRMAN MITCHELL: That is right.

JUDGE CLARK: It might happen more often as to the judgment of taking under the provision of the declaration-of-taking act, because the Government has put in a lot of people in the first step. The first step is an order of taking. Then they may find they have taken too much or they may have put somebody in that shouldn't have been in at all. I should think that might happen quite often.

JUDGE DRIVER: I had a case in the Hanford project where an agreement was reached as to compensation, but because there were some people involved whose competency might be questioned,

they came before me and introduced evidence and got an order vacating the judgment as to them. They didn't feel they could do it by stipulation between the parties. I had it happen in two or three cases.

CHAIRMAN MITCHELL: You are emphasizing the authority of the government lawyer to do that without an order of the court.

JUDGE DRIVER: They did not feel they could set aside this judgment of taking even by agreement without getting an order of the court.

MR. LEMANN: Would it be worth while to get Mr. Tolman to call Mr. Williams and see whether we ought to know something about the practice before we frame the rule?

CHAIRMAN MITCHELL: This is his suggestion.

PROFESSOR SUNDERLAND: That suggestion was made by Swidler.

MR. LEMANN: Swidler says you ought to put in "at any time". He says it is not "clear when dismissal by stipulation may take place, and urges that if the parties agree, dismissal and revesting of title should be allowed even after taking of the property. He would insert in line 282 after the word "part" the words "at any time".

He may not have been thinking about this point we have been thinking about.

JUDGE DRIVER: The declaration of taking does vest

title in the United States.

JUDGE CLARK: Yes. We brought up that point on the question of the order. The suggestion that came in to us raised the issue but did not say anything about the order, but we raised the point as to whether there should be an order.

PROFESSOR SUNDERLAND: If the declaration vests the title in the United States, then it gets title without judgment.

JUDGE DRIVER: The judgment confirms it. My understanding of the operation of a declaration of taking is that when that declaration is filed title vests in the United States and the money deposited takes the place of the property. That is the reason there is conformance with the constitutional provisions. The money takes the place of the property and the property vests in the United States.

PROFESSOR SUNDERLAND: So they do not get the title through the judgment.

JUDGE DRIVER: They get it through the filing of the declaration and the deposit of the money.

MR. PRYOR: The declaration statute says so.

JUDGE DRIVER: It says so, as I understand it.

CHAIRMAN MITCHELL: I think we can put all this in subdivision (2). In (2) you can say: "By Stipulation. The case may be dismissed before there has been any taking or judgment" and then say: "By Order of the Court. After taking judgment, on consent of both parties and after hearing, the

court may vacate this judgment", and so on.

JUDGE CLARK: I am inclined to think, as I sit here, it would be better to have it in (2) rather than in a separate provision. A separate provision on the vacation of the judgment would not be broad enough and we want to refer to that. We don't want to shut out Rule 60 (b). If we fit it in with the subdivision on "By Stipulation" we wouldn't shut out Rule 60 (b) where that applies. Don't you think that is so?

PROFESSOR MOORE: Why say anything about dismissal of judgments?

JUDGE CLARK: Mr. Moore says, "Why say anything about dismissals after judgments, except in a note?" A reason for doing it is that all these people are going to wonder about it. It may well be that if you did not put anything in, they could always proceed under 60 (b). The question has already been raised by TVA and others.

CHAIRMAN MITCHELL: That is a case not of consent, but it has to be fraud or hardship, or something like that. This is a case where the parties get together and say, "Cut out some of those lands. Give it back to them because we don't want it." They ought to be allowed to do that if they both agree and if the court has a hearing vesting the title back in the landowners without going to Congrress to get an act passed to authorize the department involved to reconvey.

JUDGE DRIVER: Aren't we getting dangerously close to

substantive law? Can we declare by rule that declarations of taking shall not vest title in the United States but shall have some other effect?

JUDGE DOBIE: It seems to me we do not have to go into the effect of declarations of taking and the effect of these orders. All we provide is that it can be dismissed by stipulation of parties, but, if any order has been entered, then it has to be by the court. Would that take care of it? If there has been an order, the order can specify the effect of the dismissal.

