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THURSDAY MORNING SESSION

March 28, 1946

The meeting reconvened at nine-thirty o'clock, Mr. William D. Mitchell, Chairman, presiding.

THE CHAIRMAN: Gentlemen, we are up to Rule 75. What have you on that, Mr. Reporter?

JUDGE CLARK: While there have been various suggestions, they are really very small. The only one that I would recommend is the one that appears as to (a), and that is not very large in itself. It is the one of the Association of the Bar of the City of New York, stated on page 92 of the main statement of ours. The Association of the Bar of the City of New York suggests a possible ambiguity in the second sentence of Rule 75(a), lines 8-12, in that literally the 10-day provision in the sentence may apply "only to cases where the appellant has served and filed the original designation." As clarifying the Association proposes substituting for the word "thereafter" in line 9, the words "after the service and filing by either the appellant or the appellee of such a designation."

THE CHAIRMAN: You recommend that.

JUDGE CLARK: Yes, we say we believe this proposal has merit and recommend it.

JUDGE DOBIE: I move that it be adopted.

DEAN MORGAN: I second the motion.

THE CHAIRMAN: Is there any objection? If not, it is agreed to.

JUDGE CLARK: That really is all I have. These others are quite small points. Shall I bring them up or not?

DEAN MORGAN: I couldn't see anything in them. I went through them.

THE CHAIRMAN: You went through this Waterbury suggestion, too?

DEAN MORGAN: (c), (d), (h), (n), and all. I went through the whole business, and I couldn't see anything.

JUDGE CLARK: I am told, as to reporters, that Mr. Youngquist thought there would never be a case calling for our rule where there was no report, but I understand that there has been quite a good deal of difficulty about the reporters; I mean, about getting the new statute into operation, about fixing the amounts. There has been some feeling in some places that the court has appointed somebody not competent, and in New York they have a lot of trouble, I know, about the rates of pay, and so on.

JUDGE DOBIE: That is giving a terrific amount of trouble. Judge Parker is on that committee. It is the most marvelous thing how they varied. Of course, I knew that New York was high, but what amazed me was that one of the high states of the United States is West Virginia. God knows why.

THE CHAIRMAN: That (n) is worth putting in.

I haven't tried many cases recently where there has been a lack of a reporter, but in the country districts where I used to try cases a good deal in the old days, we often ran short of a reporter and had to get along the best we could.

JUDGE DOBIE: I don't think there is anything to Longsdorf's suggestions, do you?

JUDGE CLARK: I am afraid not. Mr. Longsdorf is very busy on all these rules. I didn't see that there was anything to them.

THE CHAIRMAN: Then, our next is Rule 77.

JUDGE CLARK: Section (d), as to notice of orders or judgments. I guess there isn't any question about anything else. That is the one that has been debated. In New York they still think the clerk should do it.

THE CHAIRMAN: Send a notice?

JUDGE CLARK: Yes.

THE CHAIRMAN: It is carefully drawn, and it certainly covers the ground, doesn't it? We did that very carefully before.

JUDGE CLARK: Yes.

MR. HAMMOND: I have a note here on this. In line 16 it says "or by these rules", "failure to appeal within the time allowed by law or by these rules". I was thinking about the District of Columbia, where it is regulated by a rule of the Circuit Court of Appeals. We want to cover the District

of Columbia.

THE CHAIRMAN: I wonder if "time allowed by law" covers every case which is not covered by these rules. Strictly, the statute itself doesn't fix the time, if the rule is made pursuant to law. I think the point is worth thinking about.

MR. LEMANN: Take out everything after "allowed", "within the time allowed."

JUDGE CLARK: That might do it.

JUDGE DOBIE: Put a period after "allowed" and cut out the rest. Is that your suggestion?

MR. LEMANN: You wouldn't put a period. It would be "within the time allowed, except as permitted in Rule 72(a)."

THE CHAIRMAN: Strike out "by law or by these rules", and it would be broad enough to cover these rules and the law of the District of Columbia. Isn't that a good suggestion?

JUDGE CLARK: I should think that is all right.

THE CHAIRMAN: It covers your point.

MR. HAMMOND: Yes.

THE CHAIRMAN: It is suggested that in line 16 of Rule 77(d), as shown in our preliminary draft, the words "by law or by these rules" be stricken. Put a note in stating that that is intended to cover a case where the time for appeal is fixed by law, which happens when it is less than these rules.

JUDGE DONWORTH: An alternative course would be to

leave it as it now reads and cover the point by a note that we consider the rule in the District of Columbia as the law there. However, that is a mere thought.

MR. HAMMOND: If you strike that out, there is a question whether "within the time allowed" doesn't mean by these rules only. I don't know.

THE CHAIRMAN: Let's go back. We have regulated the appeal in the District of Columbia, haven't we? Let's go back to that. What is that rule?

MR. LEMANN: Rule 73(a).

THE CHAIRMAN: I wonder about that.

JUDGE CLARK: I wonder if that isn't all right even if we have.

THE CHAIRMAN: They now have 30 days.

JUDGE CLARK: I thought they extended their rule after Hill v. Hawes.

MR. HAMMOND: From 20 to 30.

JUDGE CLARK: They extended it only to 30?

MR. HAMMOND: Yes.

THE CHAIRMAN: My point is that by Rule 73 we have taken away from the Court of Appeals of the District of Columbia the power to make any different rule than we have.

MR. LEMANN: That is right.

THE CHAIRMAN: I think that is so.

MR. LEMANN: We wouldn't need the phrase "by law"

anyhow, I think, because these rules in 73(a) say 30 days unless a shorter time is provided by law, so the rules incorporate that already. I think those two words certainly are superfluous.

THE CHAIRMAN: It is quite clear to me. I never realized it or thought of it before. I am glad to have this brought up that Rule 73(a) is all-inclusive. It doesn't include the District of Columbia at all; it ratifies their present time, 30 days. What have they got, 60 days for Government cases in the District of Columbia?

MR. HAMMOND: No, I don't think they have.

THE CHAIRMAN: They haven't any? That is a thing we ought to take note of right away, because if they have a rule for 30 days in all cases and we have made a blanket rule that says 60 days in United States cases, we ought to put a note in there calling attention to the fact that it supersedes the District rule.

DEAN MORGAN: The District doesn't give the Government any more time?

MR. HAMMOND: I don't think it does.

THE CHAIRMAN: We are doing something pretty radical, without realizing that we are doing it.

MR. LEMANN: There are a lot of Government cases in the District, aren't there?

DEAN MORGAN: I should think so.

MR. LEMANN: None of the district courts have said anything about this.

THE CHAIRMAN: I think we had better check up on that. You are sure they don't fix a different time? They certainly wouldn't kick on 60 days for the Government if the Judicial Conference didn't make an exception of the District of Columbia in their recommendation for 60 days on United States' appeals.

MR. DODGE: What is it, a rule of the Court of Appeals?

THE CHAIRMAN: It is a statute that gives the Court of Appeals of the District of Columbia power to fix the time for appeal. They used to have a 20-day rule, and after that district decision in Hill v. Hawes, they amended their rule and made it 30 days. I am told they didn't make any 60-day rule for the Government. We come along and dip into that thing, which we have never done before, and in a broad provision, which supersedes all other provisions of law unless a shorter time is fixed by law, we make it 30 for the average case and 60 for Government cases.

MR. DODGE: No lawyer in the District has raised a question about it. Let's get the rule and see what it does say.

MR. LEMANN: Why not call the clerk of the District of Columbia? He ought to be able to tell you right away.

THE CHAIRMAN: We ought to know what their rule is.

JUDGE CLARK: I don't know whether I can find it here or not.

MR. HAMMOND: I will ask Mrs. Dennis to get a copy.

JUDGE CLARK: That probably will be the best way.

THE CHAIRMAN: We haven't time to consult the circuit judges here as to whether we want to take over the job of the District by these rules. I think we should, but suppose we let it stand, and between now and the time our report is made up or the Court acts on our report, we can call it to the attention of the District authorities. In the meantime, if they bring up any good reason that the thing should be altered to leave the District Court with its present power, the Supreme Court can alter the thing. I do think that we ought to put a note in here, Charlie, on 73.

JUDGE CLARK: Yes, I guess we should.

THE CHAIRMAN: We should call attention to the fact that the District system up to date has been under a statute authorizing the local court to fix the time, that now that this rule steps into the field, it is uniform and would operate to put an end to the special power of the Court of Appeals of the District. That note would call their attention to it, and then if they raise a fuss and persuade the Court that they ought to retain their power, the Court can do that. Wouldn't that be the best thing to do as long as we don't know

how they feel about it.

JUDGE DOBIE: I think that is a good way to handle it.

THE CHAIRMAN: Let's do that. Now we go back to 77. What do we want to do there?

MR. LEMANN: I think it is a good idea to take out "by law". In fact, I would take out that whole part of the rule. You see, "by law" is only one case we know of. I think those two words are unnecessary because "by these rules" incorporates "by law" in that one case.

THE CHAIRMAN: The rules specify a lawful time if it is less than we say.

MR. LEMANN: That is right. That is why I think it is redundant. I would be somewhat inclined to take out all six words following "allowed". That would be my first vote. My second vote would be to take out "by law".

JUDGE DOBIE: I thought we decided to take out the six words.

MR. LEMANN: I am not sure that we have. That would be my preference.

THE CHAIRMAN: There is a little difficulty about that. When you say "within the time allowed", allowance looks like a sort of allowance by court. We do give the court power in the rules to allow an extension.

MR. LEMANN: You would keep the "except" in.

THE CHAIRMAN: Oh, yes, I see. Then, the suggestion

is to strike out the words, "by law or by these rules", in line 16 of Rule 77. Is there any objection to that? That is agreed to, and it is also agreed that a note about the District of Columbia situation will be appended to Rule 73(a).

Is there anything in these suggestions from members of the bar about 77?

JUDGE CLARK: I don't think so. It raises the same question, as I have said. The New Yorkers think there should be notice of entry by the parties and that the time for appeal should run only from the giving of notice by the winning party.

JUDGE DOBIE: Didn't we thresh that out pretty carefully before?

THE CHAIRMAN: Yes. We took care of that by allowing the court to grant an extension of 30 days if the fellow slipped on it. You would have to reconstruct all of that.

JUDGE CLARK: Rule 81 is the next one, I guess.

THE CHAIRMAN: There is nothing on 79? Rule 81.

JUDGE CLARK: First, our friend Longsdorf raises a question, which some of the judges have raised, as to habeas corpus and a statute requiring an allowance with a certificate of probable cause by the judge, 28 U.S.C. s446. I had always supposed--and I think it is pretty clear--that that is a jurisdictional matter, the question of how and when the appeal can be taken, and that we haven't intended to change and have not changed that.

THE CHAIRMAN: I don't quite understand that. Let's see what the clause is in 81.

JUDGE DOBIE: Habeas corpus isn't really governed by these rules, is it, Charlie?

JUDGE CLARK: We say that appeals in habeas corpus proceedings are governed. The question is whether that does away with the requirement of the statute that the trial court must make a certificate of probable cause for appeal.

JUDGE DOBIE: That is where it is in state custody, isn't it?

JUDGE CLARK: That is it.

THE CHAIRMAN: I am not quite sure it doesn't.

JUDGE CLARK: The question has been raised.

THE CHAIRMAN: How has it been decided?

JUDGE CLARK: The Schenk v. Plummer case held no, they are not supersedeas.

JUDGE DOBIE: I think the circuit court of appeals rather thought that was still in effect that you have to have a certificate of probable cause from the district judge in a case in state custody.

JUDGE CLARK: Rule 73(a) provides no new requirement, but neither does it repeal 28 U.S.C. s466, which requires a certificate of probable cause from an appeal in habeas corpus cases in which there is detention by virtue of state process. That is from Judge Mathews in the Ninth Circuit.

JUDGE DONWORTH: We would desire to retain that, wouldn't we?

THE CHAIRMAN: Yes, not the allowance part of that, but the certificate of probable cause part.

JUDGE CLARK: Here there was no ceritifcate of probable cause and no jurisdiction to entertain the appeal. The appeal was dismissed.

THE CHAIRMAN: The lawyers slipped on that.

JUDGE CLARK: Here is another case in which it was said that the circuit court of appeals is without jurisdiction in the absence of a certificate.

THE CHAIRMAN: What did they hold?

JUDGE CLARK: The same way.

THE CHAIRMAN: Our rule is weak, and they had to take two cases to the circuit court of appeals to settle it. I am wondering whether some other lawyer may not miss those cases and slip.

JUDGE DOBIE: I would like to retain that in there because, as you probably know, under some of the very broad Supreme Court decisions these habeas corpus cases in state custody have become a damned nuisance in federal courts.

THE CHAIRMAN: We would have to add a sentence to subdivision (2) in 81(a) which said that a certificate of probable cause in habeas corpus proceedings, as provided by section so-and-so, is still required.

JUDGE CLARK: We could put it in a note. We could say that it seems to be settled now, and so forth, and cite the cases.

JUDGE DONWORTH: That would be easier, wouldn't it, than to try to reframe the language?

THE CHAIRMAN: The trouble is, when they print these rules and the lawyers have them, do all their sets contain our notes?

JUDGE CLARK: It is true that they do not. They are printed separately often.

THE CHAIRMAN: You ought to do one or the other. What is your pleasure on it?

JUDGE DONWORTH: Mr. Reporter, where would such a clause or sentence go in, if we made one?

JUDGE CLARK: You mean if we put it in the text, how would we do it?

JUDGE DONWORTH: Yes.

THE CHAIRMAN: You could add it, as I suggested, in §1(a)(2), simply saying that the certificate of probable cause required by section so-and-so in habeas corpus appeals is required.

JUDGE DOBIE: I think that should be in the rule, General, for the reason just stated, that a great many lawyers don't have these notes. It comes up quite frequently.

JUDGE DONWORTH: A new sentence has been suggested

and, as the Chairman has just mentioned, it might be added to Rule 81(a), subdivision (2). A new sentence at the end of subdivision (2) would seem to come in very appropriately there as we have just mentioned habeas corpus a few lines above.

THE CHAIRMAN: Is that the sense of the Committee?

MR. DODGE: What is the suggestion?

THE CHAIRMAN: The suggestion is that Rule 81(a)(2), which applies to appeals, shall apply our rules of appeals in habeas corpus cases, and that we add a sentence to (2) to the effect that a certificate of probable cause, required by section so-and-so in habeas corpus cases, may be obtained.

JUDGE DOBIE: I make that motion.

DEAN MORGAN: It seems to me it ought to be in there.

THE CHAIRMAN: There being no objection, we will agree to that.

JUDGE DONWORTH: Has the Reporter got that?

JUDGE CLARK: Yes, I think so. Mr. Moore was discussing putting it at the end and saying habeas corpus when a certificate required by law has been made.

JUDGE DONWORTH: The present motion is simply to add a new sentence at the end of subdivision (2). That has been carried, hasn't it?

THE CHAIRMAN: Yes. Is there anything else on 81?

JUDGE CLARK: Yes, two or three things. The first, under 81(a)(3), the new matter in italics, is a question which

came up with reference to a case that we had in our court where it was asserted that these rules govern the use of the subpoena power under statute completely, so that as soon as an action was brought, the discovery rules here applied, with various protective orders. In fact, the question came up as to obtaining restrictive orders against Mr. Bowles. The Government relied on the Price Control Act. We held that that wasn't supersedeas. This is a matter which is discussed on page 99 of the summary. I have raised the question whether this language may not possibly hold out hopes to the lawyers in cases like that that the statute really takes away. I query whether the words in lines 11 and 12, "These rules shall apply to ... proceedings", might not perhaps be better made to read that they apply to the practice in proceedings instituted.

MR. LEMANN: How would that help?

JUDGE CLARK: Of course, I suppose no words, unless spelled out in great detail, will make it entirely clear, but I think it would stress the idea that these are only procedural rules, not rules granting authority, that they govern only practice and procedure, and don't govern the power.

JUDGE DOBIE: What do you want to insert, "practice in" before the word "proceedings"?

JUDGE CLARK: Yes, "to practice in proceedings instituted".

