P R O C E E D I N G S

ADVISORY COMMITTEE ON RULES

FOR CIVIL PROCEDURE

VOLUME III

Wednesday Afternoon, October 27, 1943
Thursday Morning, October 28, 1943
Supreme Court of the United States Building
Washington, D. C.

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WEDNESDAY AFTERNOON SESSION

October 27, 1943

The committee reconvened at 1:50 p.m., Chairman Mitchell presiding.

THE CHAIRMAN: Gentlemen, Judge Clark asked us to go ahead on this Condemnation Rule. He said he might be a few minutes late. The subcommittee has its rule. Do you want to present it? Major Tolman, would you like to present this rule to the committee?

MR. TOLMAN: Whatever you think. I think I might explain about it a little. Perhaps I ought to explain what these different papers are.

We sent out by mail heretofore two separate mimeographed copies of proposed rules on condemnation. On each of those rules there has been work done with the Lands Division, the attorneys in the Justice Department who were assigned to condemnation cases. We sat down in Chicago on the occasion of the meeting of the American Bar Association there with attorneys from the Lands Division and came to an accord on almost everything, but when we sent that copy out we found other matters of form and style and expression and punctuation and capitalization and some important matters that we still wanted to change. That is the copy that came to you in September sometime, in August or September.

THE CHAIRMAN: The August 27 draft.

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MR. TOLMAN: August 27. Appended to that were notes and forms. The papers that have been circulated here do not have the forms or the notes, so when we need to look at a form or a note we will have to go back, and I have some copies of those here.

The paper that was given to you yesterday was a mimeographed reproduction of the draft which we agreed upon yesterday with the Department of Justice as the nearest approach that we could get to settling all of our controversies. It leaves, of course, the controversy as to the rule on dismissal. The paper that has been distributed to you here today is a paper that contains the second draft, with the changes that were made by yesterday's draft indicated on it.

THE CHAIRMAN: You mean this last paper is the August 27 draft plus the changes that were made in the last day or two?

MR. TOLMAN: Yes.

THE CHAIRMAN: There the changes from the August 27 draft are shown by brackets and interlineations, the way our other drafts are.

MR. TOLMAN: Yes, sir; that is the situation.

JUDGE DONWORTH: Excuse me. I do not think the latter clause is correctly stated; that is, I do not see in this draft that we received yesterday any brackets, and so forth, showing the changes.

MR. TOLMAN: No. That is the final thing.

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JUDGE DONWORTH: In other words, the cart is before the horse.

MR. TOLMAN: The one you got today, Judge Donworth, shows those interlineations.

THE CHAIRMAN: That is what I was talking about.

MR. TOLMAN: That is the one with the heading at the top of it.

JUDGE DONWORTH: Let me ask this: The mimeographed is the clean copy of what you are now proposing, isn't it?

MR. TOLMAN: Yes.

JUDGE DONWORTH: So I don't see that these brackets, and so forth, cut much figure, except historically. This mimeographed copy (indicating) is the only thing before the house.

THE CHAIRMAN: I don't know what you are referring to by this. The only document handed to me is the document which is headed: "The August 27th draft of the Condemnation Rule revised in accordance with agreement with the Department of Justice draft of October 26, 1943. New matter is underscored, deletions are bracketed." That is the up-to-date draft.

JUDGE DOBIE: Here is the one with those deletions.

JUDGE DONWORTH: The up-to-date one is mimeographed, not typewritten.

THE CHAIRMAN: So is this one mimeographed.

MR. TOLMAN: They are both mimeographed.

JUDGE DONWORTH: The one headed "10/26/43" is the

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clean bill before the committee.

SENATOR PEPPER: The only difference between the two is that the earlier shows the background of history in that some things are underlined and some things are bracketed, and the document before the house is as the thing would read if the bracketed matter were omitted and the underscored matter added.

MR. TOLMAN: Yes.

JUDGE DONWORTH: That is right.

THE CHAIRMAN: My embarrassment came from the fact that I never saw the document labeled "10/26/43." It was not handed to me yesterday. The only thing that was given to me was the document I referred to, which shows the differences between the final draft and the August 27 draft. That was given to me five minutes ago as being the last thing and the real thing.

MR. TOLMAN: I thought I handed it to you, but I see that I did not.

THE CHAIRMAN: No. I never saw it before. Now we will proceed, Major, to consider the draft of Rule 71-A which is labeled at the top "10/26/43."

MR. TOLMAN: Mr. Chairman, what is your idea? Should I read these various sections?

THE CHAIRMAN: It is the same old story. When this committee has to take up a draft that they have never seen at the meeting, they don't get very far with it. I leave that to

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you. Maybe you want to take up the controversial matters, or it may be your preference to go through it subdivision by subdivision. What would you recommend to the committee?

MR. TOLMAN: I think perhaps we had better go through it subdivision by subdivision.

THE CHAIRMAN: Is that agreeable? All right. Commence now and go through it subdivision by subdivision.

MR. TOLMAN: This rule is given the number 71-A so as not to change the order of any other rule. It is based on the original rule, the number of which I have forgotten.

PROFESSOR CHERRY: Seventy-four.

MR. TOLMAN: It was printed in the report of 1938 and was withdrawn from the consideration of the Court. It follows in general the order of those rules. The first paragraph reads:

"RULE 71-A. CONDEMNATION OF PROPERTY FOR PUBLIC USE. The procedure for the condemnation of property under the power of eminent domain is governed by the applicable provisions of these rules, except as otherwise provided in this rule."

May I make an explanation about this heading? The Lands Division in the first place wanted to make a unitary set of rules, and in it they provided that no provisions of the general rules applied to condemnation. They have withdrawn from that position. They tendered us a set of rules drafted on the old printed rule that was in that report, and then out of

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that came the first mimeographed draft that you got with the notes and the others. Here you see the radical change in their position is indicated by the statement that all of the rules, so far as they are applicable, apply to condemnations, except as modified. These, then, are a statement of the modifications in condemnation cases from the original general rules.

"(a) JOINDER OF PROPERTIES. One or more separate pieces of property sought to be taken for the same use, whether in one or different ownership, may be proceeded against in the same action."

DEAN MORGAN: Is that "uses" or "use"? You read it in the singular, and it is printed in the plural.

THE CHAIRMAN: Plural, "uses."

MR. TOLMAN: Plural.

SENATOR PEPPER: In line 6 you used the singular as you read the word u-s-e. It ought to be plural as there printed, ought it not?

MR. TOLMAN: It is "uses."

THE CHAIRMAN: And he said "one" instead of "the same."

MR. TOLMAN: "the same uses," because there may be more than one use.

THE CHAIRMAN: He said "whether in one". It would be "whether in the same or different ownership". There is no question about the identity of the copies?

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MR. HAMMOND: No, sir.

THE CHAIRMAN: Has anybody a suggestion to make about subdivision (a)?

DEAN MORGAN: That seems all right.

THE CHAIRMAN: If not, we will go on to (b).

JUDGE DOBIE: That doesn't make any provision about venue in different districts, I take it. It is just a general provision to permit one proceeding to take several pieces of property.

THE CHAIRMAN: That is right.

JUDGE DONWORTH: Of course, the court has the right to grant separate trials under our other rules, if justice makes it proper.

MR. TOLMAN: Yes.

"(b) COMPLAINT. The title of the action shall name the condemnor as plaintiff, and the property designated by quantity, lot, parcel, or tract, and at least one of the owners or parties in interest, as defendants. The complaint shall name as defendants all owners of and parties interested in the property sought to be taken, if known, and all others shall be made defendants under the designation of 'Unknown Owners'. The complaint or an exhibit attached thereto shall also contain a brief description of the property reasonably sufficient for its identification, and a statement of the interest therein sought to be taken."

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Perhaps one word of comment on the title. There is a growing habit in all modern cases to emphasize that this is a proceeding in rem and, therefore, is regarded as the United States v. 1000 or 10,000 acres of land, and so forth. The Department of Justice suggested that we put in one name to help in identifying the particular case. That is why we come to that sort of title. I might say that the title is very similar to the title of the cases in the condemnation of property under the tax laws and otherwise.

THE CHAIRMAN: I should like to ask this question, Major. In lines 8 to 11 you are dealing with the title of the action, not the body of the complaint. It says, "The title of the action shall name the condemnor as plaintiff, and the property designated by quantity, lot, parcel, or tract". That means that you have to describe with particularity every lot, tract, and parcel in the title; is that right?

MR. TOLMAN: No, sir. That is in the body of the complaint.

THE CHAIRMAN: But you say it is done in the title.

MR. TOLMAN: In the title it is described by quantity, lot, or parcel. I have a form here.

JUDGE DONWORTH: You notice the word "or". The word "or" helps out. You can just say "Against 710 acres of land and John Smith."

THE CHAIRMAN: You don't even have to say what county

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or state the land is located in.

DEAN MORGAN: "quantity, lot, parcel, or tract".

JUDGE DONWORTH: Not in the title but in the complaint, the body of the complaint.

MR. TOLMAN: Here is a form of the complaint, Mr. Chairman, and it shows the division. Here are other copies, if anyone else wishes them.

THE CHAIRMAN: You state the location in your illustrative example, but your rule doesn't say that you have to designate the location in the title. It may be a petty point, but as I read it you don't have to.

JUDGE DONWORTH: In the complaint you have to give a legal description, you see, which would include the county and the state, and so forth, but not in the title.

THE CHAIRMAN: You don't even have to say it is a thousand acres of land in any location, do you?

JUDGE DONWORTH: No.

THE CHAIRMAN: The form does.

JUDGE DONWORTH: To distinguish case A from cases B, C, and D, you put in the name of one defendant, which gives you that information.

THE CHAIRMAN: I see. All right.

MR. DODGE: Is there any obligation on the part of the Government to try to find out who the owners are, if known? They can put in just the name of the owner of one parcel whom

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they happen to know and leave all the rest out.

MR. TOLMAN: In the body of the complaint all the property is described. In the title you may say "1000 acres of land in Montgomery County, Maryland."

SENATOR PEPPER: Mr. Dodge's question, Major, was whether there was any duty on the part of the Government to ascertain as far as possible who other owners are--

MR. TOLMAN (Interposing): Oh, yes.

SENATOR PEPPER: --or whether they may put in just one owner and say "Unknown" as to the rest.

MR. TOLMAN: No. It is provided definitely in the rule that they must name every person who is known, an owner or interested party.

MR. DODGE: Who is known, but there is no obligation to find out those they don't now know.

MR. TOLMAN: Those whose names are not known and those whose names are known but whose whereabouts are not known are put in a separate category of "Unknown Owners" and are dealt with later on in the rules.

THE CHAIRMAN: What is your test for a known or unknown owner? Who is the fellow whose ignorance settles that?

MR. TOLMAN: That is definitely described in another rule that comes later on.

THE CHAIRMAN: Another rule?

MR. TOLMAN: Yes.

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JUDGE DONWORTH: The same rule, but another section.

PROFESSOR SUNDERLAND: I wondered why this complaint shouldn't state the purpose of the taking and perhaps refer to the statute under which the taking was sought. Wouldn't that information be very useful?

JUDGE DOBIE: You mean for a naval depot or something.

PROFESSOR SUNDERLAND: Yes; so you could know what the Government is trying to do and check whether there is any right under the statute to do what it is trying to do.

THE CHAIRMAN: Doesn't imply your complaint has to state a cause of action under our rules, a good claim? If you don't allege you are taking it for an authorized public use, you don't state a claim.

PROFESSOR SUNDERLAND: Under this you don't have to state it.

THE CHAIRMAN: Yes; 71-A says that all the federal rules apply except as otherwise expressly provided.

PROFESSOR SUNDERLAND: Here you give a detailed list of what is to be put into the complaint. Doesn't that control?

THE CHAIRMAN: No, it just names certain things to be put it. It doesn't say that is all.

PROFESSOR SUNDERLAND: I would say that ordinarily, if you give a detailed list, it excludes what isn't in the list.

THE CHAIRMAN: No. It says the complaint shall name the defendants and describe the property.

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MR. TOLMAN: Perhaps the form of complaint will help you. The question of the use, and so forth, is referred to. Perhaps it ought to be put in here, but the form that has been prepared for the complaint does show a statement of the use under the particular statute which authorizes the condemnation. There is reference to it, and elsewhere that matter will be dealt with. My suggestion is that we take Professor Sunderland's objection and, when we get through, if it hasn't been properly cured, we confer with him about it. I don't think it is really necessary.

THE CHAIRMAN: I should suppose the first provision in Rule 71-A brings into operation every one of our rules as to what the complaint should do, except as otherwise stated. One of the things our federal rules require is that the complaint shall state a good claim on which relief can be granted, and in order to state a good claim in condemnation suits, you have to allege what the use is, an authorized public use, and so on.

SENATOR PEPPER: I think it must be like that, because there is nothing in subsection (b) which requires the complaint to contain any statement of the relief asked; no statement that condemnation is sought.

THE CHAIRMAN: No.

SENATOR PEPPER: That is part of the general requirement of the contents of the complaint, and these are special requirements applicable to this type of proceeding.