CHAIRMAN MITCHELL: You have changed (2) so that it may be done before any taking or judgment without an order of the court, but after taking or judgment a hearing and order of the court is required.

PROFESSOR SUNDERLAND: And the court could make an order broad enough to take care of the judgment.

CHAIRMAN MITCHELL: Vacating the judgment.

PROFESSOR SUNDERLAND: Vacating the declaration of taking.

PROFESSOR MORGAN: Then we let the title searcher make up his mind as to what the effect on the title is if an executive takes property and it becomes the authority of the United States and he then conveys it back. What authority does he have to do that?

MR. PRYOR: The court can do something that will have

that effect.

CHAIRMAN MITCHELL: Suppose he makes a showing that he has made a mistake. Then he reconsiders his action and finds he has done something he doesn't want to do.

PROFESSOR MORGAN: He cannot do it without the consent of the landowner.

CHAIRMAN MITCHELL: We don't provide some machinery for it with an order from the court and then the case is still pending to cancel out what has been done. Then you have to go to an act of Congress. I don't believe it is really necessary if it is done at that stage. I wouldn't question the authority of a department head who ordered a taking and while the case was pending, because they decided they had too much or had to pay too much, he decided to cut it down and eliminate a certain portion and have it reconveyed and the judgment revised. If the case is over and out of court and the Government has acquired the property and then a year later the fellow says, "I would like to reconvey it and get my money back from the former owner," then you are up against it.

JUDGE DRIVER: I certainly have no objection to providing for dismissal after judgment on stipulation and order of the court, but I don't believe you should provide for the vacation of a judgment on stipulation alone.

JUDGE DOBIE: Couldn't we refer that back to the Reporter to redraw it and send it around? It is hard to fit

these things in there.

CHAIRMAN MITCHELL: As I understand it, for the record, the consensus of the Committee is that there ought to be a provision here that after a taking or a judgment (a judgment vesting title or any other kind of judgment for damages or for anything else during the case), with the consent of both parties and after hearing the court may order the vacation of that judgment.

JUDGE DOBIE: I think so.

CHAIRMAN MITCHELL: We will leave it to you to fit it in either by separate paragraphs or in any way you want.

MR. LEMANN: In paragraph (3) there is a prohibition against dismissals by the court at certain stages. That prohibition will become inapplicable where the parties stipulate that the action be dismissed.

CHAIRMAN MITCHELL: That is the case where they do not stipulate.

MR. LEMANN: The language of (3) makes no exception. Maybe it is to be read in.

CHAIRMAN MITCHELL: I think you are right and you will have to reconsider the language of (3) when you draw this thing up.

MR. LEMANN: "in the absence of a stipulation" could be mentioned there.

CHAIRMAN MITCHELL: I will ask the Committee if it

thinks that we need to keep Mr. McCarthy of the TVA in the city any longer.

JUDGE DRIVER: In line 284 it provides that a stipulation of dismissal be signed by the plaintiff and the defendant. The plaintiff is the United States and there might be a question as to who should sign. Wouldn't it be better to say "on behalf of the plaintiff and the defendant"?

CHAIRMAN MITCHELL: Don't you think the general clause "signed by the plaintiff and the defendant" means that it shall be signed by counsel?

MR. PRYOR: Why say anything about signing? It wouldn't be a stipulation unless it was signed.

JUDGE DOBIE: If you have a filing, it has to be written, of course.

PROFESSOR MORGAN: You don't need to put the "signed" in there.

MR. PRYOR: The "filing" and "stipulation" indicate that it shall be a written agreement.

CHAIRMAN MITCHELL: The reason he has mentioned it is that he wants to make it clear that some defendant who is not interested in that tract doesn't have to sign it, so there is some reason for that.

JUDGE DRIVER: I see.

PROFESSOR SUNDERLAND: Cut out the word "signed".

CHAIRMAN MITCHELL: What is the general rule on

dismissal?

MR. LEMANN: Rule 41. It says "plaintiff".

CHAIRMAN MITCHELL: It says: "by filing a stipulation of dismissal signed by all the parties who have appeared generally in the action."