THE CHAIRMAN: Is it a question of whether we have

attempted by these rules to interfere with the power of subpoena of an administrative body?

JUDGE CLARK: Yes.

THE CHAIRMAN: We haven't any right to do that. The rules of practice for the district courts are not broad enough to establish or take away the power of an administrative board.

MR. LEMANN: Look at the "except" clause in line 16. Doesn't that put everybody on notice?

JUDGE CLARK: Yes. All I can say is that we didn't accept that point of view, which was quite strenuously presented to us by one of the great New York law firms. I have forgotten which one it was.

THE CHAIRMAN: How would you word it? "These rules shall apply (1) to proceedings to compel the giving of testimony". They claim that that applies to procedure as to the matter and contents of a writ of subpoena, didn't they?

JUDGE CLARK: As soon as action was brought. They didn't have to claim in that case--and I take it that they would not necessarily claim--that the administrator could not go out on his own, so to speak, and get the production of documents, and so on, but here the Administrator had already instituted an action for remedy. Then he wanted to keep on investigating. He issued his own subpoenas in the form that they do.

THE CHAIRMAN: I see.

JUDGE CLARK: Then the objection was made that the action superseded everything else and that the proceeding then must be entirely under these rules and apply to the restrictive orders and whatnot.

THE CHAIRMAN: I should suppose that if he wanted to get a subpoena to produce evidence to use in the action he had pending, he would have to apply through our rules. There would not be anything in the rules to prevent his going on with a further investigation under his own power, but matter procured that way would not have anything to do with the action unless he succeeded in digging up some new proof. He might do that. That was the row, was it?

JUDGE CLARK: Yes.

THE CHAIRMAN: He was trying to dig up additional testimony for his action by using his administrative power, is that it?

JUDGE CLARK: He didn't say completely. That is what the defendant said he was doing. He said, "I have just investigated generally."

THE CHAIRMAN: What did you hold?

JUDGE CLARK: We held he could, that the statute gave him that power, and that the bringing of action, so to speak, didn't take it away.

MR. LEMANN: What in here would change that result? Your "except" clause would protect that result. You say,

"except as provided by statute", and you held in that case that the statute did apply to the proceedings.

JUDGE CLARK: That is true. That may be the best we can do.

MR. LEMANN: I don't think your amendment would help any myself.

JUDGE CLARK: I am perfectly frank to confess that the amendment isn't at all complete. The amendment is perhaps only a hint.

DEAN MORGAN: Wouldn't "instituted" there make it a little clearer, "instituted to compel the giving of testimony"?

THE CHAIRMAN: As I read this thing, it looks to me as if you were trying to govern the proceedings for issuing his administrative subpoena. It says, "proceedings to compel the giving of testimony or production of documents in accordance with a subpoena". That indicates the subpoena is already issued, doesn't it?

JUDGE CLARK: Yes. That is the practice they have. They issue their own subpoena, and then if there is any question about it, they come to the court and get enforcement. The way that this came up, what we were really trying to do was to get some general course of practice that you could follow. It came up as a result of what was a rather interesting case from upper New York State, where the judge first had announced that the practice as to enforcing an administrative procedure

was not subject to the rules at all. Then he held the case two or three years, and nothing happened. When it came to us, it was very old. He arrived at the most curious result by making the conclusion, for which there was some basis, that the rules did not apply then because it was a summary proceeding, and he ended up by taking a lot more time than he would have naturally under the rules. On appeal, we said in that case that this practice ought to be followed, except as it interfered with the enforcement of the statute. The practice, so to speak, showed the model to be pursued. This was an attempt to state that. I don't know that the words are entirely too happy for it.

THE CHAIRMAN: It does seem to me that your proposed alteration carries to my mind a little further idea. It completely negatives the idea that these things have anything to do with the question of the power to issue or not. It is simply that, after issue, then in proceedings instituted to compel obedience, they should be governed by the rules. That is what you want.

JUDGE CLARK: Yes.

MR. DODGE: You mean it should be limited to proceedings in court.

THE CHAIRMAN: Why don't you make it read this way? I am just thinking out loud now. "These rules shall apply to proceedings to compel obedience to a subpoena issued by an officer or agency of the United States under any statute,

except as otherwise provided by statute.

MR. LEMANN: What else but that could the present language mean? "These rules shall apply ... to proceedings to compel the giving of testimony or production of documents in accordance with a subpoena". Doesn't that mean compel obedience to the subpoena?

THE CHAIRMAN: Proceedings to compel the giving in accordance with the subpoena. I guess that is all right. I don't think you change it any by it.

MR. LEMANN: If you didn't have that "except" clause, I should think you might, but the "except" clause is so very broad that it excepts not only the statute but the order of the court in the proceedings. All the court has to do is to enter an order that they will proceed in a different way.

JUDGE CLARK: Don't you think my wording might carry out the idea a little more? I don't mean to say that it will solve everything, but I should think it would make the idea a little clearer that it applies to the practice in proceedings instituted.

MR. LEMANN: These rules are all practice, aren't they? What else could it be but practice?

JUDGE CLARK: It is true, it may be gilding the lily, but there is something in making the lily look prettier, isn't there?

MR. LEMANN: If the gilt is worth anything, yes.

MR. DODGE: What kind of order of court in proceedings would obviate the necessity of applying these rules?

JUDGE CLARK: The general idea there was that the court would say that the rules would take too long and, instead of having an answer in 20 days, and so forth, "I order you to state the reasons right away." That would be the nature of the thing we had in mind, that there might be a necessity for swift action, and there should be some way that particularly the time limits given by the rules need not be followed.

MR. LEMANN: The general idea, I presume, was to make it plain that when you had to resort to a court proceeding to enforce your subpoena, you proceeded generally in accordance with the practice we have outlined, unless the court ordered otherwise or unless the statute provided otherwise. You have explained that in your note here, haven't you?

THE CHAIRMAN: What puzzles me is why we need anything at all, because if we don't provide any rule making our rules of practice apply, there isn't any rule and the court can make an order establishing our rules or any rules he wants. We leave him with that power as it is. We simply say that if he doesn't choose to do something else, he shall follow our rules.

MR. LEMANN: I should think it helps the administrator. He wants to know, if he has to go into court, how he goes.

THE CHAIRMAN: To know how he gets there?

MR. LEMANN: He has a note on page 106. This has been in our rule from our 1944 draft. Apparently nobody has objected to it. We have a note on page 106 explaining why we are doing this, and that, I see, is practically the same as it was in the 1944 edition. Apparently nobody has found any fault with it.

JUDGE CLARK: It is useful, I think, for the very case which I cited, in which the district court did the curious thing of first saying that the rules do not apply, which was justified, and then that the rules did not apply. I don't know whether it was because he wasn't much impressed, but I think that was it, because he held, as I remember now, when he got around to it eventually, that there were no grounds for the subpoena. We reversed him. You see, he didn't do much of anything. The Administrator didn't know what course to follow. When the judge says, "The rules don't apply, and I am making my own rules," then what do you do next? You can't say that 20 days have expired under the rules, and all that, because he has already said the rules don't apply.

DEAN MORGAN: I must say I like your phrasing better than this, to say, "to a civil proceeding instituted to compel obedience to a subpoena". That is a shorter phrase, besides.

JUDGE CLARK: Do you move that it be inserted?

DEAN MORGAN: Yes, I move that.

THE CHAIRMAN: How would it read, then? Let's get the exact wording of it.

DEAN MORGAN: "These rules shall apply (1) to civil proceedings instituted to compel obedience to a subpoena issued by an officer".

JUDGE CLARK: You don't want to say "to the practice in civil proceedings"?

DEAN MORGAN: I don't care whether you say practice or not.

JUDGE CLARK: All right.

MR. DODGE: What rule have we that defines such proceedings?

JUDGE CLARK: We haven't any rule, except this. Those all come from statutes.

THE CHAIRMAN: He is talking about what rule we have for enforcing obedience to court subpoena. Isn't that your question?

MR. DODGE: Yes.

THE CHAIRMAN: Where are they?

JUDGE CLARK: Rule 45.

DEAN MORGAN: And so forth. We have it in the discovery section.

THE CHAIRMAN: We haven't struck anything yet that I see in it about proceedings, except (f).

JUDGE CLARK: I think that probably is true; (f) is

the only provision.

THE CHAIRMAN: That is Contempt. Where is the other rule for forcing obedience to a subpoena issued in a judicial case? Where is there any rule?

PROFESSOR MOORE: Issued in what kind of case, sir?

THE CHAIRMAN: A civil action. What we are trying to do is to impart into these proceedings to compel obedience to administrative subpoenas the same provision we have in these rules for enforcing obedience to a court subpoena. Bob asks where they are. I haven't found them.

MR. LEMANN: Isn't what happens that the administrator issues a subpoena, and the fellow says, "I am not going to pay any attention to them? Then the administrator has to go to court, under the statute, and get the court to order the guy to comply with the subpoena or go to jail. So, he says, "I am going to court. How do I go about going to court? If the rules do not cover it, what do I do?" I suppose the answer is to make up your own docket, don't pay any attention to anything, but just make up something of your own. I suppose it was to fill that vacancy.

THE CHAIRMAN: That means he has to bring a lawsuit under our rules, with complaint and answer, 20 days to answer.

MR. LEMANN: Yes, so I would assume, unless the judge ordered otherwise, but of course he would ordinarily get the judge to order otherwise. Then there might be motions

in that proceeding; there might be a lot of things in that proceeding. I can't envisage them all.

JUDGE CLARK: That is just what happens. As a matter of fact, how else would you do it? First, I don't see what the ordinary subpoena in civil actions has to do with this. I shouldn't think it was very important, anyway. What other remedy do you need except contempt, except that where it is directed to a party you might have some other order for excluding testimony, and so on. I don't see that that is very important. This is a court proceeding of some kind required by all these administrative statutes. There are quite a few of them.

MR. LEMANN: Suppose I were the defendant in that and I wanted to show that the administrator was animated by some ulterior purpose, and I wanted to take his deposition to show that, or to take that of some of his people, to show abuse or oppression. Then I would need a subpoena other than the subpoena which the administrator issued, and I assume that then these rules would tell me what I could do.

THE CHAIRMAN: I understand now what you are trying to do is this: The administrative officer has issued a subpoena, and it has been disregarded. He wants to institute proceedings in a court to compel obedience, and he doesn't know what form the institution should take. Shall he file a summary petition and ask for an order to show cause, or shall

he file a complaint and issue a summons, with 20 days to answer, and all that? I am getting around to the idea that what we are trying to do by this amendment is to say that the practice when you want to institute a case in the district court shall be by summons, complaint, answer, and all the rest of it as prescribed by our rules for the institution of any civil action, except as the court orders otherwise.

JUDGE CLARK: That is it.

THE CHAIRMAN: It seems perfectly absurd to me, when you have a summary proceeding like that to compel obedience, to have to go through so much rigmarole. I don't know.

JUDGE CLARK: How else would you do it, actually?

THE CHAIRMAN: You could prescribe that proceedings in court instituted to compel obedience to an administrative subpoena may be by action or petition and summary order to show cause, something like that, or in such other manner as the court may order.

MR. DODGE: The court issues a capias and sends it to the sheriff and tells him to bring it in.

JUDGE CLARK: If you did that down in New York, they wouldn't know what it was if you called it a capias. This is just to suggest some way to go at it. In the first place, the administrator doesn't know how to go about it; the counsel doesn't know. This sort of regularizes something that is unknown.

MR. LEMANN: You might want to challenge the jurisdiction or raise all sorts of questions.

JUDGE CLARK: I was going to say that the cases that come to us are regular lawsuits. There isn't any doubt about it. The parties have made the motions. I think this whole case, as I remember, was practically summary judgment procedure. Each side had made affidavits, as I remember. They had gotten into the court, and then they made their affidavits and had a regular hearing. The only thing that is important is to tell the parties something they can do, you see.

MR. DODGE: Why do we tell them?

DEAN MORGAN: What do they do? That is what I want to know. When the subpoena is disobeyed, does he go to the district court and get another subpoena from the court?

THE CHAIRMAN: No. He institutes a proceeding to get a judgment ordering the fellow to obey the subpoena.

DEAN MORGAN: If he is going to do that, it seems to me it is all right.

JUDGE CLARK: Yes, that is what he does. He puts his subpoena in as an exhibit. He says, "I have served a subpoena. They don't obey. I want an order enforcing this subpoena."

THE CHAIRMAN: I think your draft is all right, then. I didn't understand what you were trying to do.

MR. DODGE: Is there nothing in the rules relating

to this?

THE CHAIRMAN: Nothing but this.

JUDGE CLARK: There isn't anything in the rules, unless this does it, you see.

MR. LEMANN: I see that on page 107 you say that the rules apply to summary proceedings in bankruptcy under a general order, and you suggest that that illustrates why it might be equally helpful here.

THE CHAIRMAN: Unless somebody recommends a change, we will let that stand.

JUDGE CLARK: All right.

THE CHAIRMAN: There is a suggestion just before the one you have made.

DEAN MORGAN: Charles, did they start with a summons and complaint, or did they start it with an order to show cause?

JUDGE CLARK: They could start it with an order to show cause. I can't recall exactly, but my impression would be that that was a summons and complaint.

MR. DODGE: Is this the only case where we suggest the power of a district court to depart from the rules?

JUDGE CLARK: I don't know.

THE CHAIRMAN: Yes, he can make local rules consistent with our rules. This is to make a local rule that varies from the suggestion we make.

MR. DODGE: I didn't mean the local rule, which is accepted here and perhaps elsewhere, but the right of the court otherwise to provide.

THE CHAIRMAN: Yes. That was done in our section which said that the rules shall apply to pending cases unless in a particular case the court thought it wasn't right and made an order to the contrary to retain the old practice in pending cases. That is a little different from this, which gives a standing power to the court in the future to disobey the rules if he doesn't want to apply them.

DEAN MORGAN: Make a special rule for this kind of case.

MR. LEMANN: It is very limited for this kind of case.

THE CHAIRMAN: There is a special reason for it here. If the court feels that the proceedings ought to be more summary and the time shorter than we have for summons, answer, and all that, he can shorten the time and say, "You don't need 20 days to answer. Bring your answer in in 10 days" or "5 days."

MR. DODGE: I hadn't supposed that any such proceeding as that was contemplated for a moment on the simple issue of bringing in a witness who has refused to obey a subpoena.

JUDGE DONWORTH: What is the meaning of the words "in the proceedings," in line 18, page 103? As the Chairman has already suggested, does it contemplate a full lawsuit by

the rules of the district court or by order of the court in the proceedings?

THE CHAIRMAN: That is in those particular proceedings that have thus been instituted, as negativing a standing order covering all cases. That is, you want to make not a standing order abolishing the practice, but a special order in a particular case.

JUDGE DONWORTH: Yes, but what kind of case?

THE CHAIRMAN: A suit to compel obedience.

JUDGE DONWORTH: In practice they don't start that kind of lawsuit, of course. They apply by some sort of special summary petition. Hadn't we better recognize that? The words "in the proceedings" here seem to imply that there is some sort of short-cut of the character that has been mentioned, rather than the full civil action course.

THE CHAIRMAN: I suppose if you went to a court not with a complaint and all that, but just a petition for an order to show cause why the fellow should be brought in in 5 days, there would be a proceeding and the court could make an order right then and there that that type of proceeding should be followed, without a summons, complaint, and all the rest of it, issue his order to show cause and adopt the short-cut method. He can do it under this amendment.

JUDGE DONWORTH: Do you think the words "in the proceedings" are sufficiently clear to warrant that?

THE CHAIRMAN: I should think so. The proceeding is referred to above as a proceeding to compel the giving of testimony pursuant to an administrative subpoena. This is a proceeding to get the court to compel obedience to that subpoena. He can file a complaint and issue summons to the marshal in the usual way and give 20 days to answer, or, if there is any reason that it should be summary and quick, he can ask the court to make an order allowing him to file a petition for an order to show cause and adopt that procedure. That is the way I interpret it.

JUDGE DONWORTH: This seems to be the only instance where a man can get court action other than by a civil action.