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THE CHAIRMAN: Shall we go on now to (c)?

MR. TOLMAN: "(c) PROCESS. (1) Notice; Issuance." You see, we substitute here the word "notice" in place of "summons." If you use the word "summons," it would be just like our general rule, but in order to emphasize the fact that this sort of process is different from a process on a promissory note and that it must give notice, we have called it a notice. But it is a process.

"(1) Notice; Issuance. The clerk shall not issue in condemnation cases, the summons required by Rule 4. Upon the filing of the complaint and from time to time thereafter the plaintiff shall without court order issue in lieu of summons, notices directed to all the defendants named or designated in the complaint. Separate and additional notices may be directed to any one or more of the defendants. The issuance and the service of the notice shall have the same effect as that of the issuance and the service of the summons provided for in Rule 4."

DEAN MORGAN: Here the plaintiff issues the notice instead of the marshal.

THE CHAIRMAN: Instead of the clerk.

DEAN MORGAN: The plaintiff issues the notice here instead of the clerk.

MR. TOLMAN: Yes.

MR. DODGE: I should like to file a protest against

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the use of that word, which I regard as abominable, "issuance." I just want to go on record as opposed to any use of the word "issuance" anywhere.

MR. TOLMAN: What word do you want to substitute for it?

MR. DODGE: Issue.

MR. HAMMOND: It appears in the general rules.

MR. DODGE: I protest against it there.

MR. TOLMAN: I had better mark that on the document.

DEAN MORGAN: That is doubly offensive.

SENATOR PEPPER: The difficulty with "issue" is that that has a technical meaning.

MR. TOLMAN: Two meanings.

SENATOR PEPPER: The technical meaning is that of a point affirmed on one side and denied on the other, and that isn't the sense in which the word is used here.

MR. DODGE: In lines 28 and 29 the word "issue" would plainly cover the purpose.

MR. TOLMAN: We haven't gotten to that line yet. I didn't read that line. I read through line 26.

MR. DODGE: Yes, but you read to us 27 and 28.

THE CHAIRMAN: No.

DEAN MORGAN: No, I don't think so.

THE CHAIRMAN: We might go on, then, to the next subdivision, (2).

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MR. TOLMAN: "(2) Same; Form. The notice shall state the court, the title of the action, the names of the defendants to whom it is directed, a brief description of the property reasonably sufficient for its identification, the interest sought to be taken, the time and place the defendants shall appear and defend, and that in case of failure to do so judgment by default will be entered, and that thereafter they cannot raise any question of the plaintiff's right to condemn or as to the value of the property and can be heard only as to their rights to share in the distribution of the award. The notice shall conclude with the signature of the plaintiff's attorney and an address within the District in which the action is brought where the plaintiff's attorney may be served. The notice need not contain a description of any property other than that sought to be taken from the persons to whom the notice is directed."

That is to say, if you want to take John Smith's property, you direct a separate summons to him and describe his property in his writ, and you don't have to put in the whole string of them there. These suggestions come from the men who practically do that work and know what the easy way to go on is. I don't think I have anything further to say about that section.

THE CHAIRMAN: We will go on to (3), then.

MR. TOLMAN: "(3) Service."--

JUDGE DONWORTH (Interposing): Excuse me, Major.

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Without undertaking to delay at this time, the point was made by Professor Sunderland that the purpose of the taking or any set of facts showing that it is for public use is not required to be stated. In the main, this rule was drawn by Major Tolman, and I cooperated from time to time. With the exception of one or two special points to which I will call attention at the end of his statement, I am not undertaking to go over the main body of this rule. I think it is a fact, as Mr. Sunderland mentioned earlier in this discussion, that there is no provision here for putting in the complaint the purpose for which the use is intended or any allegation showing that it is a public use that is contemplated by the proceeding. That may be implied, but there is no requirement for it, as I understand it.

THE CHAIRMAN: Why don't we go back to subdivision (b) and settle whether we think there ought to be and avoid uncertainty as to what the complaint shall contain, whether there ought not to be a provision in subdivision (b) stating that, in addition to designating the land and the parties, the complaint shall also state the uses for which it is taken over or whatever you want? Why not go back and do that right now, as we go along? There is nothing later on in this rule that will throw any light on it, is there?

MR. TOLMAN: Mr. Mitchell, I think there is. I think you will know better what to do with it when you are once through with this, for this reason: These matters are dealt

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with in the provisions for the answer. They are here dealt with rather piecemeal in the matter of the notice, and then our rule provides that these forms shall be illustrated for the purpose. This form that we are presenting does indicate that those things are to be there. I am perfectly willing to go back, but I thought if we were to go through it once and get the daylight of it once and then came back, we would do a better job.

JUDGE DONWORTH: I think so.

THE CHAIRMAN: All right.

MR. TOLMAN: "(3) Service. The notice shall be served in accordance with the provisions of Rule 4 except that:

"(i) Copies of the complaint need not be served but the plaintiff shall deposit with the clerk at least one copy of the complaint for the use of the defendants."

The Department of Justice tell me that often their complaint is as big as a telephone directory and that they have to take a truck and send it about under the Conformity Act, where it is provided that complaints must be served on every defendant, that it is one of the most burdensome things that they do. They, therefore, ask to be relieved from that provision of serving copies of the complaint on everybody and to serve a notice of the filing of the complaint instead.

THE CHAIRMAN: Their notice gives all the information that they need, really. All right, go ahead.

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DEAN MORGAN: This is to conserve rubber, then, is it?

THE CHAIRMAN: And gasoline.

MR. TOLMAN: "(ii) At his election, the plaintiff's attorney may cause notice to be served by sending a copy thereof by registered mail, return receipt requested, to any defendant residing within or without the state, at his last known address."

Notice by mail to a person within the district does not supplant or take the place of the notice by the marshal.

MR. HAMMOND: It is an additional notice; is that it? Mr. Tolman, is this notice by the plaintiff's attorney in addition to the issuance of summons by the marshal or in lieu thereof?

JUDGE DONWORTH: In lieu thereof.

MR. TOLMAN: It is in addition to it. The marshal serves everybody who can be served.

DEAN MORGAN: You say "except that".

MR. TOLMAN: At his election, the plaintiff's attorney may mail a notice.

MR. HAMMOND: I thought the intention was that it should be in lieu of service by the marshal, and at one time those words appeared in that section.

MR. TOLMAN: It isn't there now.

THE CHAIRMAN: It is plain by this that this is a substitute for service in accordance with the provisions of

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Rule 4. It says in lines 41 and 42: "The notice shall be served in accordance with the provisions of Rule 4 except that:"

DEAN MORGAN: "except that", yes.

THE CHAIRMAN: "except that: (ii) At his election, the plaintiff's attorney may cause notice to be served by sending a copy thereof by registered mail, ... to any defendant residing within or without the state". Is that good service?

DEAN MORGAN: It certainly seems to be by that.

MR. TOLMAN: I think it is not, Mr. Chairman. Certainly as I interpreted this rule, and as the Department declared to me what they wanted it for, it was to facilitate the more complete dissemination of knowledge of this proceeding.

THE CHAIRMAN: Why didn't you say, then, "In addition to serving in accordance with Rule 4, you may also mail a notice"?

JUDGE DONWORTH: In my conversation with the Lands Division officials they gave expression to this idea: They said, "We often find encumbrances scattered all around, mortgagees and others interested, charged to the owner, and oftentimes a mortgagee may live in Ohio or Pennsylvania or some other wealthy state." So, to reach that man, they do not want to be required even to publish, but they want to serve him in this way, and I understand that this is a substitute kind of service even in the state where the property lies, if the election of the plaintiff's attorney leads him so to act.

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THE CHAIRMAN: Then if you have an owner living right in the same city where the land is located, in the same district, under this rule, instead of serving him personally, you may send him a notice by registered mail, and that is all the service you have to give him.

JUDGE DONWORTH: That is my understanding of what the Lands Division expressly intended here.

THE CHAIRMAN: I asked the Major if that was due process, and he said it isn't. Is he wrong about that?

MR. TOLMAN: It isn't what we mean to do, Judge.

JUDGE DONWORTH: I am inclined to think on the technical question it is due process, a good deal like leaving the notice at the last abode, and so forth. I understand the rule of due process is that any method reasonably certain to reach a defendant is a good notification for a judgment, and my thought was that it was on that idea they were proceeding.

THE CHAIRMAN: You agree that this is an alternative method of service both for a man personally servable within the district and also for those outside?

JUDGE DONWORTH: That is my understanding.

THE CHAIRMAN: All right.

MR. TOLMAN: Because it is a proceeding in rem.

JUDGE DONWORTH: Largely so.

THE CHAIRMAN: There isn't any doubt but that it is an alternative to service under Rule 4.

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JUDGE DONWORTH: As written here, I don't think there is any doubt of it.

THE CHAIRMAN: Yes.

MR. TOLMAN: Shall I take leave to consider making certain the statement that I made that they intend to have service by the marshal of everyone who is available for service?

THE CHAIRMAN: Then they ought to rewrite the rule, Major, because it doesn't read that way.

MR. TOLMAN: I will present a redraft of that particular paragraph.

THE CHAIRMAN: Well, we don't ask you to. We may be satisfied with it as it is, but we agree here that mailing by registered mail is an alternative method of service to service under Rule 4. That is the way the rule reads. Does the Department object to that?

MR. TOLMAN: No, they don't. They want to serve everybody in the district that can be served by the marshal, but they want also to have the privilege of service by mail. Sometimes they have a great many persons to be served, and to make sure that everybody is served whom they know, they declared definitely that they want, in addition to the service by the marshal, to send notices by mail. Their purpose is to prevent anybody's coming in and saying, "I didn't know I was served." They really want to expand that service and make it just as notorious as possible.

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SENATOR PEPPER: Major, may I make a suggestion?

MR. TOLMAN: Yes.

SENATOR PEPPER: You and Judge Donworth have different impressions as to what it is the desire of the Lands Division to accomplish.

MR. TOLMAN: Yes.

SENATOR PEPPER: But however that may be, the rule as written is satisfactory to the Lands Division as well as to you and Judge Donworth?

MR. TOLMAN: Yes.

SENATOR PEPPER: As written, it is reasonably clear, is it not, that this is an alternative or substitute service rather than an additional one. So, unless the Lands Division wants to revise the rule or unless we think that the rule as presented is not sound, you would be content to have us adopt the rule as you present it.

MR. TOLMAN: Yes, I would, because I think it is enough, but still I think the marshal ought to try to serve everybody. I don't want anything in these rules to indicate that we should shut off service by the marshal. I wouldn't like that.

THE CHAIRMAN: That is what it does. Of course, there is nothing under this rule to prevent the government lawyer, if he wants to, from serving him both ways, although the rule requires him to serve only one way. We shall have to

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go on, I think, and let that ride for the present. Line 50, Major.

MR. TOLMAN: "(iii) Notice to an infant or an incompetent person shall be given by serving, in accordance with this rule, a person authorized by law or under Rule 17(c) to represent him."

THE CHAIRMAN: Subdivision (iv).

MR. TOLMAN: Someone will have to read this.

SENATOR PEPPER: Let me read it for you.

JUDGE CLARK: I will read it, if you like.

"(iv) Without order of court, service on persons whose names are unknown and persons whose names are known but whose addresses are unkown shall be made by publishing twice in a newspaper having a general circulation in the vicinity of the property, a copy of the notice referred to in paragraph (2) of this subdivision, directed to them as 'Unknown Owners,' the second publication to occur at an interval of at least one week but not more than two weeks after the first publication. Copies of the notice shall also be posted in a conspicuous place on each lot, parcel or tract of the 'Unknown Owners' and at a county court house in the county in which the property is located.

"(v) Pursuant to an order of the court, the plaintiff may serve by publication or by posting, in accordance with subparagraph (iv) of paragraph (3) of this subdivision,

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persons who comprise a group or class having the same or similar interests whenever it is unduly expensive, burdensome, or impracticable for the plaintiff to ascertain their names or addresses. Notices need not be addressed to each of such persons individually but may be addressed to them collectively by a reasonably identifying description."

THE CHAIRMAN: This rule, then, settles the difficulty we were having, doesn't it? It makes it clear that before you can make a substitute service on unknown parties, you have to get an order of the court and satisfy him that you don't know who they are or what their addresses are and that it would be unduly expensive to try to find out.

DEAN MORGAN: That is by posting or publication, isn't it, but not by registered mail?

JUDGE DONWORTH: The registered mail stands. If you don't reach the person either by registered mail or by personal service, then this applies.

THE CHAIRMAN: Suppose you don't know his name or don't know his address. There is no registered mail involved.

JUDGE DONWORTH: Then you would have--

PROFESSOR CHERRY (Interposing): Require.

MR. TOLMAN: Publication and posting.

JUDGE CLARK: Under (iv) you publish it in a newspaper.

PROFESSOR CHERRY: Without order.

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JUDGE CLARK: Under (iv), line 53.

THE CHAIRMAN: Then I understand that (v) deals with cases where you really don't know but you could find out.

DEAN MORGAN: This is in a class, for a group or a class. You see, they don't want even to have to serve personally on each member of the class.