That means the lawyer's stipulation.

PROFESSOR MORGAN: If you strike out the word "signed", I should think it would be all right.

CHAIRMAN MITCHELL: That is all right. That will do it.

We have stricken out the word "signed" in line 284, page 9, in the draft.

Is there anything else on "Dismissal of Action"?

JUDGE CLARK: You have enough to go on?

PROFESSOR MOORE: I think so.

JUDGE CLARK: I don't think there is anything more on that.

CHAIRMAN MITCHELL: Then we get down to (j), the question of assessments before benefits.

JUDGE CLARK: We are perfectly ready to have that go out. If we are saying anything, we are dealing with substantive law.

MR. PRYOR: I think it is all right to strike it out.

JUDGE DOBIE: I think I would leave that out. You

can't cover everything.

MR. PRYOR: It is substantive law.

PROFESSOR MORGAN: You do not like that?

MR. PRYOR: No.

PROFESSOR MORGAN: You don't think that ought to be in there, Charles?

JUDGE CLARK: No.

CHAIRMAN MITCHELL: If it is provided by law, if that is the law, the court will do it anyway.

JUDGE DOBIE: I move we strike it out.

MR. PRYOR: I second the motion.

CHAIRMAN MITCHELL: We will strike out subdivision (j), lines 302 to 318, page 10, of the printed draft, entitled "Assessment for or Deduction of Benefits."

That brings us up to (k).

JUDGE CLARK: In line 322 Mr. Brossard says that we don't need "a certain sum of" and he is probably right. Why not say: "the deposit with the court of money"?

CHAIRMAN MITCHELL: Strike out "a certain sum of" in line 322, page 10.

PROFESSOR MOORE: Line 326 strike out the words "any applicable".

JUDGE DRIVER: What line is that?

PROFESSOR MOORE: Line 326.

CHAIRMAN MITCHELL: That is all right.

JUDGE CLARK: I think that is all we have; isn't it?

PROFESSOR MOORE: Line 332 strike out the word "may" at the end of the line, and begin line 333 with the word "has" instead of the word "have", so it will read: "exceeds the amount which has been paid".

CHAIRMAN MITCHELL: That is agreed to.

JUDGE CLARK: As to the last sentence, the Department of Justice said that since that is a ruling of the Supreme Court, it is law and we ought not to state it. Theoretically there may be something to be said for that; on the other hand, it is a little bobtail to have it in the sentence at the top of the page and not complete it by this sentence.

MR. PRYOR: I think it should be in there because it is procedural, isn't it?

CHAIRMAN MITCHELL: It is worded as a substantive provision. Put in "as provided by law".

MR. LEMANN: You could omit everything 331 to 342.

CHAIRMAN MITCHELL: What?

MR. LEMANN: Omit everything from 331 to 342.

JUDGE CLARK: Of course you could. I think this is a helpful thing, to tell parties what happens.

PROFESSOR MORGAN: I think it is helpful, too.

JUDGE DOBIE: If that is a matter of substantive law, it can be done in this proceeding and you don't have to have an independent rule. It is helpful enough if you have one

situation, but if you leave the other up in the air, it will confuse people.

JUDGE DRIVER: I think it is definitely helpful. I don't like to put substantive matter in the rules, even when it is helpful. Perhaps you can put it in parenthesis or in brackets or set it off from the body of the rules.

CHAIRMAN MITCHELL: It isn't more substantive than the provision that, if the Government actually benefits by the taking or possession in using the property, the court may enter judgment for that much compensation, even if the Government wants to dismiss. It is about the same sort of thing.

JUDGE DOBIE: I think I would leave it in.

CHAIRMAN MITCHELL: It is stated more in the form of a substantive provision, as a matter of right; but, as a matter of fact, as far as it is substantive, it is just a mere reiteration of substantive law as it has been held, and what we are really doing is making clear the practice for a judgment to be entered.

JUDGE DOBIE: Without any further proceeding.

CHAIRMAN MITCHELL: Yes.

MR. LEMANN: You might cover it by saying: "if by law the defendant is obligated to refund or return amounts paid or any portion of the amount paid him in the distribution of the deposit, the court shall render judgment." If you put in the words "by law", you avoid the suggestion that you are making

the law.