THE CHAIRMAN: That is right.

JUDGE CLARK: Yes, except that bankruptcy proceedings are a good deal the same. We say that the rules apply in bankruptcy as near as may be, and in our court we have said, and I think others have said, that since bankruptcy proceedings are summary, the times of the rules should not be used to extend the bankruptcy times unduly. That is something of the same general idea.

MR. DODGE: Don't these statutes authorizing these subpoenas provide methods for enforcing them?

JUDGE CLARK: Some of them don't. I think some of them really do more than others. Isn't that so? Some of them provide for very summary action, but often they provide that

if the subpoena is not recognized, proceedings may be taken to a district court to obtain an order of enforcement, but in general not a further definition of what the proceedings are.

DEAN MORGAN: Don't some of them provide that they can get a subpoena from the district court?

JUDGE CLARK: We got out a memorandum. These are very extensive, and there are a lot of different things. I can't say immediately, although I think that is the unusual course.

DEAN MORGAN: That is the unusual course?

JUDGE CLARK: Yes. The usual course is that the administrative official issues his own subpoena, and I take it that that is recognized in case after case that we don't know anything about.

DEAN MORGAN: What I was thinking of was that if they refused to obey that, I think the natural thing to provide would be that the district court could then issue a subpoena and then you could get contempt proceedings if they didn't obey.

JUDGE CLARK: You do that in substance, but you do it by issuing an order that they must obey the administrator's subpoena, and then you get them for contempt if they don't do that.

DEAN MORGAN: I see.

JUDGE CLARK: There are two suggestions, you see.

They are both of interest and importance, I think. You were looking at one of them.

THE CHAIRMAN: What do you mean? Two suggestions for what?

JUDGE CLARK: Of definite additions.

THE CHAIRMAN: To what? To 81(a)(3)?

JUDGE CLARK: The one we discussed in the supplementary statement is 81(a)(2).

THE CHAIRMAN: We are still talking about 81(a)(3), and before we skip to something else, I want to know whether you are satisfied with this thing about administrative subpoenas. If nobody has an amendment to propose--

JUDGE DOBIE [Interposing]: I thought Morgan made one.

THE CHAIRMAN: No.

DEAN MORGAN: Yes, I made a motion, but you seemed to think it was no improvement on what is there, so I don't press it.

THE CHAIRMAN: Then, we will accept 81(a) as it stands in the printed draft. What is the other point?

JUDGE CLARK: There are two different ones. Which are you looking at?

THE CHAIRMAN: I am not looking at anything. I am waiting for you to tell me what to look at.

JUDGE CLARK: Let's take page 100 of the first summary. That is the proposal that came from the Tax Division

as to including the representative of a collector, and so on.

THE CHAIRMAN: What rule is it?

JUDGE CLARK: It came up particularly as to 73(a) and the rule as to appeal time, but if there is going to be any question as to appeal time, it ought to be more generally there. We raised a question whether a new subdivision to the entire Rule 81 here might not--

THE CHAIRMAN [Interposing]: Will you state that again? You mean a question as to whether our provision for 60 days time for the Government on appeals applies to a collector of internal revenue or a former collector or person representing him if he is deceased? Is that the point?

JUDGE CLARK: That is the point.

THE CHAIRMAN: Whether representing the United States or an agency thereof.

JUDGE CLARK: That is the question. That goes back to the old theory that you sue the individual. If you are suing the individual, he may be considered just an agency of the United States, and more particularly still, if the suit involves a former collector, is he an agent?

THE CHAIRMAN: I would like to ask first whether your purpose is to treat those people as United States agencies entitled to 60 days for appeal. Do you favor that?

JUDGE CLARK: That is what we were putting in here.

THE CHAIRMAN: You favor that?

JUDGE CLARK: Yes, and we suggested the possibility of a definition, really. That is what it is.

JUDGE DOBIE: You want to add that little thing at the bottom of page 100.

THE CHAIRMAN: Would that affect our service of summons? Would you have to serve the summons on those fellows just the way you do against the United States, with notice to the Attorney General?

MR. LEMANN: It would apply also to 21(a), for example.

JUDGE CLARK: It would apply to 12(a), and I should think it would apply to the service of summons.

MR. LEMANN: The argument for it is that these suits against the collector are personal to him only in a very unreal sense.

DEAN MORGAN: That is right.

MR. LEMANN: They really affect the Government and ought to be put in the same class as suits directed against the Government. I think that is a fair argument myself. The U. S. attorney has to defend it, as the Government is behind him.

MR. DODGE: Is the collector the only one who might be really personally sued?

MR. LEMANN: He has limited that to the collector, you see.

MR. DODGE: I know.

MR. LEMANN: You question whether it should be so limited?

MR. DODGE: Whether it should be broader.

JUDGE CLARK: Of course, when we discussed Rule 25 we raised the question a little whether we couldn't get some statement from various kinds of officers. This is not as inclusive as our discussion.

THE CHAIRMAN: Your proposal is that 81 cover all three of these rules, about the manner of service of summons, the time to answer, and the Government's time for appeal. Where you have used "officer or agency thereof", we intend to mean a collector of internal revenue or the personal representative of a deceased collector.

JUDGE CLARK: Yes, that is the suggestion.

DEAN MORGAN: Whenever you sue him, the Government always comes in and asks for the 30 days additional time anyhow to answer.

MR. HAMMOND: Yes.

THE CHAIRMAN: Your time for appeal is important.

MR. LEMANN: I have had them ask for four extensions.

THE CHAIRMAN: You can't cure the time for appeal that way.

DEAN MORGAN: No.

THE CHAIRMAN: And you can't cure the service of summons that way.

DEAN MORGAN: That is true.

THE CHAIRMAN: I am wondering whether we have talked about officer or agency of the United States anywhere else in the rules for service of summons, answer, time of answer and appeal. Have we? Mr. Moore, do you remember? We have a general proposal here that wherever in these rules we refer to an officer or agency of the United States, we mean thus and so. I visualize that the rules speak about an officer or agency of the United States in connection with the matter of service of summons, the time for answer, and the time for appeal. I want to be sure that there is no other place where we do refer to officer or agency of the United States, where we wouldn't want this to include a collector. Can you think of any?

PROFESSOR MOORE: I can't think of any now. That is where it would cause trouble, service of process and time to answer.

THE CHAIRMAN: I know, but I want to know the breadth of this provision. I want to be sure we are not doing something that we are not aware of. Are there any provisions under our rules, other than those three, where we say anything about an officer or agency of the United States?

PROFESSOR MOORE: Those are the only ones I know of.

THE CHAIRMAN: All right. What is your pleasure? Do you want to adopt the proposed addition to Rule 81, adding subdivision (f) as shown on page 100 of the Reporter's comment?

PROFESSOR MOORE: There is at least one other place, Mr. Mitchell, and that is 62(e), on stay.

THE CHAIRMAN: That is it. Let's see whether a collector ought to be covered by that.

MR. DODGE: Of course, a collector of internal revenue is an officer of the United States. The only question is whether he ceases to be such when sued in his personal capacity.

JUDGE CLARK: Rule 55(e), Judgment Against the United States. "No judgment by default shall be entered against the United States or an officer or agency thereof".

THE CHAIRMAN: The collector or the representative of a collector would have the protection of that, wouldn't he?

JUDGE CLARK: Security is not required on the issue of preliminary injunction, Rule 65(c).

THE CHAIRMAN: That wouldn't apply. What is the one you referred to Mr. Moore?

PROFESSOR MOORE: Rule 62(e).

THE CHAIRMAN: "When an appeal is taken by the United States or an officer or agency thereof ... no bond, obligation, or other security shall be required from the appellant." He is all right, because the Government pays the bill anyway. The collector doesn't do it; is that right?

JUDGE DONWORTH: There is a statutory provision that says if the court finds that the collector acted in good

faith, the court may order the United States to pay the judgment. It is in the discretion of the court, but they always do it, as I understand it.

JUDGE CLARK: Rule 54(d), no costs against the United States.

DEAN MORGAN: You don't get costs against the United States. You do against the collector, don't you?

THE CHAIRMAN: There is a case where we would be abolishing the imposition of costs against the collector.

PROFESSOR CHERRY: No, it just says the United States; it doesn't say officer.

THE CHAIRMAN: It doesn't say officer or agency?

PROFESSOR CHERRY: That is right. Oh, yes, it does. "but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law."

MR. LEMANN: I am not sure he can get costs. Can we get costs in a suit against the collector? If so, it is because the law permits it. That is saved by 54(d).

THE CHAIRMAN: We have said, "Under any rule in which reference is made both to the United States and an officer or agency thereof, the term 'officer' includes a collector of internal revenue, or the personal representative of a deceased collector."

MR. LEMANN: And you could get costs to the extent permitted by law. That is all you can get anyhow.

THE CHAIRMAN: Oh, yes.

JUDGE CLARK: I ought to say there is something dropped out of the suggestion as it came to us. After the words, "the term 'officer' includes a collector of internal revenue," add the words, "a former collector of internal revenue," and continue "or the personal representative of a deceased collector."

JUDGE DONWORTH: I am not sure that striking that out would do it. As I recall the statute, if the collector is out of office or is dead, you have the option to bring a suit against the United States under the Tucker Act if the jurisdictional amount is all right. Isn't that so?

JUDGE CLARK: I think that is so.

MR. LEMANN: You have that option. I don't think you have to, though.

JUDGE DONWORTH: That is right.

THE CHAIRMAN: What I don't understand is that we are giving the representative of the deceased collector the benefit of this thing, but we are not giving the former collector, who is out of office, the benefit of it. Why?

JUDGE CLARK: That is a mistake. It wasn't included. It was dropped in mimeographing. The suggestion should have included it.

MR. LEMANN: Has this really given any trouble?

THE CHAIRMAN: The principal trouble comes up, as I

have heard about it, in that the district attorneys want to know about the matter of service of summons and all that sort of thing.

MR. LEMANN: It is clarifying.

THE CHAIRMAN: They are all in the air about it. I guess they have sort of worked it out some way. I don't know how. However, I know that when the rules were first adopted, they used to call me on the phone from the district attorney's office wanting to know whether this was a suit against the United States or an officer or agency thereof, whether service by summons had to be made in a certain way, and all that sort of thing. I couldn't answer them.

MR. LEMANN: It is a clarifying amendment, anyhow.

THE CHAIRMAN: Where would that go in in the new subdivision? "includes a collector of internal revenue, a former collector of internal revenue, or the personal representative of a deceased collector."

JUDGE CLARK: That is it.

JUDGE DOBIE: That would be added to 81, wouldn't it?

JUDGE DONWORTH: I move that that be added and then that the whole (f) as we have changed it be added as suggested here.

THE CHAIRMAN: Is it the sense of the meeting that we adopt (f) as so drafted?

DEAN MORGAN: I so move.

THE CHAIRMAN: If there is no objection, that is agreed to. Is that all you have, Charlie?

JUDGE CLARK: There was one suggestion on page 34 of the supplementary draft. I don't know whether we want to take it up or not.

THE CHAIRMAN: What rule?

JUDGE CLARK: Rule 81(a)(2). It is the proposal of Mr. Waterbury to delete everything after the words "quo warranto".

THE CHAIRMAN: That is not in our preliminary draft.

JUDGE CLARK: This is a new one. He is objecting to the use of admiralty rules in the proceedings for forfeiture of property, which is an anachronism.

THE CHAIRMAN: Do we apply them?

JUDGE CLARK: That law did, he says, although there is some doubt about it.

THE CHAIRMAN: Tell me where we make these rules applicable to admiralty. The first thing in 81(a)(1) is that they do not apply in admiralty.

JUDGE CLARK: Therefore, proceedings for forfeiture of property are still subject to the old anachronistic rule, and he wants to make them apply by striking out everything after the words "quo warranto" and substituting the following:

"In cases involving forfeiture of property for violation of a statute of the United States these rules shall

apply from and after the seizure of the property by process in rem."

That was his proposal.

THE CHAIRMAN: Why don't you get the admiralty rules amended? Wouldn't that cover it?

JUDGE CLARK: You can't get the admiralty rules amended. The Maritime Bar voted practically unanimously that they should not be touched.

THE CHAIRMAN: Why should we tamper with it? You say this is a matter in admiralty jurisdiction.

JUDGE CLARK: It was suggested that it be in admiralty because in the old days they only contemplated it that way for seizure of things. So, when you seized a can of olives or a dozen eggs, the only thing they thought of was seizing a ship, and they applied the admiralty rules.

MR. LEMANN: It is not an admiralty proceeding at all.

THE CHAIRMAN: It was conducted under the admiralty rules and he doesn't like it, and he wants us to say that it shall be conducted according to civil action.

MR. LEMANN: He is theoretically right. It has nothing in the world to do with a ship. The proceedings to seize spoiled eggs or spoiled butter has nothing to do with the maritime law.

THE CHAIRMAN: It is a proceeding in rem, like a libel suit.

MR. LEMANN: If anything, it ought to be treated similar to a foreclosure of a mortgage.

THE CHAIRMAN: You mean have personal service on defendants instead of seizing the goods, and so on.

MR. LEMANN: No.

THE CHAIRMAN: You don't provide in any prospectus for seizing bad eggs or anything under civil actions.

MR. LEMANN: I think theoretically it ought to be considered an ordinary civil action.

DEAN MORGAN: It certainly ought to be.

MR. LEMANN: Not an admiralty action. I think theoretically he is right.

JUDGE DOBIE: Has that given any trouble, Charlie? There are a lot of those cases. I never heard of any difficulty about the procedure. Has it given any trouble in the recorded cases?

MR. LEMANN: He refers to a case here. We ought to look at it, if we have time.

JUDGE CLARK: I don't know how much trouble it has given. There is confusion in the cases. Some apply admiralty, and some do not. I guess they eventually all get to the point where they make the seizure.

THE CHAIRMAN: We would have to establish a set of rules without a party, except a dozen eggs or something like that. Our rules say that you name the defendants personally

and serve summons on them. We don't provide for seizing anything and getting jurisdiction in rem that way.

JUDGE DOBIE: They proceed right against the thing. A flock of them, of course, are these automobile cases. After you declare the forfeiture of the article, there is a statute which provides that the district judge can relieve from the forfeiture. I have had a number of those cases.

THE CHAIRMAN: It seems to me that, if we adopted what he wants, we would be abolishing a proceeding in rem against the property, with no personal defendants, that we would be substituting a personal action, and you would have to hunt the owner and name him as defendant and serve him with process.

MR. LEMANN: He is going to start with admiralty libel, and everything after that is governed by the rules. He says that is what was decided in the case that he refers to, Reynal v. United States.

JUDGE CLARK: That is the point. He wants to change this provision where we say they shall not apply at all except on appeal, to say in effect that they shall apply once you have made the seizure. He still would have the seizure made according to admiralty.

THE CHAIRMAN: You start a libel and all that, and thereafter the proceeding continues as in an ordinary civil action.

JUDGE CLARK: That is his point.

JUDGE DONWORTH: That would produce more trouble than it cured.

JUDGE CLARK: He wrote a long letter. He said that in his opinion the following cases are in support of the proposition that the new civil rules apply. He has cited two there, and my staff has at least one more. Then he says, "In the following cases district courts have said that the admiralty rules apply," and he has four. There has been that amount of confusion. "That confusion exists as to whether the new civil rules or the admiralty rules apply in the proceedings mentioned is shown by the conflict of the decisions handed down since the new civil rules went into effect."

THE CHAIRMAN: We have an express provision that forfeiture of property for a violation of a statute of the United States is not governed by these rules, except in an appeal proceeding. I don't know what we can do about it. I have the feeling personally that I don't know anything about this tampering with a proceeding in rem against a bale of goods or something else.

JUDGE DOBIE: They sort of stand on their own feet. I know it has been repeatedly held that they are part civil and part criminal. Certain criminal sanctions and certain civil ones apply to them. I am a little dubious whether we would not stir up more trouble, as the Judge has said.

THE CHAIRMAN: I don't think we are prepared to deal with it.

JUDGE DOBIE: I think we had better skip it.