JUDGE DONWORTH: A labor union, for instance.

DEAN MORGAN: A labor union that owned property or even a partnership.

JUDGE CLARK: Subdivision (iv) is the unknown class; (v) is the class of those known but too numerous to hit them all.

THE CHAIRMAN: I see. Thank you.

JUDGE CLARK: Line 72, subparagraph (vi): "Service by mail is complete upon mailing. Service by publication is complete upon the second publication. Service by posting is complete upon posting."

In line 75 we go back to paragraph (4): "Proof of Service. Service by the marshal, his deputy or one specially appointed by the court, shall be proved by his official return. Service by mailing, posting and publishing shall be proved by the certificate of an attorney for the plaintiff. The certificate of the plaintiff's attorney shall have like force and effect as the return of the marshal. Failure to make proof of service does not affect the validity of the service."

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DEAN MORGAN: What about that, making the certificate of the plaintiff's attorney of the same dignity as a marshal's return? That strikes me as giving this a bit too much weight, because practically all the cases have put a heavy burden on the person attacking the U. S. marshal's return. I don't think you ought to have a very heavy burden to attack the certificate of an attorney in a case of this kind.

PROFESSOR SUNDERLAND: That really isn't under oath, even.

DEAN MORGAN: Not as much as an affidavit of service.

JUDGE DOBIE: There is no bond.

DEAN MORGAN: You know how these things are done.

JUDGE CLARK: Suppose you folks put a question mark there and see.

DEAN MORGAN: I did put a question mark there when I read it over. It bothered me considerably.

JUDGE CLARK: Paragraph (5): "Amendments of Notice and of Proof of Service. At any time in its discretion and upon such terms as it deems just, the court may allow any notice or proof of service to be amended, unless it clearly appears that material prejudice would thereby result to the substantial rights of the defendant."

I suppose this is subdivision (d): "DEFENDANT'S ANSWER. The defendants shall serve their answers on the plaintiff's attorney at the place designated on the notice

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within 20 days after completion of service of notice upon them respectively and in their answers shall state all their defenses and objections, their interests in the property, and their rights to compensation. All defenses, objections, and rights not so asserted are waived, except the right to share in the distribution of the award. The clerk shall forthwith and from time to time and without further notice, enter the default of the defendants who have not appeared and defended."

The next subdivision is (e): "AMENDMENT OF PLEADINGS. The plaintiff may as a matter of course and without order of court amend the complaint at any time before final judgment. Copies of the amendments need not be served but notice of the filing of the amendments shall be served in accordance with Rule 5(b) upon the parties affected thereby and not in default. At least one copy of such amendments shall be deposited with the clerk for the use of the defendants. Any defendant served with notice of the filing of an amendment shall serve his answer thereto within 20 days after service of the notice of filing."

THE CHAIRMAN: Does that allow an amendment to include a piece of property that wasn't originally in the complaint, which may be owned by someone else, another party?

JUDGE CLARK: I think it does, but you will notice in line 100 that in that case there has to be new service upon the parties, not on the counsel. Rule 5(b) is service upon the

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parties.

THE CHAIRMAN: This fellow isn't a party, never was made so. It may be a technical point. Go ahead.

PROFESSOR CHERRY: Suppose he is a party and is in default, would you add a new property of his?

THE CHAIRMAN: That would be all right.

PROFESSOR CHERRY: Why shouldn't he have notice?

THE CHAIRMAN: I was citing the case of an amendment to include some property that wasn't in there originally, that belonged to a man who wasn't originally named. I suppose it is taken for granted that would have to be served on the new owner.

PROFESSOR CHERRY: The man I mention is in default. Although he is in interest, is affected thereby, he is in default, so he gets no notice.

THE CHAIRMAN: That is all right.

PROFESSOR CHERRY: Is it? He has defaulted just as to one property. He may have a defense as to the other.

DEAN MORGAN: We require in our regular rules that a person who is in default shall be served if you serve an additional claim against him.

THE CHAIRMAN: That is right.

JUDGE CLARK: I think there may be a little gap here. I am fairly clear from what I heard on what they intended to do. I think you may want to watch it on account of the language, but I have no question but that they intended that to be served

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anew.

MR. TOLMAN: What line is that, Judge Clark?

THE CHAIRMAN: Line 100.

JUDGE CLARK: Line 100. All right, shall I go on now? Line 105, subdivision (f): "SUBSTITUTION OF PARTIES. If a defendant dies or becomes incompetent after the service of notice upon him, the plaintiff shall not be required to give any notice to any person because of death or incompetency, nor shall the death or incompetency of any defendant abate the action or require any other person to be substituted as a party."

DEAN MORGAN: I want to put a question mark after "incompetency" there. I think incompetency there ought to be discussed.

JUDGE CLARK: All right. Subdivision (g): "TRIAL. (1) By Jury. Any party may demand a trial by jury of the issue of compensation, by filing a demand therefor in writing, which may be endorsed upon the complaint or the answer, and may be withdrawn by any party by filing a notice of withdrawal. The plaintiff's demand must be filed not later than ten days after the complaint is filed. A defendant's demand must be filed not later than ten days after the service of his answer. A copy of the demand for jury trial need not be served. The jury shall be selected and impaneled as in other civil actions. The court in its discretion may permit the jury to view the property.

"(2) By Court. Unless a jury trial has been

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demanded pursuant to paragraph (1) of this subdivision, trial of all issues shall be by the court."

The next subdivision is (h) "DISMISSAL OF ACTION." This is the one, of course, where there has been some difference of view.

"(1) As of Right. At any time prior to the vesting of the title sought to be acquired in the action, the plaintiff may dismiss the action in whole or in part, without court order, by filing a notice with the clerk setting forth briefly and concisely the property and interest therein as to which the action is dismissed.

"(2) By Stipulation. The action may be dismissed in whole or in part and as to any person or property, by filing a stipulation or dismissal."

I wonder if that ought not to be "of".

MR. TOLMAN: It should be "of".

DEAN MORGAN: "Of".

JUDGE CLARK: "(3) In all other respects the effect of any dismissal is to be determined by the provisions of Rule 41(a)."

The next is Judge Donworth's alternative for subdivision (h): "DISMISSAL OF THE ACTION. Plaintiff may dismiss the action, in whole or in part, at any time prior to the entry of final judgment, but if the plaintiff has taken title or possession, dismissal shall be only under order of court or by

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stipulation with all parties affected by the dismissal who are not in default."

The next subdivision is (i): "ASSESSMENT FOR BENEFITS. If in connection with the condemnation of private property for public use a special assessment or special tax is sought to be levied on property not taken, which is alleged to be benefited by reason of the taking, the assessment of the tax may be levied and collected in the manner provided by the law authorizing it."

The next subdivision is (j): "COMPLIANCE WITH STATE PROCEDURE: If the action involves the taking of property for public use under the right of eminent domain arising under the constitution or statutes of a state, the foregoing provisions of this Rule 71-A shall not apply and the action shall be conducted in conformity, as near as may be, with the procedural rules prescribed by the laws of that state for similar proceedings in the state courts, subject to such changes as the district court shall by rule or order direct for the purpose of adapting the state procedure to the applicable requirements of the practice in the district courts."

Then, (k): "Paragraph (7) of subdivision (a) of Rule 81 is rescinded."

JUDGE DONWORTH: If I might make some observations in regard to (j), I am the author of (j) and it is to continue in force the procedure with which the courts and attorneys in

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all the states are familiar relating to the condemnations under their particular enactments. It should not be thought that this is a rare situation. On the contrary, in the states of Oregon and Washington there are pending now or are about to be started or have been conducted in the past year condemnation proceedings where, I am told, the amount in dispute is over 50 million dollars.

THE CHAIRMAN: By the state or by state corporations?

JUDGE DONWORTH: By state corporations.

THE CHAIRMAN: Not by the Federal Government.

JUDGE DONWORTH: Quite true. Locally the districts are known as "P.U.D." districts--Public Utility Districts. The sentiment out there and the legislative enactments rather favor the creation of municipal corporations, usually coextensive with the county but in some cases much larger, and these public corporations institute proceedings to condemn away the rights of the private owners of electrical power projects. Then, also, the railroad companies, all of which are non-resident corporations in our state (the four principal railroad companies are the Great Northern, the Northern Pacific, the Milwaukee, and the Union Pacific), much prefer when they start a condemnation proceeding to start it in the federal court. When I was on the bench, I presided at a large number of trials; sometimes it was a succession of trials running over a period of some two months, and it worked very well. This was the proceeding

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that we went under.

One difficulty of trying to set up a federal procedure for that type of action is that the procedural provisions of the state statutes and, to some extent, the provisions of the state constitutions mingle procedure with substance, and it would not do to say that you can go into a federal court, reserving the substantial rights of the parties, because, as I say, of the procedure not being substance. This whole rule is drawn on the theory that eminent domain proceedings are not substantial rights but are procedure, and the lawyers and the judges with whom I have spoken in our state say that it would be a very unfortunate thing to take away a procedure which the federal courts are working with very satisfactorily and which they find entirely adequate both for plaintiff and defendant, and substitute a new proceeding such as is outlined in the general provisions of this rule.

The Lands Division, as I understand it, says, "We are not concerned in this. If this suits the bench and bar of the country, let it go. We don't care."

So I hope that a favorable view will be taken of the provisions of (j), whatever may be thought of the other provisions.

JUDGE DOBIE: That applies only to takings under state law.

JUDGE DONWORTH: Absolutely.

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JUDGE DOBIE: It doesn't affect takings by the United States under federal law.

JUDGE DONWORTH: Absolutely.

SENATOR LOFTIN: Mr. Chairman, I have to leave about four-thirty to catch a train. I wonder if we can't discuss subdivision (h), Dismissal of Action, which seems to be the controversial section of this whole procedure, first.

THE CHAIRMAN: All right. Go ahead and say what you like to about it.

SENATOR LOFTIN: The observation that I want to make is that it provides dismissal of action first as of right. "At any time prior to the vesting of the title sought to be acquired" .... "the plaintiff may dismiss" without order of the court. All the cases cited in the memorandum furnished us by the reporter, including the United States Supreme Court, hold that vesting of title in a condemnation proceeding does not take place until there is award and the Government pays the money. Until then, the title does not pass. Construing this provision in the light of those decisions, which we must, the Government would have the right at any time prior not only to the award but to the actual payment of the money by the Government to the owner of the property to dismiss the proceeding.

I don't know that that was the intention of the Department of Justice, but reading it in the light of those

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cases, there is no other conclusion that we can arrive at. So I would certainly oppose that provision in its present shape. I do not feel that the Government should have the right to dismiss a proceeding up to that very last point.

THE CHAIRMAN: Judge Donworth's alternative was to put a check on that in this way: that it could be done any time before the final judgment, that the Government could dismiss at its election as a matter of right, except that, whether they have taken the title technically or not, if they have actually gone into possession and used it for anything, then they couldn't dismiss without leave of the court, stipulation, which would involve, I suppose, the condition that the Government would have to pay for such use as it put the property to pending the proceeding. That is his alternative.

Am I right? Is that the substance of your alternate provision?

JUDGE DONWORTH: Yes. If I might amplify a little, there has been a great deal of condemnation by the United States in the State of Washington in the last few years, and there are pending now a very large number of cases. There are two grounds of complaint about dismissals by the Government. One is the case where the plaintiff has not taken possession but has carried the case through to a verdict and the verdict is unsatisfactory. There have been several cases of that kind where the United States has dismissed because the defendant

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insisted on the verdict and wouldn't compromise for any less. So the United States says, "Very well, we will dismiss." One of those cases got into the newspapers out there. The judge said, "I don't like to dismiss this, but you have the right. You haven't taken possession. It is true a verdict is rendered, but the plaintiff may dismiss." So the plaintiff dismissed, and the result was that a man of moderate means, who had employed an attorney and conducted a trial of some little duration, was in hard luck.

I haven't tried to cover that in my proposal of (h). It seemed to me that that wasn't a sufficient matter for us to modify in this rule. Others may think differently.

The second ground of objection is this: There are several statutes of the United States (I know of about four, and I think there are several others) which provide that after a condemnation suit is begun, the plaintiff may file in court what is called a "declaration of taking," may estimate the amount of compensation and may deposit in court a certain amount which the defendant may elect to take more or less without prejudice.

Then, in addition to that, in the Act of 1942 Congress went farther than it ever had gone. In the Act of March 27, 1942, known as the Second War Powers Act of 1942, a clause was inserted reading as follows: "Upon or after the filing of the condemnation petition, immediate possession may be taken and

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the property may be occupied, used, and improved for the purposes of this Act, notwithstanding any other law."

Under the War Powers Act of '42, it isn't even necessary to file a declaration of taking or to make a deposit in court. The fact that the proceeding has been begun is sufficient authority for the Government to take this immediate possession.

I very strenuously object to any dismissal where there has been a taking of possession, whether title has passed or not, because if possession has been taken, a great deal of damage has been done; and if the plaintiff may dismiss at such a stage, then the defendant is remitted to the Court of Claims to get his damages for the title that has passed or for the possession that he has lost in interference with his occupancy rights.