CHAIRMAN MITCHELL: I don't think that is worth while.

JUDGE DOBIE: I don't either. You are stating the law as it is, which we are not making, and then you are providing a procedure to carry it into effect. I think it is unobjectionable if you leave it stay in.

CHAIRMAN MITCHELL: That takes us down to the effective date, doesn't it?

JUDGE CLARK: Yes. The last part of it is interesting. "This rule governs all proceedings in actions brought after it takes effect."

JUDGE DOBIE: Did you cut out that stuff in brackets, Charlie?

CHAIRMAN MITCHELL: No. That bracketed clause is a reiteration of a clause we had in the original rules.

JUDGE DOBIE: Isn't it a good clause?

CHAIRMAN MITCHELL: I think it is. I think if the action has just been begun, it ought not to resort to this practice. It gives the court the power to say that it may or may not be right in a particular case to switch from the old practice to the new.

JUDGE DOBIE: I would put it in. I think it is in the Criminal Rules and the Civil Rules, too. I would be willing to leave it in.

CHAIRMAN MITCHELL: Is there any objection to letting

that stand? If not, we will agree to it.

JUDGE CLARK: We will strike out the brackets of course.

JUDGE DOBIE: It is in the Civil and Criminal Rules and I think it has worked very well.

CHAIRMAN MITCHELL: We adopted the first alternative under subdivision (1).

JUDGE CLARK: There are just two or three matters of details.

We would expand the form on page 41 a little bit, the top of the page.

CHAIRMAN MITCHELL: Expand it by including the reference to an executive order.

PROFESSOR MORGAN: The applicable executive order.

JUDGE CLARK: Of course, you want to approve also the recommendation on page 43.

JUDGE DRIVER: That necessarily follows.

JUDGE CLARK: Just one other thing to collect what we have done and make it clear: I understand we will say "real and personal property" without anything more. Broadly it will cover real and personal property.

CHAIRMAN MITCHELL: Would it be "or" or "and"?

PROFESSOR MORGAN: I should think "and".

JUDGE CLARK: Furthermore, we don't need to make any special exceptions of the Atomic Energy Act, and so on, but we

will put in a footnote that special procedures are not covered.

I think that is in substance what we decided. I want to make sure there is no question about it.

CHAIRMAN MITCHELL: That note would be in this form: "This rule does not apply to cases dealing with property where under the acts of Congress they are not to be acquired by the institution of condemnation cases in the district court."

JUDGE CLARK: Under the Atomic Energy Act they still acquire the real property in this manner. There is another provision for the acquisition of personal property.

CHAIRMAN MITCHELL: If it says condemnation it means district court.

MR. LEMANN: Would you put it this way? "This rule applies only to condemnation proceedings in the district court of the United States; therefore, it has no application for any other methods provided for the taking of property under other applicable statutes, for example, as certain provisions of the Atomic Energy Act."

JUDGE CLARK: There is a section in the Atomic Energy Act for acquiring real estate. Then there is the special provision we talked about in connection with the patent board. So it is separated in the act itself.

CHAIRMAN MITCHELL: That calls for a board to award compensation, with review by the Court of Appeals.

JUDGE CLARK: That last method does.

MR. LEMANN: As suggested before, you can say it does not apply in cases where the statute provides other methods as, for example, the Atomic Energy Act relating to the fixing of compensation for patents.

CHAIRMAN MITCHELL: Well, the draft will be drawn up by the Reporter and he will send it around to all of us and we will take a crack at it. After you are through making suggestions that way, the question of the distribution of the draft comes up. I thought once personally that we might have to print the draft and send it back to the bar and judges, because there were so many alternatives in the preliminary draft. We thought we might have the profession see what we have done with the alternatives. Considering the lack of interest by the profession on the last preliminary draft, it is my thought that maybe this time it will be enough to have it mimeographed and have it distributed to the Department of Justice people and the TVA people and a limited number of other people who have shown a special interest in it, a fellow like Walter Armstrong.