THE CHAIRMAN: I don't know about this sort of thing. It comes in at the last minute here.

JUDGE CLARK: I think there is something in that. I raise the question whether we ought to take it up now.

JUDGE DOBIE: I move that we leave it as it is.

JUDGE CLARK: It seems to me that, theoretically at least, there is a good deal to be said for it.

THE CHAIRMAN: Maybe so, but I am not sure about it at all.

JUDGE CLARK: Yes.

THE CHAIRMAN: The only other thing is the provision for the effective date of these amendments, isn't it?

JUDGE CLARK: Yes. Somebody has suggested that the Chief Justice passed on to us a suggestion that we change the venue rule as to corporations, but I guess we don't want to do that.

THE CHAIRMAN: You mean to try to bring into effect a rule that a corporation which does business in a state is a resident of that state for the purpose of federal jurisdiction?

JUDGE DOBIE: They are messing with that in this provision.

THE CHAIRMAN: We haven't any authority.

JUDGE CLARK: The Judicial Code Committee is messing with that.

JUDGE DOBIE: Let's leave it to them.

JUDGE CLARK: They are messing with that and other things, but this gentleman wrote in to the Chief Justice, and the Chief Justice sent it on to us.

THE CHAIRMAN: Don't you think that our effective date rule ought to be drawn along the same lines as the one we had when the original rules were adopted? We have shortened the time for appeal from three months to 30 days. Suppose judgment has been entered and two months have expired, and a fellow still has a month to appeal, and then our rules clamp down on him. It seems to me that the draft that we had in our original rules would probably cover the situation.

"Rule 86. Effective Date. These rules will take effect on the day which is 3 months subsequent to the adjournment of the second regular session of the 75th Congress [that, of course, will have to be altered], but if that day is prior to September 1, 1938, then these rules will take effect on September 1, 1938."

We wanted to give the bar at least until that time to become familiar with it.

"They govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that in the opinion

of the court their application in a particular action pending when the rules take effect would not be feasible or would work injustice, in which event the former procedure applies."

That gives a district judge in any case the power to say that the old time for appeal still exists, and everything else.

JUDGE DONWORTH: Has the Reporter drawn a clause relating to this?

JUDGE CLARK: No.

THE CHAIRMAN: He has a memorandum, but I don't think he has drawn a clause.

JUDGE CLARK: If you will look at Rule 71A, the Condemnation Rule, you will see a clause there.

THE CHAIRMAN: What is the provision there? [Examining document.] That is the one I have just suggested. Is it agreeable that we suggest to the Court a provision for effective date drawn along the same lines as the one we had in the original rules?

DEAN MORGAN: I so move.

JUDGE DOBIE: I think that will be all right.

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

JUDGE CLARK: That will probably be a special rule just for the amendments.

THE CHAIRMAN: I am sorry to keep Mr. Williams

waiting. We wanted to finish up on this. Then, the Reporter will go ahead with these alterations, and I have suggested that as fast as he makes them, the changes be sent to each of the members so that if they want to take a look, they might pick up something that we have slipped on before the report goes in. He will get up the report and bring the notes up to date.

There may be questions by the Committee on style. Who were on our Committee on Style for the original rules?

DEAN MORGAN: Senator Pepper and I. I did the spadework for the Committee, and then Senator Pepper was the chairman at one time. Who was before him, Charlie? I have forgotten.

JUDGE CLARK: I think he did it right from the beginning, didn't he?

DEAN MORGAN: Senator Pepper was chairman of the Committee on Style, and I did the spadework.

THE CHAIRMAN: Suppose we renew the Committee on Style. How about our friend out in Chicago? Shouldn't we let him take a lick at this thing?

JUDGE CLARK: I should think we could send it to him. His name is James A. Velde.

THE CHAIRMAN: He made a lot of suggestions that we adopted in the original rules. It may save you some work.

DEAN MORGAN: Yes. Get Major Tolman to get him busy again.

[At this point the representatives of the Department of Justice appeared before the Committee.]

THE CHAIRMAN: Mr. Williams, the situation about 71A is this. Our preliminary draft that went out first caused a good deal of trouble, and when we got out this second preliminary draft we hadn't made enough progress with 71A to send a new draft out to the bar, so we sent our second preliminary draft out with a statement that we were still working on 71A. We have finished our work on the amendments to the existing rules, and we are going to lay them before the Court just as soon as we can put them in shape. Our situation about 71A is that if we are going on with it, we want to go over the last draft and make a new draft and send that back to the bar, because there would be too many radical changes in the draft sent out before to go to the Court without giving the bar and those interested another shot at it.

So, what we have before us this morning is to get your views about the situation so that in going over this draft with a view to sending another one out to the bar, we can have the benefit of your ideas.

I might say that one of the things that has been causing the greatest trouble to the Committee is the question of the provision we originally had exempting the TVA and the District of Columbia from the operation of the rule at all. The draft, as it comes before us now, has a provision in it

that all the preceding provisions of these rules, the manner of instituting them and conducting them generally, apply to the TVA, the District, and everybody else, so that you have uniformity of procedure, except that the latest draft contains a clause that the constitution of the powers of the tribunal to decide on compensation in any case shall be as fixed by a federal statute, if there be one, and if not, by state law.

The TVA presented a very powerful case to us which would be hard to overcome before the Court or Congress or anybody, showing the peculiar system that they have has worked splendidly in the kind of thing they have to do, where they have great areas to cover, and they want uniformity of treatment of different owners, and all that. There are some of us who feel that an attempt to impose a jury on the TVA would destroy that. They have, as you know, a provision that there be a commission of three, I believe, who make the initial evaluation. They can cover big areas and treat everybody alike who has the same kind of property. Then it goes to a district court. I believe that is a three-judge court with a circuit judge on it.

JUDGE DOBIE: Three district judges. You don't have to have a circuit judge.

THE CHAIRMAN: Is that it? Then it goes to the C.C.A., and they have a de novo power.

JUDGE DOBIE: That is right.

THE CHAIRMAN: They can make their own findings, and they are not bound by the clearly erroneous rule to the findings below, and they also can take additional testimony. They claim that the result of that has been to give them uniformity of treatment, so that if a case is litigated and a certain standard applies, it is pretty sure that that standard will be applied to anybody else who is going to be litigated, so they go and settle their cases. They have had very little litigation, relatively. At any rate, they have made their presentation, and that is one of the reasons that this draft has been made as it has.

The District of Columbia system is a three-man jury, I think, or something like that, with special powers.

You will remember that when there was legislation pending in Congress to get a jury system applied in all Government cases, that was opposed in Congress by congressmen coming from states where they had other systems, and it was also opposed by congressmen from states where they already had the jury trial because they had the idea that it was a matter that the states ought to have a law on and they sympathized with the fellows who didn't have jury systems and didn't want them. So, the vote on that was determined as much on that theory as by the question of whether the jury was a good thing or not. Of course, that raises all kinds of question, whether we can do anything with Congress about a jury system.

The only other thing I want to mention is a provision in this draft (I don't suppose you are interested in it at all or need to say anything about it this morning) which says that if the condemnation is under state statute, it is governed by state practice. It is not a United States condemnation, but occasionally there are condemnations that get into the federal courts on diversity of citizenship, brought by corporations or under state law, and there are some of those that are of some importance. There has been a general feeling that they ought to be governed by state practice.

The Committee has passed on neither of the questions that I have talked about. Whatever we have done with it has been informally among some of the members. So, the Committee is not committed to either of those problems. In the time that remains to us today we should like to have you present anything you have to say. You have seen this draft, have you?

MR. J. EDWARD WILLIAMS [Assistant Attorney General, Lands Division]: Yes, sir.

THE CHAIRMAN: We have tried to patch it up in some ways that meet your former points, like not requiring you to name defendants at the start of the thing unless you knew who they were. If you didn't want to take the time to find out, you could name them later. There are other little things like that. With that preliminary, will you just go ahead in your own way and tell us what you can about this?

MR. WILLIAMS: Yes, thank you. Mr. Chairman and Members of the Committee: I am grateful for this opportunity again to discuss this matter with you all.

On the first question that you raised, as to whether the TVA or the District of Columbia should be incorporated in these rules and their procedure made applicable to them, we feel, of course, that they should be and that there should be uniformity. However, we are making no point of that. It doesn't really concern us too much, and we would not object to the exclusion or the exception of the TVA or the District of Columbia.

Likewise, as to the condemnations under state statutes, we are not interested particularly in that provision.

Under the draft of the rule that is now under consideration, I should like to mention one or two things just as highlights. First, the definitions that are contained in this draft of "taking", "owner", and "persons" I feel are unnecessary. I believe that many of them get into matters of substantive law, that it would be quite inappropriate for this Committee in a rule to try to define, for example, the word "taking", which involves the Fifth Amendment of the Constitution. We have had some recent Supreme Court decisions on that question. They are quite complicated. I refer to the General Motors decision, the recent Petty Motors decision, and others. I believe that it would create a great deal of confusion to

have those definitions in the rules.

Also, the question of damage and that the taking of property shall involve interference with it. Of course, the law is pretty well settled that consequential damage, lots of business profits, and that sort of thing, are not compensable, and we would object, I am pretty sure, to the inclusion of those definitions.

On the complaint, we have been corresponding somewhat with Major Tolman. I had hoped from his letters that this Committee, or at least that the subcommittee, I believe he indicated, had more or less agreed to strike any rule on complaint, leaving the naming of parties to the discretion of the pleader, as I discussed at length at my last appearance before this Committee, relying entirely upon Rule 8(a), which provides in substance that the act under which the jurisdiction of the court is invoked shall be stated and that in substance it shall state a cause of action. Of course, to have a valid condemnation complaint, the property would have to be described, the acts under which the property is taken would have to be listed, the nature of the relief sought would have to be stated, and you would have to name your parties, which is the substance of what we provide in this rule.

That method of handling this very controversial issue it seems to me would be perfect from all standpoints. It would leave all the parties where they now are. It would

not create any difficulties in the way of incumbering the handling of these proceedings.

As presently drawn, for example, although you would permit the filing of a suit without the naming of all the parties, still the rule provides that "the condemnor shall add as defendants the names of all persons appearing of record or known to the condemnor to be the owners of the property[here is the bad part] prior to any hearing involving that property." It means that we could take no proceedings in the court even under the Declaration of Taking Act. We couldn't appear for a court order of possession. There couldn't be other orders entered or proceedings had in court in the case until we had named all the parties. I believe that is entirely an unnecessary and, in my view, unreasonable restriction upon the prosecution of condemnation cases.

I am not clear as to the intention of the drafter of this rule in the use of the alternative "or" in referring to the naming of defendants. "the condemnor shall add as defendants the names of all persons appearing of record or known to the condemnor to be the owners of the property". If it is the alternative, of course that wouldn't be satisfactory for our purposes. You would not, for example, let the complaint go, I suppose, naming parties only known to the condemnor. I wasn't clear what you meant by the use of that alternative word.

The other principal feature is on the method of trial. Of course, we would like to see uniformity and simplicity in the trial of condemnation cases. We feel that a jury trial is the most equitable and satisfactory way of determining compensation. Jury trials are now used in seventeen states in the first instance, there are twenty additional states which provide for hearings by commissioners in the first instance, and jury trials before the federal courts de novo are also provided for. So, you now have a total of thirty-seven states which are familiar with the jury trial. There are some other states in which the procedures are not quite clear. There are some, however, which provide--

JUDGE DOBIE [Interposing]: May I ask a question there?

MR. WILLIAMS: Yes, sir.

JUDGE DOBIE: Is it your feeling that, taking them by and large, these jury verdicts have been fair to the United States?

MR. WILLIAMS: Yes, sir, I would say so, and I would say also that they are fair to the property owners.

JUDGE DOBIE: I was more dubious about the first. Ordinarily they come from around where the property is. I wondered if there had been a tendency in some states to sort of sting the United States, to fix fictitious values to property that nobody had thought of before the Government

wanted it.

MR. WILLIAMS: There has been occasionally.

JUDGE DOBIE: Not an appreciable number?

MR. WILLIAMS: Well, no, I would say no more than that same attitude would be reflected upon commissioners under your TVA system or under any other system. It might even be reflected in the court where the case is being tried without a jury. In other words, trying a condemnation suit now, it is pretty hard, for example, to project the mind of a juror back to 1941 or 1942, with a complete knowledge of the inflated values that have come about. I think the juries, on the whole, have been pretty fair with us, and I do feel that the property owners, on the whole, would prefer to have their cases tried by a jury.

Recently in Congress there was effected the repeal of the Lower Mississippi Flood Control Act because of complaints by the residents of those Mississippi Flood Control states under that Act. A commissioner system was followed there, where there was no trial de novo, where the commissioners reported their awards, and where if either party filed exceptions to it, the court was given jurisdiction, as in some of our state statutes now--New York, for example--to confirm that award or, if they thought it was bad for any reason, to again refer it to a new set of commissioners. In other words, the court had no authority to modify the amount of the award.

They confirmed it or sent it back. They objected to that in many of these states, Mississippi particularly. Representative Whittington and others from down there felt that the value of the property of landowners, when taken, should be ascertained by jury. They felt they were not getting a fair break from commissioners appointed by the court.

So, I don't think that the jury trial is anything to fear in this rule, and of course, as I discussed at my last appearance before the Committee, in the action by the Congress in defeating that bill that was pending then for a jury trial, those who opposed it were completely off the track and were misguided by other considerations. They had in mind other bills that were pending. They were talking about the Declaration of Taking Act, states' rights, and that sort of thing.

Under the jury trial provision that we would like to have, there is no question of service involved. It is merely a question of ascertaining compensation. We would prefer to have the compensation determined and the rules of evidence followed under the direction of the court and the award determined according to the law as given by the court. We think that is the orderly way of conducting these proceedings, and we see no harm that could possibly come from it, and we don't see any unfair advantage to the property owners.

That is our feeling.

THE CHAIRMAN: You want a jury trial. You don't

want commissioners, with appeal to a jury, do you?

MR. WILLIAMS: No, sir.

THE CHAIRMAN: That adds expense.

MR. WILLIAMS: We feel that that is a duplication of effort.

THE CHAIRMAN: You want a jury trial right from the start.

MR. WILLIAMS: Yes, sir.

THE CHAIRMAN: Governed by the ordinary rules.

MR. WILLIAMS: Yes, sir, the ordinary rules of evidence and under the instructions of the court. We would like to see these proceedings conducted as nearly as possible as ordinary lawsuits are conducted which find their way to the federal courts.

THE CHAIRMAN: Would you object to a provision that wherever there is a federal statute prescribing the tribunal, that be followed, and in the absence of one, instead of having conformity with state law, to provide for jury?

MR. WILLIAMS: That would be perfect from our standpoint. We would have no objection.

THE CHAIRMAN: You are satisfied with the federal statutes that exist on different agencies that you have to do with.

MR. WILLIAMS: Yes, sir, we are satisfied. As I indicated, we would not object to that provision, but we in the

Department, with our experience all over the United States, do feel that we would not like to have the TVA procedure. We would prefer the other. We have no objection to that provision.

THE CHAIRMAN: Does the Department conduct condemnation proceedings for these great water power projects, or is each one of them handled by the counsel for the agency, like the TVA, and Grand Coulee, the Santee River, and all those? Are they all handled by their own legal staffs?

MR. WILLIAMS: No, sir, they are handled by the United States attorneys and the Department of Justice, except the TVA. We handle all of the acquisitions by condemnation for the Reclamation Service or for the War Department. We handle the acquisition of lands for the great flood control projects, dams and reservoir areas for the development and control of river basins.

THE CHAIRMAN: When you are dealing with a situation like that, when you have vast areas of land that is pretty much of the same type, and you use the jury system, aren't the results spotty? That is, one jury will give one fellow more or less than another, and all that. How do you handle it where you have great tracts involved? Do you have one jury that handles a whole county, or is the jury limited to the case of a particular party or tract he owns?