I thought it was fair to propose, as in my alternative, that "Plaintiff may dismiss the action, in whole or in part, at any time prior to the entry of final judgment," even though the reason for his dismissal is that he doesn't like the verdict (that is not here, but it is implied), "but if the plaintiff has taken title or possession, dismissal shall be only under order of court or by stipulation with all parties affected by the dismissal who are not in default."

In discussing this with the Lands Division officials, they say the court might be construed under this to have power

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to impose terms and conditions. Maybe so, but my thought is that you have to trust the court and require the action to proceed to judgment unless the court in its discretion thinks that the circumstances warrant a dismissal of the action.

We must bear in mind that the condemnation suit is brought for a double purpose: first, to acquire the property for the Government, and, secondly, to give the owner his compensation. One is just as important as the other and perhaps more important under the Twelfth Amendment. I think it is very bad to have a condemnation statute or rule authorize a pseudo-eminent domain-pseudo-compensation proceeding, with the idea that as soon as the action gets into court, the plaintiff may take posession and then dismiss and send the gentleman on to Washington to sue; under the Tucker Act, perhaps, if it is $10,000 or less, to sue in the local district court. I think it is making the eminent domain proceeding a mere sham to obviate the Twelfth Amendment and to prevent the defendant from really getting his just compensation.

SENATOR PEPPER: Mr. Chairman, may I ask Judge Donworth a question? What would happen if there were no dismissal? Suppose that.

JUDGE DONWORTH: The court would set the case down for trial and proceed.

SENATOR PEPPER: Then what if the condemnor, the plaintiff, just didn't appear?

the property may be occupied, used, and improved for the purposes of this Act, notwithstanding any other law."

Under the War Powers Act of '42, it isn't even necessary to file a declaration of taking or to make a deposit in court. The fact that the proceeding has been begun is sufficient authority for the Government to take this immediate possession.

I very strenuously object to any dismissal where there has been a taking of possession, whether title has passed or not, because if possession has been taken, a great deal of damage has been done; and if the plaintiff may dismiss at such a stage, then the defendant is remitted to the Court of Claims to get his damages for the title that has passed or for the possession that he has lost in interference with his occupancy rights.

I thought it was fair to propose, as in my alternative, that "plaintiff may dismiss the action, in whole or in part, at any time prior to the entry of final judgment," even though the reason for his dismissal is that he doesn't like the verdict (that is not here, but it is implied), but if the plaintiff has taken title or

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JUDGE DONWORTH: My theory is that the case is brought for two purposes, to acquire the property and to determine the compensation. The court will say, "This case must proceed here until the compensation is determined."

SENATOR PEPPER: As a practical matter, what are the reasons why the Department of Justice objects to conditioning the right to dismiss by getting court consent? Is it on the theory that presumably they don't want to dismiss since they are out to get the property, unless there has been a failure of an appropriation or something like that?

JUDGE DONWORTH: The failure of appropriation was incidentally mentioned, but I think that is a remedy worse than the disease because, if there is no appropriation available, then the poor devil of a defendant won't get his pay. But the main reason they assert is this: that the United States is a sovereign and that for a sovereign to submit to the ruling of a judge as to what it can do in a case is undignified and is going too far.

SENATOR PEPPER: They didn't say that to you, Judge Donworth, did they?

JUDGE DONWORTH: I think they did, yes.

THE CHAIRMAN: Judge, may I ask a question? Does the Department of Justice concede that, as they have subdivision (h) worded, they could start a proceeding for condemnation and in that take physical possession although they hadn't yet had

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the title vested or hadn't gone through the formality of a definite official taking? Do they concede that if they dismissed after the verdict, if they were dissatisfied with the award, they would be legally bound somewhere and in some court to pay the property owner the value of the temporary use that they had made?

JUDGE DONWORTH: No, they don't concede that.

THE CHAIRMAN: They do say, if there is such a claim, that the man has to go to the Court of Claims to assert it and that he can't assert it in that very action.

JUDGE DONWORTH: I say he has to go to the Court of Claims, and they haven't been able to show me anything to the contrary, unless he went in the district court under the Tucker Act, of course, which he might do.

THE CHAIRMAN: I see. Your proposal is just this: If he has any claim or right for the reasonable use of the property during the pendency of the proceeding which they ultimately dismiss, where the Government has actually taken physical possession, your point is that it ought to be litigated and fixed in the very action, instead of relegated to some other tribunal.

JUDGE DONWORTH: Yes.

THE CHAIRMAN: That is really the essence of it, isn't it?

JUDGE DONWORTH: Further than that, that that is the

purpose of the action that they avow when they begin. It is not a pseudo-action to get into court for the purpose of getting possession and leaving the compensation out. The purpose of the action is the two things, to get title and to determine the compensation, and they shouldn't be divorced and separate.

THE CHAIRMAN: I read part of that memorandum on the authorities, and I should like to be checked up on that. I understand from the general run of this memorandum, dated October 21, that the existing federal rule, pronounced over and over again in the federal courts, is that in cases where the Government hasn't taken physical possession of the property or actually seized it or got it at all, where there has been as yet no taking and no vesting of title, the Government has a legal right to dismiss after it has seen the verdict and doesn't like it.

JUDGE DONWORTH: Unfortunately, I think that is the law; yes.

THE CHAIRMAN: But the decisions also make it perfectly clear, don't they, that if the Government has gone a step further and, although it hasn't actually got the title or actually taken the full title, it has had by virtue of the condemnation proceeding, temporary possession for a while, enjoyed the use or at least excluded the owner from the possession, the Government is liable for its use, even if it dismisses?

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JUDGE DONWORTH: I think this memorandum demonstrates that, with the exception of one late case where the parties had entered into a written agreement or option and the court construed the option in such a way that it held the Government could dismiss, if I understood it correctly.

THE CHAIRMAN: A special case.

JUDGE DONWORTH: Yes.

THE CHAIRMAN: Then, as I understand it, your proposed (h) is in accordance with existing decisions.

JUDGE DONWORTH: I think so.

THE CHAIRMAN: And their proposed (h) ignores the fact that the existing decisions require that such a temporary possession, abandoned after the proceeding is abandoned, should be paid for.

SENATOR LOFTIN: That is the point I made, Mr. Chairman, that they give the condemnor the right to dismiss right up to the very moment that they pay over the money, because until then the title does not pass, and they are given the right under this proposed rule to dismiss at any time before the passing of title.

THE CHAIRMAN: Even where the Government has had possession during the pendency of the case?

SENATOR LOFTIN: They make no qualifications whatever.

JUDGE DONWORTH: And has possession at the time it makes the motion.

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JUDGE CLARK: Could I add something here? I have been on the subcommittee, but I don't want to argue either way on this. Anything you do is all right with me, but I really think that Judge Donworth has stated the affirmative side, and there is something more to the position of the Department of Justice and we want to face it.

In the first place, as to the authorities, I don't believe you can really answer definitely. Mr. Oglebay did the cases, and you have them here. We tried to make an extract of them. The Government reads them one way. What would you say? I get the impression that I wouldn't want to say very definitely. You can see they are somewhat doubtful.

THE CHAIRMAN: Let's be definite about that. Do you mean to say that the Government takes the position that the Government of the United States under condemnation proceeding can go into court and actually enjoy the use and possession of your property and then throw the proceeding overboard, not take the property itself, and not compensate you for the use of it?

JUDGE CLARK: I don't know about that.

THE CHAIRMAN: Do they say that?

JUDGE CLARK: I don't know about the question of incidental compensation, but I do mean, on the general point as to whether title can be, so to speak, forced upon them, that their position is that it cannot be done. While they do

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stand on the point fundamentally that you can't make a claim upon the sovereign against its will, I understood that they rested a good deal on practical matters, too. They cited the case of where the award is greater than their appropriation, and then they say they can't act. They say, in effect, "What can you do?"

THE CHAIRMAN: They are making the point, as I get it, that if a situation such as we talked about arises under Judge Donworth's amendment, the court might say, "I won't allow them to dismiss it at all." The Government might say, "I want leave to dismiss, provided I pay an amount fixed by the judge as the value of the use I have enjoyed," but their point is that the judge can say, "I won't let you dismiss at all. I am going to force the property on you and make you take it all, not merely compensate for what you have enjoyed."

Isn't there something in that, and may not this provision of Judge Donworth's be properly amended to make it clear that a judge can't do that? The most he can do as a condition to dismissal by the Government in a case like that is to fix the compensation that the Government must pay for the temporary use they have had and the damages for that, and enter judgment against them for that amount. That is a little different, you know, from saying, "You can't dismiss at all."

SENATOR PEPPER: Mr. Chairman, the factual situations are more complicated in many instances than those which merely

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call for compensation for temporary occupation. I have in mind the case of one of my partners, the delight of whose life was inherent in family property in Harford County, Maryland, an old colonial house and a beautiful estate. That was condemned by the Government for a reservoir site. They took possession within a very few days of the filing of the condemnation claim, immediately tore down the house, cut down all the trees, and started otherwise to devastate the land, as you would have to do to make a reservoir.

Assuming, just for the sake of illustration, that that matter was so proceeded with that the verdict recovered was for an amount in excess of what the Government thought was proper or in excess of their appropriation and that an application was made for leave to dismiss, a mere payment for temporary use and occupation wouldn't--

THE CHAIRMAN (Interposing): I used the word "damage." I meant to include any damage to the buildings.

SENATOR PEPPER: You see, there would be terrific damage.

THE CHAIRMAN: I didn't intend to limit it to mere rental.

SENATOR PEPPER: There you come right up against the practical situation that the Reporter refers to, that presumably the Government might not be desirous of dismissing if there had not been a failure of the appropriation, and if there is

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nothing that the court can do to produce the fund which would be compensation for the owner, it is an unrealistic situation.

THE CHAIRMAN: The judge could render judgment even though there wasn't an appropriation. You might have to go to Congress to get an appropriation, but there are numbers of cases--

SENATOR PEPPER (Interposing): Oh, yes, they could do that.

THE CHAIRMAN: --where the Government has taken property on an implied promise to pay, without any appropriation at all, and the court can render judgment against the Government for payment, of course, even though the appropriation isn't available.

JUDGE DONWORTH: My idea is that you can trust the judge. Under the suggestion of the Chairman that the judge might say, "I insist that this case go on to the end, although the Government doesn't want it," that would be an abuse of discretion. The plaintiff can always amend by confining the use to a definite thing that he has done and limit the compensation. He can always amend, and I think you have to trust the judge even when he is dealing with his sovereign. We have the Twelfth Amendment that is a very important thing, and I see a violation of the Twelfth Amendment right here.

MR. GAMBLE: Mr. Chairman, I am aware of a situation a trifle different. The Government instituted condemnation

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proceedings against certain property which was occupied by a lessee. In connection with the occupancy the lessee had property of his own, machinery, and an established business. In the course of those proceedings there was a notice filed (I don't know under what statute; it was not a case which I handled) that the Government would take possession on a given date in the future. In order to comply with the notice filed in that proceeding, the occupant disposed of his machinery and his business, and shortly before the arrival of the proposed date the Government undertook to dismiss the action.

That was resisted in our court, and our local judge held that he was not permitted to dismiss without determining the quantity of the damage which that particular person had suffered.

That is just a trifle different because the Government had not actually gone into physical possession of that property, unless notice constituted physical possession. Should a person be remitted under those circumstances by rule to the Court of Claims for redress?

THE CHAIRMAN: I should say certainly not. He ought to be allowed to litigate his redress in that very court.

MR. GAMBLE: I don't believe that either of these drafts would meet that situation.

THE CHAIRMAN: They wouldn't meet a situation where the Government had not actually taken possession but where it

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had threatened to or said it was going to and then reneged.

MR. GAMBLE: But there are some statutory provisions, I think (I can't tell you what they are), that permit the giving of this notice of the date upon which the Government will take possession.

JUDGE CLARK: I should say that the cases were fairly clear that you couldn't do it unless they had taken possession.

THE CHAIRMAN: Couldn't do what?

JUDGE CLARK: You couldn't force a claim against the Government. The only question I think the cases raise is the twilight zone where the Government has taken possession and hasn't yet title. I don't feel myself that you can be sure which way the cases are going. They talk about it, but I am not at all sure that these cases show which way.

The United States attorneys rely on certain definite statements which are only dicta that the Government can dismiss up until the taking of title. There are other statements the other way. I think that is rather the twilight zone, that you can't say for sure, but before there has been even a taking of possession, I don't believe there is anything that can be done there.

Let me say one thing more which I want to make clear. Perhaps you have a question in mind. There are obviously lots of cases of injustice to the property owner, but if the Government hasn't consented to be sued, unless you can find something

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in the authorities I don't believe we can do anything by rule. It is really the position of the U. S. land attorneys, as I understand it, that even if they went ahead and made an award, so to speak, forcing title, that judgment would be a nullity because it is a judgment which is not authorized by any law.

THE CHAIRMAN: That is what stuck in my crop when I thought it was suggested that to give the district court power to say, "You can't dismiss at all. You have to go on and take the property and pay for it," would be enough. It would be on the safe side simply to provide that you can't dismiss unless you pay the damages you have already become liable for under the Constitution.