MR. LEMANN: All the people who have made comments, who have taken the trouble to write in.

MR. PRYOR: They will be interested to know how their suggestions have been treated.

MR. LEMANN: There aren't so many.

CHAIRMAN MITCHELL: We will find out how many there

are and see whether it should be a mimeographed or printed job.

JUDGE CLARK: Leland says they can do it by mimeographing.

CHAIRMAN MITCHELL: Which would be cheaper for the Government?

MR. TOLMAN: Mimeographing.

MR. LEMANN: It wouldn't cost more than $100 to reprint this.

MR. TOLMAN: I think it would be more than that. Printing prices have gone pretty high recently. Mimeographing would be much cheaper.

CHAIRMAN MITCHELL: I am just wondering what it would cost us to print it. It is so much easier to read if it is printed, and people will read it. If you get them printed, we can then get extra copies for very little additional cost and, if people want it, we can have it for them.

PROFESSOR SUNDERLAND: And it can be bound in with our other issues.

MR. TOLMAN: The cost of the last pamphlet was about $300.

CHAIRMAN MITCHELL: How many thousands of copies?

MR. TOLMAN: There were 5000 copies. It cost about $60 per 1000 copies after the first typesetting. The cost was about $300 all together.

JUDGE CLARK: As we view it, we would do the draft

itself and we would do the notes later, and, if it were only mimeographed, we could probably send it out to the people interested and only prepare the draft. Then perhaps we would not need to send them the notes. We would send those only to the members of the Committee. If it were to be printed, rather obviously we have to put in the whole business.

CHAIRMAN MITCHELL: I think if you are going to send it to anybody outside of the Committee, it is very necessary to put the notes in. The notes will explain to all these people why we rejected their ideas and why we did this and not that. We won't get any unpleasant reactions if they would get the notes and the draft together, which might well happen if we just send them just the draft of the body of the rule and no information at all.

For instance, Mr. Armstrong who has been criticizing us about the TVA probably has never thought of the question of whether this TVA system with the three-judge court is a jurisdictional matter, and that is explained to him in the notes with a few decisions to support it. We may thereby be able to pull him off our backs.

I wouldn't wait for the notes to send a draft to our Committee, but as soon as we agree on the draft, then we ought to get the notes in shape right away. For general distribution, whether we mimeograph or print, we should have the notes in it.

MR. PRYOR: If you had it printed, you wouldn't need

more than a thousand.

CHAIRMAN MITCHELL: I think we ought to print under those circumstances.

JUDGE DRIVER: It is much more readable.

JUDGE CLARK: If you print it, you have to make a gesture of distribution. You have to send it to the American Bar committee.

CHAIRMAN MITCHELL: We would send it to every bar committee that has written in. We would send it to the American Bar Association, and I would write a letter to the President saying, "If you have a committee to look at it, get them busy and don't accuse us of not having consulted you."

MR. LEMANN: And send it to all the title companies.

JUDGE DOBIE: Couldn't you send it to the title companies' association?

MR. LEMANN: I think the Department of Justice can give you a list of the people they have contracts with, title companies. I would send it to the association. I would send it to the Section on Real Estate and Probate Law of the American Bar Association.

JUDGE CLARK: I formerly sent this to the President of the American Bar Association, Mr. Rix, and requested him to tell me what committee it should go to. He responded that it goes to the Committee on Jurisprudence and Law Reform, and we sent it to them.

PROFESSOR MORGAN: Send it to both of them.

MR. LEMANN: How about the United States attorneys, Judge Driver? Do you think it ought to go to them?

JUDGE DRIVER: I think the Department of Justice would be sufficient.

JUDGE DOBIE: They have an association, Monte.

MR. LEMANN: And we haven't had much comment from the Federal judges. Did we send it to all the Federal judges?

JUDGE CLARK: Yes.

PROFESSOR MORGAN: And Mr. Mitchell wrote to every judge who handled TVA cases.

CHAIRMAN MITCHELL: I think this mimeographed draft that you are going to distribute to the Committee for review ought to be gotten out before we print. Also, we ought to get that to the Department of Justice and to the TVA and maybe the title companies.