MR. WILLIAMS: There is no real uniform procedure on that. In these cases under our present procedure we ascertain

compensation in accordance with the state statutes, that is, commissioners or jury trials in the first instance; but there is no real uniformity on the question of whether or not one tract of land only shall be tried by one jury. A judge will set down, for example, perhaps fifteen or twenty tracts of land before one jury. The owners will put their cases on seriatim, and the Government will then put its case on. He will send the jury out to retire and consider its verdict under one set of instructions. The fact that a jury may return different awards for different properties of course is perfectly natural, because there are never two pieces of property exactly alike. They always vary somewhat in their improvements and fertility.

THE CHAIRMAN: If the enterprise is so vast that it covers areas in different judicial districts, certainly you get different results. One advantage of the TVA system is that in the final wind-up in the circuit court of appeals, which has jurisdiction over several states, we will say, they have a chance to adopt a standard of value for certain types of land that becomes uniform in the whole area, don't they?

MR. WILLIAMS: That is what they say. I don't know.

THE CHAIRMAN: That is what they tell us.

MR. WILLIAMS: It is one of their contentions that they do follow that procedure. I don't know. Of course, when you mention uniform standards of value, our property is

appraised, as theirs is, by appraisers considered to be competent. Of course, those appraisers come in, and they have more or less the same instructions, to consider the comparability of other sales and the general market value of the property at the time. Their instructions are to determine the fair market value of the property as of a certain date that is given to them. They view the property and consider it. Generally, the same appraisers will appraise property, regardless of the state line or the change in a federal district. If the case has to be tried in another court, it is done in that way.

We don't find any difficulty at all in handling these big projects. We have handled these Army camp acquisitions, some of which have run up into millions of acres in one project. We have just gone through the greatest land acquisition project, of course, in the history of this or any other government, probably. So, we think that that would be the desirable way of handling it, and your suggestion, Mr. Chairman, that it be handled in that way I think would go through without any difficulty at all.

THE CHAIRMAN: You mean go through Congress?

MR. WILLIAMS: Go through Congress. There is no question about it in my mind. I have talked with the representatives of the title companies, and they didn't understand this. They said that these men who were making the objections to the jury trial provision when it came up last were not doing

so from any urging on their part. They didn't understand it.

THE CHAIRMAN: You think Congress would be satisfied with a provision that if there was a federal statute prescribing the tribunal, that will stand---

MR. WILLIAMS: Yes, sir.

THE CHAIRMAN: ---but if there wasn't, then there will be a uniform jury system.

MR. WILLIAMS: Yes. Certainly with the prestige of this Committee making a recommendation which the Supreme Court adopts, there is no question at all in my mind that it will go through, none at all.

If anything is going to be done on condemnation, certainly you should keep in mind, it seems to me, the two objectives of uniformity and simplicity. If this provision that is now incorporated in this draft is adopted, for example, I am awfully afraid of the confusion that is going to follow, for this reason: Just indicating one of the reasons, down to the point of trial we have gone through service; we have perfected our service in accordance with these rules, and then comes the question of a hearing by commissioners, for example. This rule provides that the trial shall be and that the tribunal and the method shall be fixed by the act or in accordance with the state statute--the tribunal or method. Some states--Texas and Alabama, for example, and many others--provide that the notice of the hearing by the commissioners

shall be issued by the commissioners. That is in lieu of summons. These landowners, after all, have a right to be notified of the date of the hearing.

THE CHAIRMAN: You think the word "method" would also cover some questions of practice, in addition to the question of the constitution of the tribunal.

MR. WILLIAMS: Yes, and that is a complication I am afraid of.

THE CHAIRMAN: That is a matter of draftsmanship.

MR. WILLIAMS: Yes. When you get to the matter of filing exceptions to an award of the commissioners, in your state of Minnesota, for example, I believe they must be filed within 25 days or maybe 30 days, or the award becomes final. In some states you have requirements for service of notice and publication on the filing of the exceptions and request for trial de novo. You have three methods of service required in Pennsylvania, for example, and two in the state of Wisconsin. If you are following the state practice on the tribunal and the method of ascertaining the compensation, I am just afraid that you are going to be involved in very complicated and very important questions of service and jurisdiction of the court.

THE CHAIRMAN: Let me ask you a question to go back to a point you made a while ago. The original draft called for the naming of all the parties known, and you raised a very good point: "We want to get immediate possession. We want

to institute the proceeding. We haven't had time to find out all the owners, and we want to be able to start the proceeding before we know everybody, and get the order for taking." We tried to patch that up here by allowing you to name those you knew and then to add the others afterward; and you raise the point now that that has a string on it, that you can't do anything with respect to that property. Suppose that were altered simply to provide that you couldn't proceed to the determination of the compensation as to that party until you found out who the owner was and had served him, would that meet your difficulty?

MR. WILLIAMS: That would be a great improvement, of course, but that still would leave our fundamental objection to that type of language and that type of restriction in the complaint. That again brings up the question of the propriety of this Committee's attempting by rule to determine a substantive question of the indispensability of parties.

I would like also to point out to the Committee that more and more we are relying upon certificates of title issued by title companies, rather than going through the lengthy process of abstracts. We have our requirements issued, our rules for preparation of abstracts, which we have broadcast throughout the country to all abstracters bidding on government contracts. The bids provide that they must be furnished in accordance with the rules established by the Department of

Justice. We have varying requirements, depending upon the type of land involved, depending on whether it is an easement or a permanent fee simple title taken.

Under this rule there is no such discretion allowed. You require the names of all persons having interest in the property to be named as defendants in the action, even though we are acquiring by condemnation the right, for example, to use for a temporary period a right-of-way for ingress and egress across a man's land to a construction area where work has to progress for the construction of a dam, or where we are acquiring the right to lay a temporary pipeline, where we can't reach an agreement with the owner and must condemn the property. Right now, for the Veterans Administration and other agencies we are condemning a great deal of property, including office space the temporary use of which is needed in this emergency, but we don't desire to acquire the whole building.

THE CHAIRMAN: Suppose you didn't know who owned the property that you wanted temporary right in, but the rule is drawn so that you start your suit without knowing him and get your order of possession and use, do you claim that you ought to be allowed to go on and fix an award for whatever you are taking there without finding out who the owner is and giving him notice?

MR. WILLIAMS: Oh, no. Certainly we should give the

owner notice. My objection is the requirement that in the cases I mentioned, of the simple and inexpensive easement which may cost us $10 or $15 a year, we should be forced to spend $150 for an abstract of title going back to the source of that title to ascertain the names of all the persons in interest. Certainly we would ascertain the owner of that property by a search of the record. We may go back long enough to cover the period of the statute of limitations. We search the tax records. We find out who the owner is, just the same as if we were acquiring this property by direct purchase.

THE CHAIRMAN: What is there about the rule that prevents your doing that? You do make some search of the records to find out who has an interest, don't you?

MR. WILLIAMS: Oh, yes, we do, but under this rule it would require that .

THE CHAIRMAN: Where is that?

MR. WILLIAMS: That is the new language appearing on page 4, commencing with line 54, after the comma, "but the comdemnor".

THE CHAIRMAN: How would you want that worded? It says that sometime or other before you award compensation or pay it, you have to find and name all persons appearing of record or known to the condemnor and serve them. What is the exact objection that you have to that? How would you want it to read?

MR. WILLIAMS: I don't feel that it is necessary at all.

THE CHAIRMAN: To do what?

MR. WILLIAMS: To have such a provision in there, to have such an affirmative requirement. We do it as a matter of course. We do it at our peril. If we miss a person, we still have to pay. It is our business properly to conduct these proceedings.

THE CHAIRMAN: There was a tremendous opposition to the original rule because it was so drawn as to raise the inference--at least to leave it ambiguous as to whether you had to look at any records at all. You had every title company in the country on your neck about that.

JUDGE CLARK: Mr. Williams, may I interject here? That language was taken, as it happens, from the Minnesota statute, and it is in other statutes. By the way, that is pointed out in a footnote. This very expression, "persons known to the condemnor", appears in them. I suppose you are now following that in Minnesota. You would have to, wouldn't you?

MR. WILLIAMS: Not necessarily. We think that the matter of the selection of parties to be named as defendants in a condemnation case is a question of substance, and not a procedural matter to which we must comply.

JUDGE CLARK: Is that so?

THE CHAIRMAN: You see, you have a new in rem

proceeding.

MR. WILLIAMS: Yes.

THE CHAIRMAN: You go take the property and get title to it, and if a fellow has a recorded interest in the property, the point we raise is that he ought to be personally notified so he can come in and participate. You can't get his property by an in rem decree without giving him a chance to be heard. How are you going to find out who the fellow is that ought to be given a reasonable hearing in court personally, unless you are required, if a man has a deed on record, to look at it and name him? It is not clear to me just how you want to handle it.

MR. WILLIAMS: We would handle it just exactly in the same way as if you, as an attorney, were foreclosing a mortgage.

THE CHAIRMAN: I would examine the title.

MR. WILLIAMS: Exactly. That is what we do.

THE CHAIRMAN: Then, why do you object to a provision that you shall do what you do anyway?

MR. WILLIAMS: Just because there is no more justification for that than there is justification in a rule here that would require such an action to be taken on the part of somebody foreclosing a mortgage, for example, if such a thing were possible, or any other lien in a federal court. It is a matter that has to be left to the discretion of the pleader, in my opinion.

THE CHAIRMAN: You don't get a good title on the

mortgage, but under an in rem condemnation proceeding the rule is drawn so that you can get a good title without naming the record owner.

MR. WILLIAMS: We might get a good title, but there is still liability to pay compensation under the Constitution of the United States for the property taken.

THE CHAIRMAN: I see. You mean if you miss an owner, you still get the title but he could bring an independent suit in the Court of Claims.

MR. WILLIAMS: That is exactly the position.

THE CHAIRMAN: He doesn't want that. He wants a chance to be heard.

MR. WILLIAMS: We don't want that. We do it at our peril. I want to say that throughout this program, with no restrictive language or control on our action, we have not been flooded with these suits. Leaving it out entirely would not change the existing law.

THE CHAIRMAN: The fact is that if we say you must name the owner of the property of record, and you go on with your suit and make bona fide efforts to do that and you fail to name him, your theory is that you don't get title.

MR. WILLIAMS: No.

THE CHAIRMAN: Or do you think that you would get title and be in the position you always are if you don't name the right man? It wouldn't defeat your title, would it, if

you failed to name the owner of record?

MR. WILLIAMS: It would not defeat our title, but we still would be obligated to pay that man compensation for the property taken from him. It is our business as lawyers. If we can't conduct a condemnation proceeding so that we can get a clear title, we certainly can't justify our existence. Of course, the Attorney General has to approve that title and certify that all parties have been made defendants, so that the court has jurisdiction over them. That is why we are so careful in our instructions in these things. There are certain cases where we must be given some leeway. We must not be required to make the same search for wild $10-an-acre land that we would make if we were taking a site for an important public building in the heart of a metropolitan area.

The point that I want to make is that when we use certificates of title by title companies, I don't know what kind of search they make. I don't know whether they are giving us everybody appearing of record, but under this rule--

THE CHAIRMAN [Interposing]: Do you mean to say that under this rule you are forbidden to take a certificate of title?

MR. WILLIAMS: No.

THE CHAIRMAN: That you have to have an abstract and form your own opinion about it?

MR. WILLIAMS: No, I don't mean that. I mean that

in order to proceed with this action or to file a good complaint, somebody must show the court that all persons appearing of record are named as defendants. You have all seen certificates of title, I am sure. They are insurance policies. Those title companies don't certify that they have made a complete search of that record. They can't render legal opinions. In some places it is contrary to state statute, and in other places it is contrary to all the rules of the bar association to render opinions. They can't give us opinions on questions of law.

THE CHAIRMAN: Won't the court receive the certificate of title as for present interest and as proof that you have the owner of record?

MR. WILLIAMS: Some do. Some courts, in distributing the money, require the attorney making the search to appear and testify as to what he actually did in preparing the certificate of title. I think they do; I think they should.

THE CHAIRMAN: It is a very simple thing to put in the rule that any certificate of title by an authorized title or title insurance company may be accepted by the court as prima facie evidence of ownership.

MR. WILLIAMS: Of course, if this Committee feels that such a provision is a proper subject for a rule, that is not my concern. Personally, I don't feel that it is. After all, a rule such as this should not be controlling upon the

court as to what he thinks is proper evidence in order to support him in paying out money, for example. You might have title companies that would not be acceptable to the court.

THE CHAIRMAN: Of course, there are scores of state statutes that require that generally in condemnation cases the owners of record shall be named, and there was an overwhelming roar about the original draft, in which they accused us of abolishing any necessity of looking at the records. So, I have a fear that we may have tremendous opposition to a rule that doesn't provide in a reasonable way that the owners of record shall be named. Just how you would prove the owners of record when you take certificate of title or abstract, or whatnot, is a very simple thing, I should think. However, I don't mean to argue with you. I was just drawing out the difficulties of getting a rule.

Many of the bar associations, the American Bar and all the rest of them, roasted the original draft because we didn't say anything about owners of record. Every title company in the country was roaring about it. I don't think they were fair, but they interpreted the rule that way. It was an ambiguous rule. The Committee really didn't intend to do that, but they have made such a stew about it and they are so committed on it, that it seems to me that there would be great difficulty in getting a rule passed that would still leave that situation.

However, go on with your other ideas.

MR. DODGE: I would like to ask a question, Mr. Chairman. How is the situation alleviated from your point of view by the ordinary state statute which you have to follow?

MR. WILLIAMS: We feel that under the Act of August 1, 1888, which requires conformity to the practice, pleadings, modes of procedure--

MR. DODGE [Interposing]: In what way is the mode of procedure more easy on you?

MR. WILLIAMS: Because we feel that the selection of parties, the naming of defendants, is a matter that the pleader determines as a matter of law in his discretion, that that is not a matter of practice or procedure, but that that is a substantive matter. We feel that, as lawyer, we conduct these proceedings and name the parties who are entitled to compensation. As a matter of fact, we lean over backward. We probably name a great many parties who have no interest in the property at all. All during this war and otherwise up to the present time, we have had no real affirmative requirement that you should name owners of record, but nobody has complained about our failure to do it. We have to get a good title in the United States, and certainly we cannot be paying for property twice.

MR. DODGE: The statutory language ordinarily in substance requires the making of owners of record parties,

doesn't it?

MR. WILLIAMS: I believe that most state statutes do have some such language as that. There are some, I believe, that are silent on the subject. I don't believe that Arkansas, for example, has any provision at all, and I believe there are some other states.

MR. DODGE: It was not at all clear to me in what respect this language goes beyond the language of the ordinary statute.

MR. WILLIAMS: The principal objection is that we feel that it is a matter of substance, that it takes away all discretion from the pleader. It doesn't permit us to name the owner and the mortgagee, for example, when we want to take just a temporary easement across the corner of his farm. It requires us to make a complete search to the source of title and ascertain all the owners of record, and "owners of record" is an ambiguous, uncertain term. Where you find a defect in the chain of title, where there might be a question raised as to the validity of a deed or as to the transfer through some administration proceedings, you might say that all parties affected by that invalidity are owners of record. It is that term that bothers us. We do not feel that, under all the circumstances, we should be forced to make that kind of search and to implead all those parties as defendants.

MR. DODGE: I am interested to know what the state

statutory language is that relieves you from that obligation.

MR. WILLIAMS: I don't know that there is any state statutory language that relieves us from it. We do it at our peril.

THE CHAIRMAN: Where there is such a statute as this in a state, what do you do when you are governed by the statute? What do you do when there is a state statute, as there is in many states, which says that you name the owners of record or other parties, even if they are not owners of record, known to you to have an interest? What do you do in a case like that?

MR. WILLIAMS: As I indicated, we consider that to be a matter of substance.

THE CHAIRMAN: I know, but what do you do in the case? Do you comply with the statute or don't you?

MR. WILLIAMS: It may be that we follow it actually, but if we follow it, we don't do it because of the statute. We do it because it is the proper thing to do.

THE CHAIRMAN: Do you get by if you don't?

MR. WILLIAMS: Of course we do.

THE CHAIRMAN: Why won't you, then, under this statute?