JUDGE DONWORTH: That is my idea.

THE CHAIRMAN: That is why I suggested that we make it clear that the district judge couldn't just become indignant and say, "You have to go on to the end."

MR. DODGE: The Government may take possession at an early stage, but does it ever get title until the end of the proceedings?

THE CHAIRMAN: It may under some statutes, where the very filing of the notice of taking operates to vest the title. Isn't that so?

MR. DODGE: If you get title, isn't the proceeding merely to fix compensation?

THE CHAIRMAN: That is all.

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SENATOR LOFTIN: These cases, including the United States Supreme Court, all hold that title does not pass until there is an award and the money is paid.

JUDGE DONWORTH: Or definitely assured.

SENATOR LOFTIN: No, they say until the money is paid.

MR. TOLMAN: I think there is one error there. The title does not formally pass until the money is paid. That is the decision. The assuring of a payment at an ultimate date does not change the title, does not transfer it.

JUDGE DONWORTH: I disagree with that.

JUDGE DOBIE: You can pay the money to registry of the court. It doesn't mean that the title does not pass until it has been paid to the various claimants. In other words, the Government is not interested in who gets the money.

SENATOR LOFTIN: But there must be an award determining the amount.

JUDGE DOBIE: And the payment of the money, I should think, to registry of the court.

THE CHAIRMAN: I don't agree that there is any constitutional requirement of an award determining the amount before title is vested. The Court has held over and over again that the law is valid which provides for the immediate requisition of the property with an assurance of compensation, and the Government may take title and be the absolute owner and validly so, provided there is an assurance under the law

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to determine that they pay compensation. If that is so, it is a mere question of the interpretation of the particular statute as to when the title is intended to vest.

My notion about it is that we ought to stick to Judge Donworth's theory here, but I would tone it down a little bit so as not to give the court an absolute right to forbid a dismissal. Make it specific and say that if the Government has been in possession and cut the trees down, and so on, and then wants to quit and not take the title and pay for the whole property, it may do so provided the court fixes the compensation for the use and damage that is done and renders judgment accordingly, and in that case the court will dismiss for the rest.

MR. DODGE: But Judge Donworth says dismissal shall be only under order of the court. That may not go very far in protecting the land owner, in view of these decisions that the court can always dismiss. If the Government moves to dismiss, the court will rely upon these cases and let it dismiss.

JUDGE DONWORTH: The cases are my way.

MR. DODGE: Are they in this memorandum?

JUDGE DONWORTH: Yes.

THE CHAIRMAN: You talk about a twilight zone, but I can't imagine any case which holds there is a twilight zone on a question of whether, if the Government has actually gone into possession with the power of eminent domain and then quits, it

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doesn't have under the Constitution to pay just compensation for such use as is made of the property pending the proceeding. If there is any ambiguity about the decision, that ought to be resolved at once in favor of the liability. Otherwise, you are adopting a theory of decisions which shows they run counter to the Constitution.

PROFESSOR SUNDERLAND: Were we to state that proposition in our rule, that would eliminate the twilight zone, wouldn't it? Wouldn't that be controlling? Isn't that a procedural matter?

SENATOR LOFTIN: If Congress approved the rules, they would then have the force of law.

THE CHAIRMAN: I should like to see (h) written in such a way that plaintiff may dismiss, but if he has actually taken possession of the property, the court shall proceed in that same action to ascertain the amount of damage or the value of the use and the compensation that the owner is entitled to up to date and render judgment for that, regardless of dismissal.

JUDGE DOBIE: You would make it so that he could dismiss as a matter of right up to the time of taking.

THE CHAIRMAN: Yes. I hadn't thought about whether it ought to be the entry of judgment or the actual vesting of title. There is a little quirk there that I hadn't decided.

MR. TOLMAN: I think I ought to make as clear as I

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can the position of the Government. I am not speaking for the Government. My sympathies are all with the property owner. The Government position is this: They say this matter comes up in three different aspects, and I can see plainly that you can't mix them together; you have to take them one at a time.

The first is where the Government brings a condemnation suit and files an election of taking and deposits money in the court. It goes into the registry of the court. There the Government says, "We have no right to dismiss. Title passes when the money is deposited for us or paid by us." Technically, the date of the title's passing would be the actual payment. They don't ask to have the right to dismiss where there has been an election to take. They say they have no power to dismiss that. It is their property; they must pay for it. There is a definite method provided by Judge Roberts' decision in the Wilson case, handed down about a year ago, as to how that money deposited shall be paid, what judgment should be rendered against the United States if the award is greater than the amount they deposited, and what shall be done with overpayments to the property owners if the property owners are paid out of that deposite more money than they are entitled to. So that isn't in this right of dismissal at all.

The second phase that they have is purely a practical matter. They bring a suit and they do not take possession. They have been trying the cases and a verdict comes in fixing

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the value of the various pieces of property. The Congress has made an appropriation for a certain amount of money to pay the cost of the property to be acquired; the verdict is more than the appropriation which Congress has made, more than the available funds. The Government points to three decisions of the Supreme Court of the United States saying that in that case the Government, having done no wrong, having made no taking, having taken no possession, has the absolute right to abandon that because it hasn't the money provided to pay for it. That is the second category of which they speak. They say they must retain the right to dismiss the proceeding at their own will when that is the situation.

With regard to the position where there is what is tantamount to a taking of possession or at least an interference with possession, I confess the Government's position is not very clear to me.

THE CHAIRMAN: That is really what we are talking about.

MR. TOLMAN: That is really what you are talking about now. That is the third situation.

THE CHAIRMAN: We seem to agree with the Government about one and two.

MR. TOLMAN: Yes, on one and two we all agree.

SENATOR LOFTIN: We don't agree as to the first.

MR. TOLMAN: Now let me take up this other one a

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minute. They admit definitely that there is a liability in the Court of Claims for any damage that has been done by the Government in connection with the suit, but they say that there is no consent on the part of the sovereign to be sued for those damages except before the Court of Claims. They say that there is no consent that they may be sued in the condemnation suit. Whether that is the law or not I don't know.

THE CHAIRMAN: That is mighty technical stuff.

MR. TOLMAN: They do admit the liability of the Government in the Court of Claims or, if the amount is sufficient, in the Tucker Act.

It is of course an extremely important matter, and my suggestion now is that we invite Mr. Littell, the head of that department, the Assistant Attorney General, to express his views here before we really determine on the form of our draft.

THE CHAIRMAN: Several of us are going away tonight.

MR. TOLMAN: Perhaps he could come right away.

JUDGE DONWORTH: It is important to remember that this has got to pass the ordeal of Congress, and I don't believe, speaking as a prophet, that Congress is going to approve this rule if it allows the Government to take possession, then dismiss and turn a man over to the Court of Claims. I don't believe Congress will ever approve such legislation.

THE CHAIRMAN: I should like to ask, Scott, what your suggestion is going to be. You said you didn't agree with

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the idea that the Government could dismiss if it had never taken possession or done any damage to the property.

SENATOR LOFTIN: The Major's first category, as I understood, was that where the Government makes declaration of taking and pays the money in to the court. Then the Government has no intention of dismissing but of following through to a conclusion.

THE CHAIRMAN: They admit they are liable to go through there.

SENATOR LOFTIN: They don't under this rule. They say they have the right to dismiss at any time before the passing of title.

THE CHAIRMAN: They treat the declaration of taking filed with the court and the payment of the money as a partial fund as operating to vest title, and under some statutes that I happen to know about they are clearly right.

SENATOR LOFTIN: It may be that under some statutes that is right, but under the decisions cited here there is no passing of title until the money is actually paid and accepted, paid to and accepted by the owner of the property. The owner doesn't have to accept this money that is paid to the court. I have in mind a case right now pending in Florida, where they took possession and use of a property. They have used it for a year. They paid the money in to the court, and the owner says that that isn't half what it ought to be. Under these decisions

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it might be that they would go to a jury trial, and the jury would find that they should pay twice as much as they deposited in court, and they would say, "Well, in view of that, we don't want the property, and you can take what we have paid in court or nothing at all.

MR. TOLMAN: Mr. Loftin, that has all been changed anyway by Judge Roberts' decision. He provides that where a notice of election to take is filed, the court can enter a judgment against the Government for the excess of the verdict.

SENATOR LOFTIN: I don't see that case. Is that a recent case?

JUDGE CLARK: Yes.

SENATOR LOFTIN: It is not cited in this memorandum.

MR. TOLMAN: I don't know what memorandum we are talking about.

SENATOR PEPPER: Mr. Reporter, Mr. Loftin asks whether the decision in which Judge Roberts delivered the opinion is cited in the memorandum.

JUDGE CLARK: I don't think it is. You see, this memorandum is on dismissal. That didn't deal with dismissal. That was on the method of getting the money out of registry of court. I might say that cases are cited saying that the Government cannot abandon under those circumstances, the case on page 6 of the memorandum from the 8th Circuit, United States against so many acres of land, going over to the top of 7,

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which in turn cites the Hessel case from Illinois. They say the title vests upon the filing of the declaration and the making of the deposit. The Government has no right to abandon the proceeding.

MR. TOLMAN: Yes.

JUDGE CLARK: That is under that Declaration of Taking Act. That is under that particular form of Act.

MR. TOLMAN: This case of the Supreme Court is later than that. It was decided within a year, I think.

JUDGE CLARK: I remember the case.

JUDGE DONWORTH: That is the Miller case.

MR. TOLMAN: United States v. Miller.

JUDGE CLARK: But that is in the memorandum; that is true.

THE CHAIRMAN: It really doesn't bear on our problem here.

MR. DODGE: Is it a fact that if the Government has taken possession under the ordinary condemnation proceedings, under which title does not vest in the beginning, its abandonment or discontinuance of the proceeding clearly leaves the land owner a claim for damages enforceable somewhere?

JUDGE DONWORTH: I think those decisions there are to the effect that if possession is taken, the Government is committed to a liability and has no right to dismiss.

MR. DODGE: Looking at them hastily, I thought I saw

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a statement that there was a conflict of authority. Not having had any chance to look at them, I was wondering if anybody had a firm opinion on that question.

THE CHAIRMAN: One thing is perfectly clear, that any court that has held that there is no liability is liable to the Constitution. I would assume, if there is any ambiguity in any decision, that they meant to obey the Constitution. There can't be any doubt about it at all. If the Government, under the power of eminent domain, goes and takes possession of the property and then quits on you after it has done some damage, it may not be compelled to go on and take the property but it has certainly become liable to just compensation.

MR. DODGE: It certainly should.

THE CHAIRMAN: But where there has been a partial taking under the implied promise to pay--

MR. DODGE (Interposing): You would have to bring a new suit either in the Court of Claims or under the Tucker Act, I take it.

THE CHAIRMAN: That is the Government's position, and what we want to do is to say we would settle those damages right in the same case, right away.

MR. DODGE: Yes.

JUDGE DOBIE: Mr. Chairman, if we want Mr. Littell here, I think we had better telephone for him. He is a very reasonable and a very fine man. I happen to know he is

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interested in all these proceedings. He appeared before our conference down in Asheville and made a very strong speech. I don't know whether you want him, but if you do want him--

THE CHAIRMAN (Interposing): You want him, don't you, if he is willing to come before we adjourn?

JUDGE DOBIE: I should like to hear him. I think he is very fine.

THE CHAIRMAN: Do you want to call him?

MR. TOLMAN: Yes.

JUDGE DOBIE: Mr. Littell is the Assistant Attorney General in charge of all this matter. He has all this stuff at his fingertips.

SENATOR PEPPER: As far as the consent of the sovereign is concerned as to suits hereafter brought, if it is one of the rules of procedure that dismissal can be had in such cases as we have been discussing only on terms, then if the sovereign starts a condemnation proceeding under the law as thus established, isn't it consenting to all the incidents of that proceeding?

JUDGE DONWORTH: Quite right; yes, sir.

SENATOR PEPPER: I should think so. It would be pretty difficult, it seems to me, for them to maintain the proposition that they were consenting to so much of the rules as carried assets and not consenting to those features of the rules which carried liabilities.

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THE CHAIRMAN: The question gets back to whether the rule is valid or not, and their argument would be that it would be trying to impose, by a procedural rule, a liability on the Government which it hadn't consented to, brought in any particular court. It is like that case in the Supreme Court in which the 2nd Circuit held--what was the type of that case in the 2nd Circuit?

JUDGE CLARK: The New York Telephone Company case?

THE CHAIRMAN: What was the nature of the action?

JUDGE CLARK: That was a condemnation, and they condemned the land without the easements. Then the Telephone Company claimed that the Government required them to remove their wires, and so on, and we couldn't see that we had any authority to do anything about it. We said they would have to go to the Court of Claims down here.

THE CHAIRMAN: I know. It was that other case where the Supreme Court finally said that the Government had to consent to be sued anywhere.

JUDGE CLARK: Oh; the Sherwood case, yes.

THE CHAIRMAN: What was that case?

JUDGE CLARK: That case was a case of joining the defendants in the action, joining a defendant with the United States.