MR. LEMANN: Before we print.

CHAIRMAN MITCHELL: Before we print. They may have some suggestions and we don't want to have to send out the printed copies with any obvious defect. I think we will do it that way. We will look the ground over and see whom we should send it to. We will send one to Armstrong and to the American Bar Association and a few other bar associations to get the benefit of their suggestions if they want to make them.

JUDGE CLARK: I have one other point of detail I

want to bring back to you. On the matter of service and with reference to service by publication, and so on, you may recall that you wanted to provide that the matter of personal service be covered of anyone in the Continental United States. We didn't settle on the exact phrase. Now there is a detail that comes up in connection with that because the rules are made applicable to Hawaii and Puerto Rico, and so on. They are not made applicable by virtue of the rules themselves but by separate provision.

CHAIRMAN MITCHELL: The acts of Congress that say that the practice that prevails in the courts of the United States shall prevail in those territories. Isn't that where it is from?

JUDGE CLARK: Yes.

Coming back to the particular rule of service by publication, do we want to say: "within the United States"?

PROFESSOR MORGAN: "Continental United States".

JUDGE CLARK: How about Hawaii and Puerto Rico? When the rules come out, by virtue of these additional provisions, what is the effect in Puerto Rico and Hawaii? Furthermore, can we get some expression whether we should go beyond the Continental United States and include Hawaii and Puerto Rico?

JUDGE DOBIE: Make it cover the forty-eight states and the District of Columbia.

JUDGE CLARK: Then you have a hiatus.

PROFESSOR MORGAN: You don't get any hiatus.

CHAIRMAN MITCHELL: You don't see the point. Here is a rule that provides for service and by acts of Congress these rules applicable to the United States district courts in this country become automatically applicable to condemnation cases in Hawaii and other places. When that is so, if we say, "Continental United States" or the "forty-eight states", when they become applicable in Hawaii and a condemnation suit is started there and a fellow resides in California, under the terms of the rules, he is within a state and he has to have personal service on him; but if he lives in Hawaii--

PROFESSOR MORGAN: --he doesn't have to have it.

JUDGE CLARK: Why don't we make the phrase cover the United States, its territories and insular possessions? That means you have to serve out in Honolulu. Why not? You can send it to the marshal. They have marshals in those places. That adds a little to the area of personal service, but why not?

CHAIRMAN MITCHELL: He is also the fellow who isn't likely to see the newspaper. The fellows who are out in the outlying districts are the ones we should take pains with.

PROFESSOR MORGAN: Monte points out that you want to watch for "public use" in those forms.

MR. LEMANN: Not only on page 40 but in several of them.

JUDGE CLARK: That is certainly correct.

PROFESSOR MORGAN: You don't get any hiatus.

CHAIRMAN MITCHELL: You don't see the point. Here is a rule that provides for service and by acts of Congress these rules applicable to the United States district courts in this country become automatically applicable to condemnation cases in Hawaii and other places. When that is so, if we say, "Continental United States" or the "forty-eight states", when they become applicable in Hawaii and a condemnation suit is started there and a fellow resides in California, under the terms of the rules, he is within a state and he has to have personal service on him; but if he lives in Hawaii--

PROFESSOR MORGAN: --he doesn't have to have it.

JUDGE CLARK: Why don't we make the phrase cover the United States, its territories and insular possessions? That means you have to serve out in Honolulu. Why not? You can send it to the marshal. They have marshals in those places. That adds a little to the area of personal service, but why not?

CHAIRMAN MITCHELL: He is also the fellow who isn't likely to see the newspaper. The fellows who are out in the outlying districts are the ones we should take pains with.

PROFESSOR MORGAN: Monte points out that you want to watch for "public use" in those forms.

MR. LEMANN: Not only on page 40 but in several of them.

JUDGE CLARK: That is certainly correct.

PROFESSOR MORGAN: You better make that change.

CHAIRMAN MITCHELL: Are you going to make a time limit for the submission of comments on this in this small group we are sending it to?

MR. LEMANN: I think a time limit would be desirable even with a small group. Make it, say, thirty days for a small group.