MR. WILLIAMS: Because you have a specific rule of court here in the federal court where the proceeding is filed with this affirmative requirement.

THE CHAIRMAN: A state statute in the conformity system is an affirmative requirement, too.

MR. WILLIAMS: We don't think so. We think that under the Act of August 1, 1888, our conformity statute--

THE CHAIRMAN [Interposing]: You don't think the conformity statute applies to the question that parties shall be brought into the case.

MR. WILLIAMS: Yes.

THE CHAIRMAN: That is your theory, is it?

MR. WILLIAMS: We think that under that Act we comply with the procedural provisions of the state statutes; that is, the method of service and--

THE CHAIRMAN [Interposing]: I am afraid our federal rules are all void. The Supreme Court of the United States hasn't any power to make rules of procedure on substantive rights, and yet about a third of these rules are devoted to substantive matters. We regulate that.

MR. WILLIAMS: Mr. Chambers just reminded me that there is nothing in these rules, so far as we can see, that makes any requirement for the naming of parties in any kind of action that finds its way into federal court. I don't know of any.

THE CHAIRMAN: These are all in personam actions, and not in rem. There is that difference, I will admit.

MR. WILLIAMS: If this is an in rem action, certainly

there is no place in here for requiring personal service on these. If it is not a personal action, there is all the more reason that it should not be in here.

THE CHAIRMAN: Isn't a rule that prescribes who shall be served a procedural matter? Our rules certainly do that.

MR. WILLIAMS: That is procedural, but of course that comes into play only on the question of serving the parties who are named as defendants in the complaint, and that question is left to the pleader.

MR. LEMANN: Have you an alternative language to suggest, Mr. Williams, as a substitute?

MR. WILLIAMS: No. I just suggest that we leave the complaint under the present Rule 8(a).

THE CHAIRMAN: And say nothing about who shall be named and who shall be served?

MR. WILLIAMS: Yes, sir. You serve the parties that are named as defendants, of course. You serve them in accordance with these rules.

THE CHAIRMAN: I interrupted you and called you back to that. Maybe you had better go on with your discussion.

JUDGE CLARK: Mr. Williams, could I ask a question now? On the matter of trial and the methods, and so on, those matters of notice, and so forth, I suppose have got to be regularized in some way. What do you do when you are following a state procedure? Suppose the state procedure says

that the commissioners are to give notice. Don't you have the commissioner give notice?

MR. WILLIAMS: Oh, yes.

JUDGE CLARK: I mean, suppose in the section on trial we were to take out the word "method", we would have to have, either by implication or by express statement, something to cover it.

MR. WILLIAMS: Yes.

THE CHAIRMAN: Something to take the place of the state rule.

MR. WILLIAMS: Yes.

JUDGE CLARK: Either to take the place of the state rule or to adopt the state rule.

MR. WILLIAMS: Then, of course, if you adopt the state rule for service, that means we would have to abandon the other provisions in this rule regarding service of process and publication, service by registered mail.

JUDGE CLARK: It wasn't the intent here to go back on the questions of service, and so on. This was more to make sure that we covered not merely a jury trial when that was the state practice, but also where it was a three-man commission, and so forth.

THE CHAIRMAN: In other words, the word "method" as used in this rule was on the assumption that a tribunal provided by state law was the thing that fixed the compensation,

and it might not be a jury. It might be some other kind of tribunal. In the operation of fixing it, they would have to take certain steps. That word "method" was stuck in here, I understand, to make it clear that if there were a commission under state law that went into the details of their award proceedings, they should follow the method prescribed by state law in such details as you refer to. There is a question, of course.

MR. WILLIAMS: There has to be some provision made if you are going to follow that system of having trial by commissioners in the first instance and then an appeal or a trial de novo by a court and jury. There has to be some way of getting it from the one to the other.

THE CHAIRMAN: If you had the thing that you want, a provision that the federal statute would control about the tribunals and that in the absence of a statute, there be a jury trial, that is already taken care of by federal rules. The details of the jury are taken care of, and we wouldn't have to use "method" or anything else.

MR. WILLIAMS: Yes, sir. Of course, the proposal says that trial shall be by court unless the jury is demanded by the party. We tried to adopt, in effect, as much as possible exactly the provisions you now have on jury trial. It has been our whole objective throughout the consideration of these rules to adapt your present rules to our proceedings.

We see very little difference, actually. We think they should be under the new rules. That is what we have been striving for for years. There are certain things, thought, on service, the question of service of copy of the complaint, for example, and one or two other things, in which we think there should be a variance. The jury trial is just exactly what we are trying to do, to get the uniformity that you now have under the federal procedure.

Those are the principal things that I wanted to discuss. There is one other provision as to answer which I think you should consider. The provision on answer, as redrafted, provides that "All objections and defenses not so asserted are waived, but the right to present evidence of value and to share in the distribution of the award shall not be waived by any failure to answer." Of course, we agree entirely. It was our original proposal that the right to share in the distribution of the award should never be waived by anybody, whether he appears or not. Assuming that nobody appears at the proceeding, we have to ascertain and pay the court just compensation for the taking of that property, and it shall be held by the court for the people entitled to it.

However, the language about the right to present evidence of value and that the right to share in the award shall not be waived raises the question in my mind whether or not we could ever really say we were through with a certain

proceeding. Where you name all the parties in a chain of title that may appear of record, most of them may not answer, and there may be only two or three answers filed, perhaps only one; but anybody named as a defendant who fails to answer can come in at any time in the future and be heard on the question of value of the property. There is no limitation here.

We don't value each individual interest. We value the property we have taken. How soon are we ever going to be through with a proceeding here?

THE CHAIRMAN: Do you interpret this rule to mean that after the case is closed, a man can come in and offer proof? Certainly that wasn't our intention. I think what we meant was that when the court took up the matter of proof as to value and fixed the time for a hearing of that evidence, a fellow could come in on that point at that time and place along with the other people who had been named and put in evidence. It certainly was not intended to mean that he could do it at any later date. If the rule reads that way, it would be easy to correct.

MR. WILLIAMS: That is the way we read it, of course. We have no objection to it at all the way you intend it. That is perfectly satisfactory.

THE CHAIRMAN: That is certainly what I would assume we intended. I don't know.

MR. WILLIAMS: We want to try it once, but we don't

want the thing reopened from time to time over a period of years.

THE CHAIRMAN: It ought to be plain in the rules, if it isn't, that the right of a non-answering defendant to put in evidence is limited to the time when the case is being tried by the court, when the others are putting in their proof. If he doesn't, he is out.

MR. WILLIAMS: Yes. I think that is all, Mr. Chairman.

THE CHAIRMAN: We haven't had a written report from you about this later draft, have we?

MR. WILLIAMS: No.

THE CHAIRMAN: Would it be too much to ask you or your staff to take up this last draft and come back as soon as you possibly can with a written statement, section by section, making your points about them, so that our further work on the rule could be assisted that way?

MR. WILLIAMS: Yes, I would be glad to.

THE CHAIRMAN: It would be helpful to us.

MR. WILLIAMS: Incidentally, I don't know that I indi- indicated first what the subcommittee had done, but in December Major Tolman gave us the distinct impression that the subcommittee had agreed to limit conformity to those actions in which the exercise of the right of eminent domain of a state was involved and to strike out of the redraft the provision for conformity to state procedural statutes in all cases.

I don't know whether or not your subcommittee has gone that far, but if it has and if the Committee is going to adopt that view, of course that takes care of our principal objection.

JUDGE CLARK: I am afraid that went a little beyond what we had in mind. The Major corresponded with me afterward, and I said that I thought we couldn't be considered as having settled that point.

THE CHAIRMAN: You are referring to the clause about condemnations other than by the United States that get in by diversity. Is that it?

JUDGE CLARK: No. The Major has been very active in believing, with Mr. Williams, that the provision of Rule 8(a) on the complaint, which is the ordinary provision on the complaint, should govern here and that there should not be special provisions. Of course, I am willing to say that it is a very logical thing. I think you are right that we have not attempted in the rule to define what indispensable parties are. There is no doubt about that. However, I wrote the Major that I thought he was going a little beyond what we could do, and what I have in mind is of course what the Chairman has said. I take it that this provision as to notice was perhaps the thing about which the greatest objection centered.

THE CHAIRMAN: You mean naming defendants of record and serving them.

JUDGE CLARK: Yes. In view of that, the Major has

assumed, I think, a little more than I was ready to go and I think probably than Judge Donworth was ready to go, that we could in any worth-while way attempt to suggest a rule which perhaps initially we might have adopted. I raise that here again as a practical matter. I should think that if we were starting anew, there would be certainly a great deal to be said for what you have in mind, but as it stands, there has been the most extensive objection, and positions have been taken by people all over the country. Are we able to disregard that?

On the other hand, what we have here is of course buttressed by the fact that it represents, I think fairly generally, state statutes. Of course, that is fairly easy to support. Suppose objections now come in. You referred to the Minnesota statute, which does just this. If you are in fact doing substantially the same thing, may it not be desirable just as a matter of getting ahead, to be able to say so in a rule and therefore get the benefit of that much support for the rule as we go to the country, so to speak? I think it is more a problem of how we shall proceed from this point in view of the history of our previous attempt.

MR. WILLIAMS: I suggest that the way to eliminate this controversial issue and the complaint about it is to be silent on it entirely.

THE CHAIRMAN: We were silent before, and you heard what happened. The atomic bomb wasn't in it.

MR. WILLIAMS: It was a misconstruction of the words that were used there and the fear that somebody was going to take advantage of those words.

THE CHAIRMAN: It was the construction that they placed on the rule that you didn't have to pay any attention to the recorded interests or make any effort to find out who had recorded interests. That was where the fire centered.

JUDGE DONWORTH: Mr. Williams, have you before you the latest draft of our proposed rule?

MR. WILLIAMS: Yes, sir, I received it yesterday through Mr. Washington from Judge Clark.

JUDGE DONWORTH: On page 17, if your draft is the same as mine, in the middle of the page it says "TRIAL."

MR. WILLIAMS: Yes, sir.

JUDGE DONWORTH: Down at the bottom, beginning with line 230, is new language which hasn't been before the Committee before. It is now proposed to be a part of the rule. I will read it. It is not very long.

"The tribunal or tribunals before which and the methods by which the issues and compensation are determined and awarded shall be as fixed by Act of Congress, where an Act of Congress prescribes them, and in the absence of such a statute shall conform, as near as may be, to that prescribed by the law of the state where the property sought to be condemned is situated."

Isn't that exactly what you are doing at the present time?

MR. WILLIAMS: Yes, sir.

JUDGE DONWORTH: So, this would not subject you to any inconvenience that you are not subject to at the present time so far as this particular point is concerned.

MR. WILLIAMS: Except for the point we previously discussed. If we serve in accordance with the provisions of this rule, we will be faced again with the question of additional service and methods by which you proceed from the commissioners to the jury, for example, on new trials, all in accordance with the state statutes in order to follow out that procedure. In other words, I don't want a duplication of service and publication once we have done it under this rule.

JUDGE DONWORTH: I don't think this contemplates any such difficulty as that.

MR. WILLIAMS: Yes, I understand you didn't contemplate it, but at the same time I am just afraid there will be some confusion following from the use of that.

THE CHAIRMAN: That may be so. When we were talking about the methods of the tribunal, we weren't referring to the service that had to be made when the suit was instituted, but to the notice of the hearing by the tribunal and details of that kind.

MR. WILLIAMS: Incidentally, Mr. Chairman, may I say

that the reason we haven't commented up to date on this draft of the rule is that we were told by Major Tolman that the sub-committee were working on a re-draft of this rule which, when completed, would be submitted to us for comment.

THE CHAIRMAN: There is a re-draft of this very provision that we have before us.

MR. WILLIAMS: Is this the re-draft that Major Tolman had in mind?

THE CHAIRMAN: I don't know that Major Tolman saw it. He is ill. Didn't you send that over to the Department yesterday?

JUDGE CLARK: That is this one here. That is the one you have been reading, Mr. Williams. I think it ought to be said that Mr. Williams is quite correct that the Major has said right along that he was going to submit a revision to the Department. There isn't any doubt and it ought to be quite clear that the Major has been very strenuous (I think perhaps I am understating it) against the two provisions stated in this draft. That is, he has been, as I take it, substantially in accord with Mr. Williams' view. I don't know of any difference in it.

THE CHAIRMAN: You mean he has taken the position that instead of conformity to state statute where there is no federal statute, he wants the tribunal to be a jury?

JUDGE CLARK: That is it. That is one.

THE CHAIRMAN: There is no question about that.

JUDGE CLARK: The other is that he wants the provision on the complaint to be simply the complaint under Rule 8(a). He has corresponded with me at great length about it and has wanted to submit, on behalf of the subcommittee, a draft which would embody those two features. I said right along that I thought that would be going really ahead of our constituency, so to speak. But from Mr. Williams' standpoint, he is quite justified in what he says now, that he wasn't called upon to comment on it, that we never did resolve that point. That is quite true. It hasn't been resolved to this day as far as the subcommittee is concerned. In fact, the Major has written separately to me that he thought much of the value of the rule would be destroyed. If the Major were here, there is no doubt that he would argue very strenuously on both those points.

MR. WILLIAMS: Of course, those were the two points really in controversy so far as we are concerned. If those are eliminated, we have a rule and, I think, a good one. I think it would be a credit to the Committee, and I think it would be generally accepted by the bar. I think it would give us a nice uniform procedure. It would be a simplified procedure, just about what we want.

JUDGE CLARK: I am frank to say as a member of the subcommittee, if we were starting anew with this, I would certainly agree, but what are we going to do in the situation

we are now in?

THE CHAIRMAN: That may apply to the question of looking at the records to see who has an interest in the property, but I don't think the bar generally has taken any particular position about whether, if there is no federal statute, there should be a jury trial or there should be a trial by the tribunal which the state law provides. I think the bar generally has not been stirred up about that at all. Except for the attitude the Congress may have taken about it or something of that kind, it has not yet developed any opposition.

MR. WILLIAMS: I don't think you will have trouble with Congress on the jury trial provision. As you point out, the bench and the bar have made no objection to that, really. The real contention has been on the other thing.

THE CHAIRMAN: There were details, of course, but the row mainly turned on the question, the way the thing stood, first that there wasn't any requirement that anybody who had a recorded interest be served or given any notice at all; there was another provision about service by publication. There was no requirement that any effort be made to locate a man, to find his residence or serve him, or anything. Not even an affidavit was required of the plaintiff's lawyer that he was unable to locate a man. He could publish at will, without any showing at all that the particular defendant could

not be reached personally. He might even be a resident of the state where the land was located and the suit was brought.

That created a row. They thought that most state statutes that deal with publication require that before a summons can be published so as to be binding on a defendant, there must be a prima facie showing that the address is unknown or cannot be ascertained by reasonable diligence. Some state statutes go further than that and require not only an affidavit, but an order from the court which is in the nature of a finding of fact that effort has been made and he can't be located.

I have always thought that in the protection of the validity of your condemnation decree, it would be wise in a rule like this to say you could not publish a summons unless you had made a showing and got a finding like that, an order for publication or something that was a determination of the fact that you didn't know the fellow, because if there is no action by the court at all on that and if plaintiff's lawyer in a condemnation case can publish at will without any showing that he doesn't know the man's residence, that fellow can come in years afterward and assail the validity of the decree; whereas, if he made a showing and got an order, its determination would be the basis and the man could not come in afterward. I think the decrees would be fortified if you had some requirement. I think this new draft probably puts in something of that kind. There has to be some kind of showing made

that you can't find him or don't know his residence. There was a howl about that going on with the plaintiff's lawyer deciding that for himself without any presentation of facts.

Is there anything else?

MR. WILLIAMS: No, except that I would like just to emphasize the point that you made there. Were there not such a showing, any defendant could come in years later and open up the proceedings and be heard.

THE CHAIRMAN: Yes.

MR. WILLIAMS: That is exactly what I mean by saying that we take on this risk at our peril. We don't want that to happen. That is why you can be perfectly assured that we are going to name all the parties that have a compensable interest in this property.