JUDGE DONWORTH: In a Tucker Act case.

JUDGE CLARK: A Tucker action case, yes. I might say

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the Government cites that incidentally right along here.

THE CHAIRMAN: That is a case where, under our rules, in a Tucker Act case (a suit against the United States in a district court for less than $10,000), the plaintiff joined another defendant, and the Government objected, said they had never consented to be sued either in the Court of Claims or in the Tucker Act court in conjunction with any other defendant. The Supreme Court said, "Yes, that is so," that there is no more right to join a defendant under the Tucker Act with the Government than there is in the Court of Claims and that the federal rules construed to permit joining of a party or an interpleader of a party with the Government in a suit against the United States under the Tucker Act were void because of the Government's immunity having been waived under certain conditions.

MR. DODGE: What would be the effect of a rule modifying Judge Donworth's draft a bit so as to read: "Plaintiff may dismiss the action, in whole or in part, at any time prior to the entry of final judgment unless it has taken title or possession, in which case the action shall proceed for the assessment of damages." Is that what we want to accomplish?

THE CHAIRMAN: I should say not, because it raises the inference that if it has taken possession, the Government is forced to go on and take the title, pay for the title. What we are really aiming at is that they pay damages for what they

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have done to date.

MR. DODGE: I didn't mean to exclude that. I meant the dismissal to be subject to a determination first of the damages.

JUDGE DONWORTH: The word "damages" is not the appropriate word. That implies a tort, I think. It is compensation for what has been done. It is protected by the Twelfth Amendment.

MR. DODGE: We call them land damage cases in Massachusetts.

THE CHAIRMAN: Do you want to discuss some other aspect of this thing while we are waiting to see whether the Attorney General is coming?

MR. HAMMOND: May I make a suggestion in connection with this? Possibly you could go as far as to provide that any claim up to $10,000 could be set off in that action because the district court--

THE CHAIRMAN (Interposing): That is the Court of Claims, isn't it?

MR. HAMMOND: Yes, but I don't really think you can go beyond that.

JUDGE DONWORTH: The Tucker Act doesn't permit counterclaims, I think.

MR. HAMMOND: No; I know it doesn't.

JUDGE DONWORTH: It is a distinct procedure.

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MR. HAMMOND: But if the Tucker Act does provide for a suit against the United States--

JUDGE DONWORTH (Interposing): It has to be independent and served on the Attorney General, and so forth. It is a special procedure.

MR. HAMMOND: You can't do that, then.

JUDGE DOBIE: Do you think, if this goes through Congress and they approve it, that we couldn't allow that court to go ahead and award more than $10,000 damages?

JUDGE DONWORTH: It is a very brash assumption that Congress is going to approve this.

MR. HAMMOND: No. I don't think Congressional approval would help it.

THE CHAIRMAN: If Congress passed a statute approving the rule, all right; but they won't. The most they will do is to say, "We won't do anything."

MR. DODGE: I should like to ask just one question of Judge Donworth again. Just what kind of order of the court did you anticipate in in committing it all to the court's order?

JUDGE DONWORTH: I think the court is then vested with discretion to do what the circumstances of the case require under the Fifth Amendment, and I think you can trust the judge to see that he applies the Constitution of the United States to a case which the Government itself has instituted to bring the subject matter before the court. The court can dispose of

the case and would have disposed of it justly and constitutionally under my suggestion.

MR. DODGE: Assessing compensation in that case?

JUDGE DONWORTH: Yes. The Government started the suit for that purpose. It was the purpose of the suit not merely to acquire the property but to determine the compensation.

SENATOR PEPPER: Is there any authority for some such proposition as this: that whereas the condemnation was begun with the idea of acquiring the fee, and whereas the matter had been so proceeded with that the fee had never been acquired, that there had been no payment or whatever steps are necessary to the vesting of title, but that by conduct the condemnor had taken something less than the fee which it started out to take (to wit: the limited interest of a person in possession), it was liable under the Fifth Amendment for the extent of interest in the land which actually its conduct had shown that it required? Is there any such distinction as that?

JUDGE DONWORTH: Well, here is the decision by Judge Wham in Hessel v. Smith, 15 Fed. Supp.: "Thus it seems well settled that the United States may lawfully take possession and proceed with its use of land sought to be condemned prior to trial, judgment and payment of the judgment, if adequate provision be made for the ultimate payment of just compensation to the land owner."

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I thought it was fair to propose, as in my alternative, that "Plaintiff may dismiss the action, in whole or in part, at any time prior to the entry of final judgment," even though the reason for his dismissal is that he doesn't like

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Then in Cherokee Nation v. Southern, 135 U.S., the court said: "The Constitution declares that private property shall not be taken for public use without just compensation. It does not provide or require that compensation shall be actually made in advance of the occupancy of the land" (occupancy is the point made) "to be taken. But the owner is entitled to reasonable, certain and adequate provision for obtaining compensation before his occupancy is disturbed."

So says the Supreme Court of the United States.

SENATOR PEPPER: But suppose a case in which a proceeding is begun looking toward the ultimate condemnation of the fee and suppose there has been no such deposit of money in the registry of the court or no such filing of a bond as would constitute security for compensation, but that under the permitting statute possession is taken. Is there any authority in the books for a compensation on the theory that the taking of possession is itself the condemnation of a limited interest in land?

JUDGE DONWORTH: There are plenty of authorities--and they are cited in this memorandum--that the taking of possession is a taking. I do not recall seeing any case where they held the Government to pay for a lesser thing than it purported to apply for in the beginning.

SENATOR PEPPER: I see.

THE CHAIRMAN: Of course, the deposit of the money

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isn't required as necessary assurance of compensation. The federal courts have held that the responsibility of the Government for the damage to the property and the provisions of law which expressly and impliedly contemplate that after taking the owner can go and sue for just compensation in the Court of Claims are enough, even though you have to get an act of Congress to appropriate the money to pay the judgment. In other words, an honorable government is financially responsible and can be reasonably relied upon to pay the ultimate bill in good faith, if it has to. That is all that is required. You don't have to pay the money in advance; you don't have to deposit it in advance; you don't have to give any bond or any other kind of assurance. In the case of a private corporation it is different, you see. Their credit isn't so good.

JUDGE DONWORTH: What we are dealing with here is the procedure in a proceeding begun by the United States.

THE CHAIRMAN: It looks to me as if the real question in this case is this: There can't be any doubt in anybody's mind, I think, that if the Government starts an eminent domain proceeding under a statute to take possession of property pending the proceeding and then changes its mind and says, "I don't want to go on and buy this property," and quits or is allowed to quit, there has been a taking of a partial value under the power of eminent domain and that they are bound to pay for it under the Constitution.

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The only thing that we are struggling with, as I get it, is that the Department of Justice says, "Well, you are really suing the Government there, and the Government has never agreed to have any judgment rendered against it, except in the Court of Claims, except where it finally takes the property and consents to have a judgment." They say that, although there is a liability, the Government can dismiss and harass the man whose property they have occupied by compelling him to come around to another tribunal at a far distant place and litigate for four or five years before he gets his money. In the meanwhile, the Government can bargain with him and get off easy because of the obstacles they placed in his way.

It really comes down to a question of whether there is no legal power to allow the court in which the condemnation proceeding is pending to make that award for the temporary use and whether it has to be relegated to the Court of Claims, if no act of Congress is passed. If these rules as Judge Donworth has got them aren't good without the consent of Congress, then I don't think we ought to adopt any rule at all to tell the Lands Division, if their only point is the tribunal which settles this claim for temporary use. If they admit there is a liability (I don't see how they can avoid that), we say that it ought to be done in the same court, at the same time, and we are not interested in promulgating a rule that does anything else. If there is any doubt in their minds as

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to the power of the Supreme Court by procedural rule to provide for that, send them back to Congress.

The truth of the matter is, I understand, that they had a bill up in Congress, and the bill was objected to in Congress because it didn't do this very thing. Wasn't that it? It didn't provide for any compensation after dismissal.

MR. HAMMOND: I don't know anything about it.

JUDGE DONWORTH: I don't remember the specific point, but in the committee (I forget which House it was) they disapproved the bill, although no formal vote was taken. They declined to approve the bill because they thought it was too favorable to the United States. That is my understanding.

THE CHAIRMAN: I remember some of the objection to it was because the measure of damages and the character of proof to be offered as to the value of the property were restricted by the statute.

SENATOR PEPPER: Mr. Chairman, is there anything in this aspect of it? Suppose Congress makes an appropriation for the condemnation of certain properties for a park or other public use. Then suppose the matter is so proceeded with that the Government, after having gone forward to a certain point, desires to dismiss. Then the objection is made that they can dismiss only on terms, the terms being the payment of compensation for the use. Supposing that order is made, will the Comptroller General pass any part of that appropriation?

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THE CHAIRMAN: Probably not.

SENATOR PEPPER: Then aren't you driven to get an act of Congress in the one case as much as in the other?

THE CHAIRMAN: Well, you have to get an act of Congress to pay the judgment--

SENATOR PEPPER (Interposing): Yes.

THE CHAIRMAN: --but so you do if you have to go to the Court of Claims. There is no fund to pay a Court of Claims judgment.

SENATOR PEPPER: Oh, no. I mean you probably couldn't. Of course, it would be greatly to the advantage of the property owner, if Congress had appropriated a million dollars for certain use and then desired to dismiss and damage to the extent of $50,000 had been done, if that damage were collectible out of that appropriation, but I doubt if they could do it.

THE CHAIRMAN: The appropriation is made for the purpose of paying for the whole title.

SENATOR PEPPER: That is right.

THE CHAIRMAN: It might be. Of course, appropriation acts are sometimes pretty--

SENATOR PEPPER (Interposing): Broad.

THE CHAIRMAN: --broad.

JUDGE DONWORTH: Senator, you will bear in mind that the Fifth Amendment doesn't mention an appropriation.

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SENATOR PEPPER: No.

JUDGE DONWORTH: The protection of the Constitution is positive. It doesn't depend upon an appropriation by Congress.

THE CHAIRMAN: What about Littell? Is he going to come?

MR. TOLMAN: Mr. Littell and Mr. Williams are coming. Mr. Williams is their first assistant, who knows just exactly what the practical steps are. He won't wait for Mr. Littell because Mr. Littell may be a little delayed. He has just left the office. They will both be here this afternoon, and Mr. Williams will be here at four o'clock.

THE CHAIRMAN: Suppose we go back to these details. We didn't have any question in (a), but we had a question in (b) that in order to avoid uncertainty it ought expressly to provide that the complaint, among other things, should state the uses for which the property is to be taken.

MR. DODGE: I think it is clearly shown in the form which is annexed that it does have that in. Why shouldn't we add that at the end.

PROFESSOR SUNDERLAND: We had it in the original condemnation rule that we drew, Mr. Chairman, and it read as follows: "A description of the property and of the estate or interest therein sought to be taken and the authority for and the purpose of the taking, shall be briefly stated."

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THE CHAIRMAN: I think I was right earlier in the day in saying that the way this rule was worded, which makes the federal rules apply unless otherwise stated, the necessary result is that in your condemnation complaints you have to state a good claim, which would involve all those things plus these special provisions. I also agree that there is no harm in saying so here.

DEAN MORGAN: You could fix it clearly if you just stated "shall include, for example."

THE CHAIRMAN: Yes.

DEAN MORGAN: Then it would mean that these were just additional.

THE CHAIRMAN: Is it the sense of the meeting that subdivision (b) be amended so as to state that the allegations in the complaint shall include allegations of the uses for which the property is to be taken and the authority for taking it, a reference to the statute or reference to the law?

PROFESSOR SUNDERLAND: Yes, some reference to the law.

SENATOR PEPPER: It might be well to say that the complaint shall comply with the requirements of Rule 8, because the general rules of pleading include the requirements of the complaint. "The complaint shall comply with the provisions of Rule 8 and shall name as defendants", and so on. That would make it clear that we were tying the thing up to the formal

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requirements of Rule 8.

THE CHAIRMAN: If there is no disagreement, we will ask the subcommittee who drafted this rule to make an amendment to subdivision (b) to cover this point.

There is nothing else in (b), as I understand it.

MR. GAMBLE: Mr. Dodge raised a question that there is nothing in (b)--and I haven't seen anything anywhere else in the proposed rule--that makes any provision as to what efforts the condemnor should undergo to find out the owners.

DEAN MORGAN: That is true.

MR. GAMBLE: I didn't see anything further on.

DEAN MORGAN: There isn't anything.

JUDGE DONWORTH: The nearest to that, as I understand it, is that the certificate of the plaintiff's attorney is sufficient evidence. I thought there was a clause to that effect.

THE CHAIRMAN: That was the certificate of service, but not of unknown owners.

DEAN MORGAN: By publication; that is all.

MR. GAMBLE: That certificate doesn't say that they have served all that they know.

THE CHAIRMAN: In what subdivision is that certificate referred to?

MR. GAMBLE: Line 78 on page 3.

THE CHAIRMAN: Yes, but that is proof of service;

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that is not a certificate that the fellow is unknown. It is a certificate that he mailed and published a notice, that he deposited it in the post office with a stamp on it, addressed to John Smith, where he does know the man and knows his address.