CHAIRMAN MITCHELL: When we send out the mimeographed copies, first it will go to us and to the Department of Justice and the TVA, and so on. We will just tell them to send in their comments immediately because we are going to have it printed and we have to have it promptly. I don't suppose you can do more than that. Then Charlie will decide whether there is anything more to be heard from.

MR. LEMANN: I wonder whether for this limited distribution you have in mind not sending anything to the Department of Justice and the title companies with respect to the notes.

CHAIRMAN MITCHELL: No. They know why we have made these changes. But the printed draft for more general distribution ought to explain our action.

MR. LEMANN: I suppose it would be better to reprint the entire body of notes. Some of these notes are quite long. We won't change them. I wonder whether it might be worth considering the possibility of just printing the changes or

additions to the notes.

CHAIRMAN MITCHELL: You mean leave out the notes.

MR. LEMANN: Those that are unchanged. For the most part they will be unchanged.

CHAIRMAN MITCHELL: The trouble is that you set up the type and when we have the report to make to the Court we will have to put the full notes in on that.

MR. LEMANN: That will take another printing anyhow.

CHAIRMAN MITCHELL: But we hold the type on the notes that we are sending out in our printed draft so that when we put it in the report to the Court the printer will have it set up in the type and he will merely, in our report, have to make such alterations as we have made in the text of the notes as a result of this distribution, and that will save a lot of time and expense.

MR. LEMANN: If I were going to look at the new draft, it would help me to see what the changes were and not have to thumb through and compare each provision with the preceding provision, many of them being the same.

CHAIRMAN MITCHELL: I hardly think it is feasible for the Reporter to get out a draft which compares with the preliminary draft with the revisions in italics, or something of that sort. That would be quite a job. It doesn't hurt you to read the whole rule over anyway, because you may find something we have slipped up on.

PROFESSOR MORGAN: Is it contemplated that we have another meeting on this?

CHAIRMAN MITCHELL: I don't think so, unless you want it.

PROFESSOR MORGAN: Unless there is a radical change suggested.

CHAIRMAN MITCHELL: Unless we have made a blunder. I have a feeling that, even if some rather important question came up that we slipped up on, we can handle it by correspondence, explain it by letter and get the decision of the Committee on it.

MR. LEHMANN: The applicability of the rule and the tribunal are really the only knotty problems we have.

JUDGE CLARK: Leland points out that our appropriation runs out June 30th. We will either have to get everything done by that time or something will have to be done about that.

CHAIRMAN MITCHELL: Here it is February and I think we will get the final report to the Court before June 30th. That will take care of us. If the Court doesn't do anything, as it possibly won't, until fall, then if they haven't the money for printing the report and its order of promulgation, they will have to ask for it.

JUDGE CLARK: It takes quite a while to go through the Government Printing Office. They say at least two months, maybe three.

MR. TOLMAN: If we get our requisition in before the end of the fiscal year, it would be all right.

CHAIRMAN MITCHELL: If they will take three months, we better go back to mimeographing the draft.

MR. TOLMAN: We might be able to speed them up, I don't know.

JUDGE DOBIE: Don't you think we can leave things like that to the Reporter and the Chairman?

CHAIRMAN MITCHELL: I feel if it takes them three months, we shouldn't be using the Government Printing Office. We want to get through with this thing this spring and make our report to the Court before it adjourns. That will give them from then to the first of the year to decide what they will do with it.

JUDGE CLARK: It was three months before we got the last report.

CHAIRMAN MITCHELL: We got our report out in July and we couldn't deliver it to the Court until September.

MR. TOLMAN: Yes. On this draft it was October before we got it.

JUDGE CLARK: This little draft took a long time.

MR. TOLMAN: From June to October.

MR. LEMANN: If it means a substantial delay, we should mimeograph it.

I move this matter be left to the Chairman.

JUDGE DRIVER: Second.

CHAIRMAN MITCHELL: Is there anything else that should come up?

JUDGE CLARK: I think we have covered everything.

CHAIRMAN MITCHELL: If there is no further business, let's adjourn sine die.

[The meeting adjourned at eleven-twenty o'clock.]