THE CHAIRMAN: The parties don't feel that they are satisfied with being ignored and having to hire a lawyer sometime afterwards, after the land has gone. Such a defendant would not be able to get into the court in his own jurisdiction and have his property valued, and he would have to come down to the Court of Claims and institute an independent suit on his constitutional right. He is not content to be left in that position. He wants a chance to come into the court in his own jurisdiction where the land is situated and get his compensation without having to go to Washington for it.

MR. WILLIAMS: That is exactly what we want him to

do, too. We don't want two or three lawsuits proceeding out of one condemnation proceeding. That is our whole objective down here.

THE CHAIRMAN: We are very much obliged to you for coming down and, if you will take the trouble, look over this draft and give us in written form any comments you want to make or suggestions for changing of any provision, including the things you have mentioned this morning.

JUDGE CLARK: Mr. Williams, when you do that, on page 21, dealing with compliance with state procedure, in the note you will see a query is raised as to the extent of the statute and whether it may not include two different things--whether it may not be condemnation in the federal court by the United States under state constitution or statute, which I take it sometimes happens by permission, that the state constitution gives permission to the United States to act, and so on, or whether it may not be condemnation in a federal court by state agencies. We raised a question there as to whether perhaps that ought to be divided. I am not asking you to answer it now. Perhaps you have noted that.

MR. WILLIAMS: Yes, sir.

JUDGE CLARK: Will you comment on that?

MR. WILLIAMS: Yes, sir.

THE CHAIRMAN: Thank you.

MR. WILLIAMS: Thank you very much. It is a pleasure

to be here, and I want especially to compliment the Committee on the fine work you are doing on these rules.

JUDGE DOBIE: Thank you.

[At this point the representatives of the Department of Justice left the room.]

THE CHAIRMAN: Are we going to take up now the question of the status of this rule? I think we should, unless the Committee has another idea.

JUDGE DONWORTH: As to what we are going to do about it, you mean.

THE CHAIRMAN: I have the idea that maybe we ought to consider at least this provision about whether we adopt conformity to state tribunals or substitute a jury trial right through where there is no federal statute. We might also consider secondly the question of whether the state practice in toto is to apply to condemnations that reach the federal courts on diversity ground. After what the Assistant Attorney General has said, I would be inclined possibly to take this provision in sending out a revision to the bar: "The tribunal before which and the method by which compensation is determined shall be as fixed by Act of Congres, where an Act of Congress prescribes them, and in the absence of such a statute shall conform, as near as may be, to that prescribed by the law of the state where the property sought to be condemned is situated." That would be stated as one alternative, and then

put another one in that reads, "The tribunal by which compensation is determined shall be as fixed by Act of Congress, where an Act of Congress covers the ground, and in the absence of a federal statute, shall be by jury trial if the parties demand it, otherwise by the court." Put the two things out and see what reaction we get to it.

MR. DODGE: Would you leave in the words, "and the methods by which"?

THE CHAIRMAN: That is a detail. I think that is open to all kinds of misconstruction.

DEAN MORGAN: So do I.

THE CHAIRMAN: I am talking about the general idea. I must say that personally I have been against this idea of sticking in a jury trial where there is no federal statute, but he is so confident that we won't have any trouble with Congress with it, maybe I have been wrong about it and it would be better to let the federal tribunal stand where fixed by law and then provide generally for a flat jury trial. You don't have to use the word "methods" then because the method is all fixed by our rule.

The other thing that I think is of importance is this question of providing for conformity to state practice in diversity cases. The rest of it is a question of minor detail about the rule. There is some point he has made that the thing ought to be trimmed up a little bit. We want to be

clear that if a man doesn't answer and wants to put in evidence, he certainly has to do it when the hearing takes place as fixed by the court, and not a year or two later. That is obvious.

He also made the point that if he didn't know who all the defendants were and if he couldn't start the proceeding until he had searched the record, there would be great delay and he couldn't get immediate possession. So, we suggested in our meeting that that be fixed up so that he could name those he knew at the start and then bring the others in later, but he pointed out that the string that is tied to that defeats its purpose, because until you name them you can't do anything and you can't get an order of possession. The rule obviously ought to be patched up there to say that the thing you can't do until you have sought him out and served him is to decide on his compensation, but you certainly ought to be able to get a preliminary order for immediate possession and occupation and all that whether you have searched the records or not.

There are some things like that that are needed, and there may be other things.

I won't be able to stay and go through the details of this rule myself, if you are going to sit this afternoon and go through it section by section. I don't know what your pleasure is. Maybe we can take a vote on the question, for instance, of putting up an alternative subidivision (1), as I suggest.

MR. DODGE: Do you think there would be much objection, outside of these government agencies, to the prescribing of the jury trial? There are only a few states where they don't have jury trial either in the first or second instance, and I have difficulty in believing that the bar at large would object to the requirement of a jury trial.

THE CHAIRMAN: I don't think the bar has shown any objection. The thing that was the troublous thing was what Congress made such a row about. There may be a good deal in what he says, that the fellows in Congress got off on the wrong foot and misunderstood it. Personally, independently of what other people think about it and the difficulties of getting it through, I would favor a provision that said that the tribunals and their powers shall be those fixed by federal statute, and if there be no federal statute, then jury trial if you demand a jury trial; if you don't, you will get a trial by the court. I don't see any objection to that at all.

I am perfectly sold on the idea, after all my dealings with the TVA, that we have just no ground at all to attack their system and to try to force a jury trial on them. I believe they could beat us in Congress with the kind of showing that they made before me on that. I don't see any harm in leaving the tribunal as fixed by federal statute. They are different statutes, and they are drawn to fit the exigencies and the nature of the particular operation that the

department is conducting. If it works well, why not leave it. Why are we so fussy about uniformity as to that? If we get the procedure all uniform and simple, we have done a good job.

MR. LEMANN: TVA and the District of Columbia are the only ones?

THE CHAIRMAN: The only ones I have in mind particularly.

MR. LEMANN: Would there be objection to specially excepting those two and leaving them to handle it according to their present system in every respect?

THE CHAIRMAN: It is just a choice of whether you say a federal statute should control, without naming them, or whether you name them.

MR. LEMANN: Except for the fact that if you use the formula of federal statute, as I understand it, you have to put in words showing that you are going to permit those statutes to be effective only as to the tribunal and that the procedure otherwise will be governed here. That may cause a little difficulty in making it plain.

THE CHAIRMAN: But you would make the general procedure apply to the TVA, wouldn't you?

MR. LEMANN: That is the point I was raising.

THE CHAIRMAN: Oh, yes.

MR. LEMANN: Why not let the TVA go as it is now. The Department of Justice doesn't care because the TVA handles

that itself and the District of Columbia handles that itself, as I understand it. If you just except them by name, as I believe was proposed at one time, then you don't have to find a formula that would make it plain that your methods were going to be governed here.

THE CHAIRMAN: That is all right from one point of view, except that if you except a particular agency by name in there, it may cause some other agency to bob up and want special exception or exemption. The point is that the lawyers for the owners of property around the country are then faced with the requirement that they know two procedures, one in case their client's property has been condemned by the TVA and another if it is being condemned by the War Department. There are two different procedures in a federal court which the lawyers will have to know.

MR. LEMANN: You would have that anyhow.

THE CHAIRMAN: No, no. You would have a uniform system, except whether it is a jury or a court. That is the whole difficulty about that.

MR. LEMANN: What is the TVA procedure apart from the tribunal?

THE CHAIRMAN: I haven't studied that.

JUDGE DOBIE: Commissioners.

MR. LEMANN: I mean apart from the tribunal. The point we are discussing here is whether we will preserve the

tribunal of TVA but make them proceed according to our new procedure.

THE CHAIRMAN: It is not this rule, I can tell you that. It is not that. I have not studied this enough to know whether Congress goes into all the rules or makes it a local law in other respects or whatnot, but certainly it would be different from this. The TVA people tell me that they would like this system. They think it is a simpler and better system of procedure than they have, except that they want to hang on to their tribunal. They have the powers. So, we would be hurting their feelings if we didn't give them the benefit of this new improved system.

However, instead of making a decision now as to whether we will take this thing or substitute general provisions for jury trial in case there is no federal statute, why should we not put them both up and see what reaction we get? Of course, we might stir up opposition to our jury trial by offering somebody an alternative. If I were to vote now as to what to do, I would vote for altering this provision in (1) making the procedure that we have prescribed uniform in all government condemnation cases, with the single exception that where there is a federal statute prescribing a special tribunal or a tribunal with certain powers, that tribunal with those powers shall do the act of fixing the value, and it is a jury trial, if one is demanded, or a trial by a judge.

The only other question in the case that bothers me very much is this one of leaving the state practice going as to condemnations under state law. That is bowing to the old stand that so many people took who fought this statute under which we are acting. They just prefer the state practice.

JUDGE CLARK: On that, Mr. Mitchell, back in 1937 when we originally did this, we had a little different formula. We said then:

"Compliance with State Procedure. If the action involves the taking of property for public use under the right of eminent domain of a state, recourse shall be had to the procedural rules of that state to the extent necessary to preserve to the parties substantive rights under the constitution of that state and under the statutes thereof granting the right of condemnation. In any such case the procedure provided for in this rule shall be modified accordingly."

It is an attempt to do something between.

THE CHAIRMAN: That was on the theory that if you had a state statute that granted a right to condemn, the right had hitched to it all the procedural provisions, that you could not condemn except in the manner provided by the state law because that was an incident to the grant of the power. That never appealed to me very much.

JUDGE DONWORTH: That is largely true now. You cannot distinguish between substantive right and procedure

under the constitution of the state of Washington, I believe.

There is another point that I think should be covered, which I called attention to in a letter about a month ago to Judge Clark, to the Chairman, and to Major Tolman. I won't take up much time with it. It is this:

Several years ago--I should guess about five or six--Congress enacted a statute to the effect that any time after starting a proceeding, the United States may take possession, leaving the compensation to be determined in that proceeding, and so forth. We don't undertake to take that right away, and, of course, we shouldn't. We recognize in this rule as now drawn that there is such a statute.

That statute goes on to say that when a fund gets into the court, the court shall make a distribution of it in accordance with justice and equity. The language is not quite so broad as I have stated. The language of the act is something like this: As between lien claimants, and so forth, the court shall make such disposition as justice and equity may require. Judge Schwellenbach in two cases held that he would dispose of the fund in court according to equity and justice, and that again implied the requirement of this act.

I think we should make a provision, general in terms, that wherever there is a fund in court arising from condemnation, the court shall dispose of that fund in accordance with equity and justice. Then that gives the court the

power to inquire into the division as between lienors, sub-tenants, and all that. Often it is a complicated matter, and Judge Schwellenbach, as I said, cut the Gordian knot by saying that he was going to decide the whole question on equity and justice. It seems to me we might well incorporate that.

THE CHAIRMAN: Is that a substantive matter or a procedural matter?

DEAN MORGAN: Substantive.

THE CHAIRMAN: Are we merely prescribing the procedure for a division, or are we establishing a rule of division which means substantive right?

JUDGE DONWORTH: It is not substantive right. The substantive right, of course, depends on who owns and who has the rights, and so forth. Major Tolman was much disturbed about the fact that money may now get into court, and it would be hard to get out. Yet, he made no provision that would touch the point that I have discussed. If we had time, I would like to formulate a clause that any fund that gets into court will be distributed under the direction of the court in accordance with equity and justice.

MR. LEMANN: Or to the parties entitled thereto.

JUDGE DONWORTH: That is implied, of course.

THE CHAIRMAN: I will have to leave. I don't know how many of you will remain to deal with this thing.

JUDGE DOBIE: Is it your idea that we continue this

meeting after you go, or are we going to finish right now?

THE CHAIRMAN: I don't see any reason that you should not continue the rest of the day and do whatever you like about it and accomplish what you can with 71A, but I can't stay, and I suggest that I record my views in this way for my vote in case these things come up:

I am in favor of a subdivision (i) which provides that tribunals with their powers, tribunals which fix compensation, are as fixed by statute. If there be no federal statute, then a jury system on demand.

I am also willing to have two alternatives put out, but my feeling is that we had better not borrow trouble by putting out an alternative that we don't want to adopt. So, with that view of it, I would like to see the draft go out without an alternative but with a provision such as I stated. However, I will cheerfully acquiesce in a majority view that we send out an alternative.

JUDGE CLARK: How about the complaint? What is our position on that?

THE CHAIRMAN: I am not clear that I know what you are talking about. I understand that the complaint rule we have here provides for certain things in the complaint that are a little different from an ordinary complaint in a civil action. I have supposed that, because of the nature of the suit, an in rem proceeding, it was all proper. My feeling is

that the complaint ought to conform as near as may be to the general form required by our rules, but on account of the nature of the proceeding it is appropriate to provide special things that it shall say and contain.

JUDGE CLARK: May I amplify that, because I think that is really one of the big points. I take it that the issues are these: First, shall the complaint simply say that it shall be the ordinary complaint, which is the complaint under Rule 8(a), or shall the complaint make additional provisions? The additional provisions that are important are of two kinds. One is the reference to the property. The language we reviewed here is taken from certain state statutes. Shall there be that kind of description of the property that we have here? The other is a reference to the persons, that matter of the owners of record, and so on. Those are the two things that the Major has objected to and that the Department has objected to. On that, how shall it be treated? Shall we put out alternatives on that, or shall we take one position or the other?

THE CHAIRMAN: I haven't any views that I want to record without having thought about it more. The other idea I have, if the Committee reaches a conclusion about this thing, about the question of the tribunal and also the question of the exemption of a diversity case from the application of the rule at all, is that we let the matter go back to the

subcommittee with the understanding that the Department is going to send in its suggestions. Then, after they are received, the draft will be gone over and will be distributed by mail to the members. Unless the members come in with suggestions by mail, the draft then will be printed, and we will get authority from the Court to pass it out to the bar again.

MR. DODGE: On that other point raised by you, I move that it go out without any alternative as to the jury trial provision.

DEAN MORGAN: So do I. I second the motion.

JUDGE CLARK: Will you state that again, without the alternative taking away the jury trial?

THE CHAIRMAN: Without the alternative, but with the provision that if there is no federal statute, it shall be the jury system.

JUDGE CLARK: Yes, I see.

THE CHAIRMAN: Do you want to vote on that?

JUDGE DONWORTH: Just a moment. That means, instead of leaving the tribunal to be determined by the local procedure, that it shall be a jury trial in every case unless a federal statute prescribes to the contrary.

MR. DODGE: Correct.

PROFESSOR SUNDERLAND: That is in all cases?

THE CHAIRMAN: We are talking generally.

PROFESSOR SUNDERLAND: Not where we condemn under

state statute.

THE CHAIRMAN: That is a separate provision.

PROFESSOR SUNDERLAND: You are excluding that.

THE CHAIRMAN: Yes.

MR. LEMANN: If no jury is asked for, it is trial by the court.

[The motion was put to a vote and carried.]

JUDGE CLARK: Do you think there is a question on the complaint, Mr. Dodge? What do you think about that? I don't care, except that I would like to know how the Committee feels about it. I should have been willing to have gone along on 8(a) and limited the complaint the way the Major wants it, but I felt that we were in danger of getting away beyond the Committee. It is all right.

MR. DODGE: I was unable to extract from Mr. Williams any statutory language which he liked. I think we ought to make it possible for him to proceed as they do now in conformity, and I don't know just what the language is that enables him to do that.

THE CHAIRMAN: You are talking more about the naming of defendants than the allegation of the complaint, aren't you?

MR. DODGE: Yes; that is one of his biggest com-complaints.

THE CHAIRMAN: They are two different things, really.

MR. LEMANN: There isn't much trouble with the

allegation of the complaint, is there? My impression was that the naming of the parties created the greatest difficulty.

THE CHAIRMAN: That is it, and whether you had to look at the records and the named people of record.

MR. LEMANN: He ought to be required to come forward with language which he would offer as a substitute. I imagine he is relying upon some state statute.

JUDGE CLARK: Monte, what he said definitely on that was that he just doesn't want to mention it.

MR. LEMANN: I don't see how we are going to do that in view of our previous experience. It would require some mention. Let's take a vote on that.