JUDGE DOBIE: It doesn't say whether they are known or not, and it doesn't say that they are the owners of the property. It is just like the marshal. He says that he posted the within notice or mailed it in such and such a way or that he published it in such and such a paper. That doesn't touch this at all.

SENATOR PEPPER: Mr. Chairman, would it do if in line 12 (b) were amended so that it would read thus: "The complaint shall name as defendants all owners of and parties interested in the properties sought to be taken, if known or ascertainable by reasonable inquiry, and all others such as cannot be so ascertained shall be joined as defendants under the name of 'Unknown Owners'."

THE CHAIRMAN: That is good principle, but the trouble is this: The question of whether or not it can be determined by reasonable inquiry ought to be settled before the service is made, by an order of the court, on proof that you don't know him. Otherwise, two years after the condemnation award is made, someone may come in and try to set aside the judgment on the ground that reasonable diligence would have discovered the unknown.

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SENATOR PEPPER: I was thinking if there were such a requirement respecting the complaint, that any defendant might object to the sufficiency of the complaint on the ground that the condemnor had simply given formal service to the rule, had named one or two persons and had then listed the whole residue of owners as unknown and had not used diligent inquiry to ascertain them.

THE CHAIRMAN: I think the only safe way is to require the plaintiff in the interim proceeding to go to the judge and make a showing as to who are known and unknown, and to make an order to substitute service on unknown people. That is a common system of dealing with unknown people, and the advantage of that is that the fact that the judge has passed on the point and made the order settles the validity of the service.

DEAN MORGAN: I guess that is right.

THE CHAIRMAN: You don't have anybody deciding whether reasonable diligence would have discovered this man.

DEAN MORGAN: Yes. You have had in New York lots of cases where you don't have to go to court; just make trial affidavits, you remember.

MR. DODGE: Is there any provision here for applications to the court in such a case?

THE CHAIRMAN: No, there is not.

MR. DODGE: There ought to be.

THE CHAIRMAN: Isn't it usual in condemnation

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proceedings to go to the court--

MR. TOLMAN (Interposing): Yes.

THE CHAIRMAN: --and get authority for substituted service on a showing that you can't find the fellow or don't know his address or who the owner is?

MR. TOLMAN: It is, and I am told that that is what they do.

THE CHAIRMAN: In the districts, you mean? Everywhere?

MR. TOLMAN: Yes, in the districts, and in all the federal cases they get an order.

THE CHAIRMAN: This rule doesn't provide for it.

MR. TOLMAN: No, it does not.

MR. DODGE: In the case of a class of persons.

MR. HAMMOND: I should think the Government would want it for its own protection.

THE CHAIRMAN: Yes. Then how would you vote on the suggestion, in principle, that the rules be amended so that treating a man as an unknown person or one whose address is unknown, particularly in the matter of service upon him, has got to be dealt with under a new provision that provides that there will be a showing to the judge and an order by him recognizing that the owner is unknown or that his address is unknown and authorizing some substitute service? Do you feel that that ought to be done in some way?

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I thought it was fair to propose, as in my alternative, that "Plaintiff may dismiss the action, in whole or in part, at any time prior to the entry of final judgment," even though the reason for his dismissal is that he doesn't like

SENATOR PEPPER: Mr. Morgan moves to that effect, and I second it; isn't that right?

DEAN MORGAN: That is right.

THE CHAIRMAN: They ought to like it.

DEAN MORGAN: I don't care whether they like it or not.

THE CHAIRMAN: Unless they want a judgment set aside a few years hence.

SENATOR PEPPER: Mr. Morgan made a motion to the effect suggested by you, and I seconded it.

THE CHAIRMAN: Since the Judge said the Government wouldn't like it, maybe we ought to wait and hear from Mr. Williams about it.

MR. HAMMOND: I think it would be a good idea to get his views on it.

THE CHAIRMAN: Maybe we can ask him to show cause.

SENATOR PEPPER: We could reconsider if we wanted to.

THE CHAIRMAN: Subject to discussion with Mr. Williams, all in favor of that proposal say "aye"; opposed. (Carried.)

MR. TOLMAN: May I suggest the other amendment which you have just spoken of, how it could be most conveniently made?

THE CHAIRMAN: Where is that?

MR. TOLMAN: "The purpose for which the property

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is sought to be taken," and so forth.

JUDGE DONWORTH: What line should that go in, Major?

MR. TOLMAN: In the old rule, the first rule, we had it in lines 21 and 22, and I think it should be put in here in the same way. "A description of the property and of the estate or interest therein sought to be taken and the authority for and the purpose of the taking, shall be briefly stated." That was once approved, and it fills this bill, I think.

THE CHAIRMAN: We authorized you to put that in in any way you think is proper.

MR. TOLMAN: All right.

JUDGE DONWORTH: Major Tolman, at what line does that go in? Can you state the place?

MR. TOLMAN: It would go in here somewhere between lines 14 and 17. I think it probably would go at the end of 17. I think it follows line 17, Judge Donworth, and it is lines 20 to 25 of the original printed draft which we approved before.

THE CHAIRMAN: The next mark on the margin that I have of a specific point that was raised would be on page 4, line 100, which says, "Copies of the amendments need not be served but notice of the filing of the amendments shall be served in accordance with Rule 5(b) upon the parties affected thereby and not in default."

If the amendment affects a party, even though he is

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in default, if it enlarges or reduces the amount of property you want to take, ought not he to have notice of that? He may be defaulting because he has no kick about it.

MR. HAMMOND: We had a rule in our general rules reading this way: "Every order", and so forth, "shall be served on each of the parties affected thereby. No service need be made on parties in default for failure to appear, except that a pleading asserting new or additional claims for relief against them shall be served among them in the manner provided for the service of summons in Rule 4."

We ought to have some similar phraseology to cover the additional claim.

THE CHAIRMAN: The additional land and, contrary to the other case, you ought to serve him if you were reducing the interest you were taking. Suppose you take a whole farm and then amend and say, "I want to cut it in to take a strip," he ought to know that even though you are reducing your claim. I don't see any reason that the words "and not in default" should not be stricken out.

MR. DODGE: Would that be 5(b) or 5(a)?

MR. HAMMOND: Rule 5(a), sir.

MR. DODGE: A mistake in this draft. It says 5(a); it should be 5(b).

MR. HAMMOND: That is in the next paragraph.

MR. DODGE: Line 100?

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THE CHAIRMAN: It is 5(a) of the general federal rules of procedure you are talking about?

MR. HAMMOND: Yes.

THE CHAIRMAN: The clause I am talking about, Mr. Dodge is on page 4 of this draft, in line 100.

MR. DODGE: That is just what I was looking at.

THE CHAIRMAN: I suggest that you strike out "and not in default", because if you are amending your complaint either up or down, anybody affected thereby should be notified, shouldn't he?

DEAN MORGAN: Yes.

THE CHAIRMAN: We protected him in the other rule against increasing your claim, but I pointed out here that you may be reducing, and still he would have reason to object.

MR. TOLMAN: Would it do simply to take that language that we worked on so long and apply that here? The language that Mr. Hammond read seems to fit this case pretty well.

THE CHAIRMAN: It is quite obvious that we have to patch this thing up if we are going to require service on a man in default under any circumstances at all. Rule 5(b) wouldn't do it.

DEAN MORGAN: No. That is just the manner of service.

THE CHAIRMAN: That is the manner of service where he hasn't defaulted.

DEAN MORGAN: Yes, that is right, Mr. Mitchell.

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MR. HAMMOND: We have to add something similar to 5(a).

MR. TOLMAN: I think so.

THE CHAIRMAN: The next thing I had noted on the margin here was on page 4, line 102. I had a mark there, something to do with incompetency. Who made that point?

DEAN MORGAN: I wondered about what happened when a person becomes incompetent after the service of the notice upon him. Are you just going to say there doesn't have to be any substitution of parties or that nobody has to be given any notice or anything of that kind? How is the interest of that person going to be protected at all? A person may go absolutely incompetent, without any committee being appointed or anything of that sort. I don't know anything about whether that kind of provision is usual or not or whether or not you are going to try to protect the interests of persons who have become incompetent after the service of notice.

MR. HAMMOND: Mr. Morgan, I think that was taken from the provision on the substitution of parties in Rule 25.

DEAN MORGAN: Was it?

MR. HAMMOND: We don't define there what competency means.

DEAN MORGAN: That is an old statute, too, isn't it?

MR. HAMMOND: No, it isn't a statute at all.

DEAN MORGAN: It was, wasn't it, in 25, if a party

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dies? That is what it says there in Rule 25(a).

THE CHAIRMAN: Your point about that rule is that if a man becomes incompetent, there is no provision for notifying anybody--

DEAN MORGAN (Interposing): Yes.

THE CHAIRMAN: --or for seeing to it that he has a representative substituted for him.

DEAN MORGAN: There is no provision for substitution of parties here.

MR. HAMMOND: Yes.

THE CHAIRMAN: The spirit of the rule is that if you served him when he was competent, if he may be in default he will stay in default, but if he isn't in default certainly somebody represents him and it is his business to know he died and to take the necessary steps.

DEAN MORGAN: But suppose he is served just shortly before he becomes incompetent. That is the only kind of case I had in mind. Of course, if he is in default, that is one thing, but very frequently a person is not regarded as incompetent until he is declared incompetent. Isn't that right in many cases, Edson?

PROFESSOR SUNDERLAND: I think so.

DEAN MORGAN: So you might have proceedings going on against this particular person and have service left at his place of usual abode and nobody pay any attention to it.

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SENATOR PEPPER: Subsection (f) is entitled "Substitution of Parties," and the cumulative effect of subsection (f) is that there ain't no such thing. (Laughter) "If there is substitution of parties, there shall be none".

DEAN MORGAN: I suppose the intention was simply (I am not saying it isn't right, but I think it ought to be discussed) that the representatives will ultimately share in the award. I suppose that is really the way the protection comes, because, as far as I can make out, these fellows don't have any defense anyway.

THE CHAIRMAN: The general rule is that when these government condemnations take place, it is just a promising, profitable source of funds to the population of the neighborhood; everybody gets excited about it, and they know all about it. There is no chance of anybody's getting lost.

DEAN MORGAN: There is something in that.

... A brief recess was taken, during which the representatives of the Department of Justice appeared ...

JUDGE DONWORTH: Mr. Chairman, what point did you think we would take up first?

THE CHAIRMAN: I thought we would take up first the main point about compensation for temporary occupancy. That is the biggest one.

JUDGE DONWORTH: Oh, yes.

THE CHAIRMAN: Mr. Littell, we have two or three

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things that we would be grateful to you if you would with them before us, but I think one of the things that is most important of all is the question that has come up before the committee here. Have you a copy of this draft as it is before us?

MR. NORMAN M. LITTELL (Assistant Attorney General of the United States): No, I have not.

THE CHAIRMAN: Before you look at the details of it, the question comes up under the matter of dismissal as a matter of right in a condemnation case. We don't have any difficulty here, seemingly, about the right of the Government to dismiss before they have disturbed the property at all, when they have done nothing about it. While it is a little bit hard on the other fellow to have been litigating and then have the thing blow up, the decisions make it clear that the Government may desist at any time before they have actually taken and enjoyed the possession or use of the property or damaged the property, provided, of course, they haven't actually acquired the title to it and possessed.

The case we have been talking about is the case where the Government institutes a proceeding, and actually there has been no vesting of the title in fee or anything of that kind. The Government has stepped in and taken possession in contemplation of acquisition of the fee, and they start doing things to the property. They occupy it and exclude the owner and change the buildings or remove them. Then the Government,

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before title is actually vested, doesn't like the verdict assessing compensation, so it dismisses as a matter of right. That leaves the owner of the property with the property on his hands, and there has been some actual taking of something by the Government. They have taken the use for a time, and they may owe him compensation for other things, for the damage they have done or for alterations.

As we understand the situation, your draft here would leave him helpless, the Government having the right to dismiss and the court not having any power to arrest dismissal or to impose any conditions on the Government or even to proceed in the same action to award the man the compensation that he is entitled to under the Constitution for what has actually been done up to date; and we understand the theory is that if any such claim exists, the man is relegated to the Court of Claims and the Government hasn't consented to be sued any other way. That gags us a little bit.

We have a proposal here before the committee the effect of which would be, by a provision against voluntary dismissal as a matter of right, to check that sort of thing and at least give the court power to say, "Well, if the Government wants to quit and doesn't really want the whole property, that is all right provided in this proceeding, without going to Washington, the Court of Claims, and whatnot, we immediately assess and award the owner with reasonable compensation he is

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entitled to for what the Government has done to the property pending the case."

What do you say about that? That is the thing that we are troubled about most, I think.

MR. LITTELL: May I ask first if your case is an actual or a hypothetical case?

THE CHAIRMAN: One of our members here spoke about a case where the Government took a country estate that had great historical buildings and fine trees on it. That is, they started condemnation proceedings, and they actually went into possession and cut down trees and tore up the manor house, and one thing and another; and then they decided they didn't want to go on and acquire title.