JUDGE DONWORTH: Mr. Williams' statement that "We must do so-and-so at our peril, or we won't get good title" gets nowhere.

THE CHAIRMAN: He says he does it anyway, so why order him to do it? That is all I could see in it.

MR. LEMANN: Why doesn't he say he would do it at his peril in our language, if he wants to? Is he ignoring some language now in a state statute?

THE CHAIRMAN: I would like to record my view as favoring a provision similar to that which we have now, which conforms generally to state statutes which call at some stage of the case for looking at the records and not turning your back to people who have deeds on record and not telling

them you are taking their property, or anything of the kind. I don't think you can get by with anything short of that. I do think his point is good that you are not stayed in any proceeding for quick possession or anything of that kind by not having yet done that.

MR. LEMANN: I move that we adopt the Chairman's last statement as the sense of the Committee.

JUDGE DONWORTH: That is different. As I understand, the other motion was that we put in jury trial as the positive.

MR. LEMANN: We have already voted that.

JUDGE DONWORTH: We voted yes, did we?

MR. LEMANN: Yes, we voted yes. Now we are voting on the question of the naming of the parties when taking possession of the property.

JUDGE DONWORTH: As I understand it, the Chairman favors the thing substantially as in the present draft.

THE CHAIRMAN: Yes. I think we have to say something about it. The state statutes do, and if we leave it out, it raises the inference that we don't have to do anything, and we will be busted again by an outcry from the bar associations and the title companies.

MR. LEMANN: Also with the provision that permits the taking of the property. The Chairman favors that.

MR. DODGE: I suggest that there may be some state statutes which adopt language that is not quite so rigorous.

Wouldn't it be well to find out whether there are not some state statutes?

THE CHAIRMAN: We have documents, and they have them, that show extracts from every state in the Union, I think.

MR. DODGE: Why not pick out some language that perhaps doesn't sound quite so rigorous and yet accomplishes in substance the result?

JUDGE CLARK: My staff thought that that was along the line of milder language.

JUDGE DONWORTH: Mr. Chairman, an important question, of which I have not heard any solution, is this. I understand that as soon as the general amendments to the rules are written up and the Committee on Style have approved them, they are to go to the Court as our final recommendation, and there is to be no more bar discussion on the subject.

THE CHAIRMAN: That is right.

JUDGE DONWORTH: Secondly, as to the eminent domain rule, I understand that what I have just said does not apply.

THE CHAIRMAN: That is right. The eminent domain rule goes back to the profession after we get it whittled up, and we do not adopt it now. We send it out for further comment by the bar.

JUDGE DONWORTH: That necessitates, sometime or other (we don't know when), another meeting of this Committee to determine the final wording of that eminent domain rule.

THE CHAIRMAN: Not necessarily. I am asking for an appropriation that will cover it, if you want to meet, but I have an idea that when the re-draft of 71A is ready, it will go out to us by mail, and we can get suggestions from the members. If the thing can be ironed out by mail, it can go to the bar without another meeting.

MR. HAMMOND: You might have to have another meeting after you get the suggestions from the bar. That is a possibility.

JUDGE DONWORTH: It seems to me that is really necessary. We always have had a meeting--

THE CHAIRMAN [Interposing]: It won't go to the Court after going to the bar unless this Committee by mail orders me to do it. I certainly wouldn't do that. I will take your pleasure then as to whether you want to have a meeting or whether you think you are satisfied with it and can work it out by mail.

MR. LEMANN: Suppose we arrive at an impasse with the Department of Justice. We stand pat on your last suggestion, and they say they don't want it. Shall we send it out to the bar?

THE CHAIRMAN: I don't think they will take that position?

JUDGE DOBIE: Are we through, Mr. Chairman?

THE CHAIRMAN: I have to go. There is barely time

to get my train. It is up to the Committee to decide whether they want to stay this afternoon and consider this further.

JUDGE DOBIE: I can stay if there is anything really necessary.

THE CHAIRMAN: I am sorry to go when you haven't even reached your regular adjournment time.

JUDGE DONWORTH: I think we are all in a state of mind where we cannot do our best work. My judgment is that there would be no use to continue this meeting.

DEAN MORGAN: Is there anything more you want to bring up, Mr. Reporter?

JUDGE CLARK: I don't think so, unless you want to go over the details of Rule 71A. I doubt that you do. I gather that that is your feeling. If you want to, we can go over them. We have covered everything except 71A.

THE CHAIRMAN: The only other thing I think about in 71A, an important thing that the Committee has not chewed over and finally decided, is that provision that in diversity cases the practice would be according to state law. That is quite a problem. I don't know how you feel about it. It is something the Committee really has to consider and vote on. There is a good deal to be said on it both ways.

JUDGE CLARK: Do you want to discuss that a few minutes?

THE CHAIRMAN: I have the suggestion to make, too,

that I think the condemnation rule probably ought not to be applied to pending cases. The other rules will be applied to pending cases, unless the Court orders otherwise, but when you get into court in condemnation cases, and get all going and set up under the present system, I should doubt that the rules ought to apply. I don't know. It may be that it is all right to leave it with the Court to say they shall not, if he thinks they shouldn't. Maybe that is the solution of it.

[Mr. Mitchell left the meeting at this point, and, following a brief recess, Judge Clark took the chair and the meeting resumed.]

JUDGE CLARK: I take it that we have adjourned. Is that so?

MR. LEMANN: I suppose so. There wouldn't be enough of us left to take any authoritative action, anyhow. We wouldn't have anything to do but look over the wording of 71A.

JUDGE CLARK: Has anybody anything on the state conformity procedure under 71A, just that one provision, that he wants to get off his chest?

DEAN MORGAN: Judge Donworth has. He is very much in favor of keeping it, and the Attorney General's representative said he didn't see any objection to that. He was satisfied with it.

MR. LEMANN: The only objection is that it is a step backward toward conformity.

JUDGE DONWORTH: No. There is a reason for it. I don't like extravagant expressions, but you are going to ram a new procedure down their throats where there is no demand for it. Who is there in the state of Washington that wants to substitute this thing in toto for a purely state condemnation? It seems to me it is an abstract hope that is actuating our Chairman, rather than any practical reason. So far as men being educated is concerned, a man who is going to conduct a condemnation suit is either a lawyer or a judge. In the state of Washington there is a state law. He has to study the state situation from the ground up, and he cannot go there from New York and say, "I know all about this procedure because it is defined by general rule." It simply won't work. He has to be educated from the ground up in the procedure in our state, because it dovetails in with the substantive requirement.

That is my view.

MR. LEMANN: I think you have a special argument to return to conformity in this case because it deals with land. Nothing can be more local than land. It is just complying to titles to land, and I would rather think it was a justifiable exception.

DEAN MORGAN: I should think so.

PROFESSOR SUNDERLAND: It would be very intricate to work two systems of procedure together, partly state and partly federal. We say that we confine ourselves to the

tribunal, but the tribunal itself is tied up with procedure. I don't think you can work them in together without a lot of friction and trouble.

MR. LEMANN: I think we ought to make a general exception that this rule does not apply to proceedings for condemnation under state law.

PROFESSOR SUNDERLAND: I make that motion.

DEAN MORGAN: I second it.

JUDGE CLARK: Is there any further discussion?

[The question was called for, and the motion was put to a vote and carried.]

MR. LEMANN: I make the further motion that when you come to draw your language to except the TVA and the District of Columbia, you exclude this reference to methods and be very careful to provide retention only of tribunals. I don't know that we need to vote on that, but I think that if you take that language "methods", you are opening up all that trouble.

JUDGE CLARK: I think we can have that in mind. We will take out "methods".

The Department objected to our device of defining "taking", and so on. That was simply an attempt at a short way of expression, and we should think that you had to have something in there, whether you put it by way of definition or not.

JUDGE DONWORTH: He has a real point there which he didn't apprehend, I think. Really, I mean just what I say. You know that beginning with the Illinois constitution of 1870 or thereabouts, they introduced the word "damaged", no property shall be taken or damaged without just compensation. We have it in our constitution. The federal cases hold that the United States Constitution does not imply that a mere damaging which is consequential is entitled to compensation. That is a real point which he didn't develop and I think he didn't appreciate very much.

MR. LEMANN: Would our taking include the idea of damage?

JUDGE DONWORTH: There is some ground that it might be plain that we imply that damages entitle one to compensation, but I think the answer to that is that our enabling act says that we cannot change the substantive rights. The point I have been mentioning is a substantive right, and we can't change that one way or the other. So, I think there is no use of wasting time on it.

MR. LEMANN: It would be misleading, though, if we used language which implied that we meant to include damages, and we would then have to point out to the lawyers who use this, "Don't worry, it can't be enforced because it would be a substantive change." I think that would be rather confusing and unfortunate. It would be better to change the definition

of "taking" so as to exclude any idea that we were trying or considering a change of the law.

JUDGE DONWORTH: That gets into a shadowy realm that is hard to handle.

MR. LEMANN: Look at the language which Mr. Hammond has called my attention to, which we have in the last draft. It says, "The word 'taking' shall include every interference with the ownership, possession, enjoyment, or value of private property." Are you going to vote to leave that unchanged?

JUDGE DONWORTH: I am voting to leave that unchanged, because to undertake to elucidate the fine points would just wear us out. We would have to dig into several hundred cases, wouldn't we?

PROFESSOR SUNDERLAND: Probably.

MR. LEMANN: On the other hand, if we leave them in, I think we are going to create confusion and uncertainty.

PROFESSOR MOORE: Would it help if you added right after "value of private property", "now compensable under law"? That shows that it is a type of taking which under the established cases the Government has to pay for. We don't use the word "taking" to embrace anything else.

MR. LEMANN: Have we any definition of "taking" under the federal law which could be used instead?

PROFESSOR MOORE: No, I don't think we have, apart from the decisions.

MR. LEMANN: I am wondering if it wouldn't be better just not to define "taking"; use it and not define it. Judge Donworth says that to try to define it in any different way will get us into unending trouble. To define it in this way I think will be confusing and misleading.

JUDGE DONWORTH: I think there is some merit in Professor Moore's suggestion, "compensable under the law."

DEAN MORGAN: There is something in that, too.

MR. LEMANN: If you used as broad language as this, if I were reading this, I would say that the guys who wrote this thought that interference with enjoyment was compensable.

MR. OGLEBAY: The word "taking" is used a good many places in the draft, and if we don't define it, then we raise all these problems of what it means every time. Either spell it out or leave it undefined.

MR. LEMANN: You are not helping any if you use this language. Even if you tack on to it "compensable by law", you still have to struggle with it. You are just deluding yourself with the idea that you are avoiding trouble.

JUDGE DONWORTH: I think we would get into a very difficult problem, Mr. Lemann, if we undertook to elucidate this situation.

MR. LEMANN: What did we do in prior drafts? Did we try to define it?

PROFESSOR MOORE: No.

MR. OGLEBAY: No, but we had a lot of questions raised by the bar as to what it meant. The Department of Justice originally had some provisions in which they always took the position that the Department could withdraw from the case at any time before the award was made and judgment was entered, even though they had gone in and torn down the building and messed up the property. We tried to restrict their view on that. Most of the difficulty in the cases has come up because of that very thing, what a taking is, whether it is the taking of possession or whether it contemplates something that does not happen until the Government gets a judgment for condemnation. Most of the cases seem to indicate that the taking is any seizure of any kind, whether compensation has been arrived at or not, but the Department of Justice kept trying to argue that they were entitled to withdraw as of right at any time up until the judgment had been rendered against them.

The Committee, of course, took the opposite view, and the cases seem to take that view any time that the Government seizes property and begins condemnation proceedings in any manner. In some of the old cases they moved in first and started the proceeding afterward, or they got an immediate order of possession from the court before the complaint was filed. Then they said that at any time then they can't withdraw except upon awarding of costs against the United States for the damages, you see.

MR. LEMANN: Mr. Hammond, how was this taken care of in the prior draft?

MR. HAMMOND: We didn't have any definition of "taking" in the prior draft at all. I just asked Judge Clark how it came in, and he said that he and his staff put this in.

JUDGE CLARK: Oh, yes, that is so.

MR. LEMANN: I would be very dubious about it. If you are going to go to the Court and have a controversy with the Department of Justice about language of this sort, if I were the Court I would throw up my hands about promulgating a rule like this which can't be taken for granted in the face of a serious debate. Unless we can get a fairly united front with the Department, I should think that it was going to be difficult to get the Court to promulgate the rule, Eddie, wouldn't you?

DEAN MORGAN: I don't know. I should think so.

JUDGE DONWORTH: That confirms my proposition that we are going to have another meeting of this Committee before the thing goes to the Court.

MR. LEMANN: I am for it.

MR. HAMMOND: I think Mr. Mitchell is very much against it. He is not against it. I shouldn't say it that way, but he doesn't think that there will be any necessity for it if the subcommittee works on it.

DEAN MORGAN: If the members of the Committee don't

object to it when it comes out. I think, Monte, you are going to have trouble with the Department on that.

PROFESSOR SUNDERLAND: What thing is that?

DEAN MORGAN: On interference, the definition of "taking".

JUDGE DONWORTH: Yes.

DEAN MORGAN: As Judge Donworth has pointed out, the federal rule is different from the rule in some of the states. That will be swell under the Illinois constitution or a constitution of that kind.

MR. LEMANN: Even if we got by the Supreme Court, if the Department goes to Congress and says, "Look what these fellows are trying to do. They are implying to the profession that the United States is going to have to pay for a lot of things it doesn't have to pay for now," then Congress is going to vote us down, and our general prestige is going to suffer if we make a recommendation that is voted down. Unless we can get eye to eye with the Department of Justice on this rule, I think we ought to be very hesitant about presenting it to the Court or the Congress, because I don't think we can afford to take the risk of beating down their opposition either before the Court or before Congress. I would be very hesitant about it, wouldn't you, Judge?

JUDGE DONWORTH: I thought, when I listened to him, that the substantive right provision in our enabling act

prevented any.

DEAN MORGAN: Yes, it does. I suppose it does. I think this is clearly substantive.

MR. LEMANN: Yes, I do, too, but we certainly would not be helping by confusing the bar and giving them false hopes here.

JUDGE DONWORTH: No.

JUDGE CLARK: I rather conclude from this discussion that there is a little objection to "taking".

MR. LEMANN: I would think so. I think that is a very conservative judicial statement.

DEAN MORGAN: We take exception to "taking".

JUDGE CLARK: There is some exception taken to the definition of "taking". All right, is there anything more?

MR. LEMANN: You asked for it.

JUDGE CLARK: I did. I asked for it.

JUDGE DONWORTH: You rather favor Professor Moore's suggestion of a brief clause?

JUDGE CLARK: Not necessarily. As we used it, that was merely a device of expression and wording and presentation, an easy way of doing it. I would say that if we are going to raise all these questions and have the Illinois constitution down on our necks, no, we don't want it.

MR. LEMANN: I think you can find some other formula, if you scratch your head a little more, to meet the point that

has been raised here, which you are trying to cover by a definition of "taking".

PROFESSOR MOORE: It is your position that you want the definition omitted?

JUDGE DONWORTH: No.

MR. LEMANN: I wouldn't insist that it be omitted if you could find some way to avoid the implication that your present definition raises. I don't know whether you can or not.

JUDGE CLARK: Mr. Moore did suggest putting in "compensable".

MR. LEMANN: Personally, I wouldn't think that a sufficient answer to the objection. I think you would have to find some device other than the use of that word. You might add another sentence or two to negative any implication that might be given. I think you ought to think about the whole thing.

JUDGE DONWORTH: It might be necessary to add a sentence, "It is not intended to change the rule ...," or something of that kind.

MR. LEMANN: Or in connection with the point that was raised before, all you are trying to do is to say when they can abandon the proceeding, which is what we were told was the reason we put this in.

MR. HAMMOND: That is covered by the dismissal rule.

JUDGE CLARK: Is there any further suggestion? Shall

we adjourn, then?

JUDGE DONWORTH: Yes.

[The meeting adjourned at twelve-forty-five o'clock.]