SENATOR PEPPER: Let me interrupt you there. The condemnation was for a reservoir site in Maryland, but I was using it merely as an illustration, because it doesn't appear yet whether they are going through with it or not. Presumably they are.

THE CHAIRMAN: Oh. The Government hasn't actually taken title yet.

SENATOR PEPPER: They haven't taken title.

THE CHAIRMAN: Under this rule they would be in a position to dismiss, though, without paying anything for what they have done.

SENATOR PEPPER: That is the point.

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MR. LITTELL: It has not been dismissed, however.

SENATOR PEPPER: No, no, and I have no present reason for supposing it would be.

MR. LITTELL: I think, then, it is fairly clear that that is a hypothetical question. I have a very specific reason for asking that, Mr. Chairman.

Let me state at the outset that, as a matter of policy, as a matter of principle, we certainly do not in any way resist the basic equitable right of that man to recover in the case which you have stated.

THE CHAIRMAN: Recover from some tribunal.

MR. LITTELL: Recover from some tribunal. I will come to that. The substantive law has been, up to this present discussion, that the Government has this right to dismiss. As a practical matter (let me dispose of that first, and that is the reason I asked you whether your statement of facts was hypothetical or actual), this arises most acutely only in the war effort, where we are proceeding in these emergency proceedings under Title 2 of the Second War Powers Act, which is the old War Powers Act of 1917, which gave the same right of entry and immediate possession upon the filing of a condemnation case. Then, of course, it could be dismissed even after immediate possession was taken. So your hypothetical case is a perfectly fair case to put. It can happen here in terms of entering into possession, doing a lot of damage, then

dismissing the condemnation case, leaving the party to his remedy in the Court of Claims.

That is the law because it is the law by statute and by decision. We think that if you change it, it ought to be done by statute and not by this rule.

As a practical matter, we don't think people are hurt that way, because in many cases where there has been a change of mind--this perhaps goes more to my statement that there would be no necessity of delaying the passage of this rule, the adoption of this rule, until you have got their remedy through by statute, if you considered it of such fundamental importance as all that. It probably goes to that argument, because I say, as a practical matter, these situations don't arise as a general problem. I am aware of no specific case where it has arisen. I don't say there isn't any such case. I am just not quite prepared on this.

My general assistant assures me of what I was tempted to state to you, but for lack of preparation for this particular interview I didn't feel that I ought to state it. That is that the problem is actually a minor one. When cases are dismissed, if we are taking the property in fee, for example, we have frequently suggested (I say frequently--in a number of cases) to the Secretary of War or the Secretary of the Navy that we be authorized to amend the petition in condemnation to take only a temporary interest of six months, which,

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as you know, we have the power to do. Under that temporary interest, we can then determine and pay him compensation for that temporary period of occupancy.

JUDGE DOBIE: Including damages?

MR. LITTELL: There is a question of degree there. If we have actually taken his property, if we have removed his trees--

JUDGE DOBIE (Interposing): In the supposed case you have cut down the trees and knocked down his house.

MR. LITTELL: --and we have taken his house. I hesitated for a moment there in the interest of being cautious and accurate because, as you know, we don't pay disturbance value. If it is personal property, suppose he was permitted to remove a barn, then the case was dismissed and he moved it back again, that, I think, would be a borderline situation in which we might not pay him adequate compensation, except, of course, for ordinary wear and tear under a leasehold interest. If it is within the limits of ordinary wear and tear, the answer to your question is "Yes."

THE CHAIRMAN: When you do that, when you go into possession of property and tear down a house, cut down trees, do you say that there always results by that act a vesting of title; as you have it in the rule here, "vesting of the title sought to be acquired in the action"?

MR. LITTELL: I am sorry, sir. I didn't quite get

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your question.

THE CHAIRMAN: Take the case you speak of, where you have gone into possession of the property and done some alterations or damages to it. The mere act of going on there doesn't vest the fee in you, does it?

MR. LITTELL: No.

THE CHAIRMAN: So your phrase here of a right of dismissal at any time prior to the vesting of the title would allow a dismissal after those acts had occurred.

MR. LITTELL: That is true, or a modification. As I have pointed out, we have modified these petitions in condemnation in order to do justice within the condemnation case. The fundamental fact is that the court has no jurisdiction to determine these damages if we dismiss the case. Of course you realize that. That is why you want to change it. It has jurisdiction under the condemnation law to determine what has been taken and to appraise the fair market value of what has been taken. That is why we modify the petition to reduce it to a temporary taking of six months, let us say, in a case where we want to dismiss, and changes have actually been made. Where for some reason a man has been injured by dispossession, he ought to be paid a leasehold interest, which the jury can determine. We give the court jurisdiction by those amendments.

I am aware of no actual cases. I think this is more a theoretical objection than it is actual, as far as the

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procedure is concerned.

THE CHAIRMAN: You say that the Government can arrange for compensation for that temporary occupation even if they decide to abandon the acquisition of the fee by that device, but we can't do it under a procedural rule, can't do the same thing to allow that court to determine compensation for temporary use or occupancy. You say we can't do that by a procedural rule, but that he has to go to the Court of Claims. That seems to me to be stretching it a little bit.

MR. LITTELL: We thought that was the situation, Mr. Chairman. We might be in error in that. We thought that it was a substantive right that should be changed by statute, if it is going to be changed.

THE CHAIRMAN: What would you say to a rule that provides that plaintiff may dismiss the action in whole or in part at any time prior to the entry of final judgment (the Government can do it), except in cases where it has taken title or possession or altered any part of the property, in which case upon dismissal the court in which the condemnation case is pending might be allowed to go on and award the compensation for what has been used and taken, just as you allow the same court to do by amending your complaint and having a double proceeding, so to speak?

MR. LITTELL: My short answer to that, sir, is that you not only nibble at the statute, but you out deeply into it,

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because the statute says we can dismiss at any time whether we have taken and provided immediate possession or not. We can't dismiss a case in which we have taken title, you understand. It is only where--there are three kinds of condemnation.

I know this isn't necessary, but just to refresh our memories and be sure we are on common grounds of discussion, let me say that there is what we call in the Department, for convenience, straight condemnation, which is the ordinary peacetime condemnation in which we file a petition on this table top and this field, and nothing happens. Those various papers (indicating) are different farms and properties, and everybody continues to operate their farms and their businesses, and nothing happens. We go ahead and, when the case is prepared and the court finds time, we try it. If the verdict isn't what we like, we dismiss the case before judgment is entered, and nothing has happened; nobody has been hurt.

SENATOR LOFTIN: Mr. Chairman, I have to leave at this time to catch my train. I am sorry to interrupt Mr. Littell's discussion. I should like to hear him. I am very glad to have been able to be with the committee at this time.

JUDGE DONWORTH: I should like to ask Mr. Littell at this point if he can refer us to the section of the statute that gives him the right to dismiss. It seems to me that if there is a statute to that effect, we don't need anything in the rules.

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MR. WILLIAMS: There is no statute. It is a substantive law.

MR. LITTELL: I am in error in that, Judge Donworth. It is the construction of the statute and has been over a period of many years. It doesn't say specifically that you can't dismiss, but I presume it is inherent in the right to take that you can abandon your exercise of the taking. It is inherent in the--

THE CHAIRMAN (Interposing): Sovereign right?

MR. LITTELL: --essential soveriegn power. I am sorry I misled you on that. It is a matter of statutory construction. It is accepted construction.

The second type of condemnation case. I am naming them in chronological order, because this one came in 1930 with the passage of the Declaration of Taking Act. In that case, because these other cases took so long and many vital projects were delayed, we passed the Act of 1930, which said that in a condemnation case, upon the filing of a declaration of taking signed by the Secretary of War, the agency that is taking it, title is vested in the United States Government. That paper, when it is filed in the court, cuts right down through the whole works, as I have said before, like a biscuit cutter and vests title in the United States, and we have no title trouble after that. We have only distribution trouble.

THE CHAIRMAN: You can't dismiss, either.

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MR. LITTELL: We cannot dismiss, except for an act which we drafted and which was adopted a little over a year ago, permitting, on stipulation, the dismissal in whole or in part of properties vesting interest in the United States. That was because many errors were made. We have taken an extra foot by mistake and found we would have to destroy a parting wall that might cost $75,000 to build, where the extra foot was worth only $50, and we wanted to amend that declaration to include that extra foot and the parties would stipulate. So, aside from the power to stipulate with opposing counsel to eliminate all or any part of an interest taken--and that power has been exercised quite extensively and quite usefully both to property owners and to the United States. Anyway, that is the second type. That vests title, and we can't dismiss except for the right of condemnation.

That doesn't concern you gentlemen at all, because the rights are clear, and what vests in the property owner is the clear right to just compensation as determined by the court. If the deposit isn't sufficient, he gets more.

The third is the emergency acquisition, which is Title 2 of the Second War Powers Act, in the interests of still greater speed than we could accomplish under the Declaration of Taking Act. That act provides that, in the imminence of war or in the time of outbreak of war, of course, upon the filing of a petition in condemnation on this same area, we can enter

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into possession immediately.

THE CHAIRMAN: Without deciding whether you are going to take all or part, or without committing yourself?

MR. LITTELL: The petition can be amended and some of it eliminated, and it has been done. Property owners have come in and said, "Now, you don't need this part of my farm. You are wrecking the rest of my farm. Jog your fence in a little in taking it." We have done a lot of work on this severance business to adjust ourselves to the property owners' interests. The ArmyEngineers are apt to draw a straight line on the map and go around hills and follow certain contours, and when we can jog that line in and save a man's farm by saving 300 acres, we urge that it be done. We have adjusted that line in hundreds and hundreds of cases.

That is a practical illustration of the power to dismiss, an absolutely necessary measure of flexibility in the interests of the property owner. It has been more in the service of the property owner than it has been of the Government, because we have adjusted these crude takings--and they are crude takings. They have to be crude.

If I may digress just a minute to bring your imaginations to that point, when the M Day plans were over after Pearl Harbor, from then and during the ensuing year millions of acres had to be taken, thousands of sites, in order that the war program could go forward. Land was the first essential

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of the war effort. It was only one of many, but it was the first essential. Those things had to be acquired very rapidly. We had already so streamlined our procedures that even under the Declaration of Taking Act we were taking them in the quarter in which Pearl Harbor occurred in four days, four hours, and twelve minutes from the moment when the request reached my office to the moment when title vested any place in the continental United States or the territories. So we were geared to that rapid line of action as far as the war effort was concerned.

I have repeatedly stated, and I have stated it to both Judiciary Committees with respect to an act which I have pending up there to bring relief to property owners and to expedite payment to property owners, that we have expedited our procedure to an unprecedented extent of streamlining in the interests of objective number one: to get the military agencies of the Government into possession quickly so that the war effort would be unimpeded. I think you must agree that that was objective number one and had to be. Objective number two has been the relief of property owners.

THE CHAIRMAN: Excuse me. Does that taking possession under the recent war acquisition act, that kind of seizure and possession under the act, permit government taking like the original Declaration Act?

MR. LITTELL: No, sir. Up to the outbreak of war it

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did. This problem that you are discussing really didn't arise, because we were plunging in these declarations of taking all over the country.

THE CHAIRMAN: You couldn't take possession unless you committed yourself personally to an acquisition.

MR. LITTELL: Yes, sir, but I want you to bear in mind that that worked a great hardship on the property owner also, because these men woke up some morning and found they didn't own their place. They didn't know it. There wasn't time to notify them. We have taken a lot of things crudely in the necessity for speed. It was one of the biggest legal jobs, counting in the War Department and the Navy Department, in the preparation and acquisition of these sites, that was done around here in that limited period. There was a lot of crude stuff done. It was very harsh on property owners, because in the case where we saw we had taken 300 acres too much from the farmer and didn't need to take it, it was too late to get it out.

That is why I wrote that act forbidding us to stipulate to eliminate interests that had been taken in fee. That act has brought great relief in the declaration of taking cases.

But after the war, sir, we came on this tougher branch of cases, the war purchases cases, and they were tougher because we didn't have the detail on each of these properties that we had under the Declaration of Taking Act. The agencies

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didn't have time to prepare in the meticulous detail that we did hold them up to with certain standards under the Declaration of Taking Act. We wanted a pretty good description of every one of those tracts that we could get, but we couldn't hold them up for that under the War Powers Act. The very purpose of Title 2 was to permit them to move in there rapidly, and we filed perimeter descriptions--from this corner to that corner to that corner to that corner (indicating)--and the Government took possession of everything in there.

Let me qualify that so that you will understand how the practical problem has been handled. At the outset of the administration of the Second War Powers Act, the Army would send out a notice to everybody there to get out in two weeks, that it was government property. They were used to government reservations. Take Fort Dix, where I broke this policy down, 13,500 acres in New Jersey. We had virtual riots up there and headlines and mass meetings and all sorts of things. People were being thrown out. I went up to see how the thing actually operated at close hand. I got all the officers around a table, and I asked them what they were going to do with this, and I found what their construction plans were. "What are you going to do in the next month?" "Well, we are going to do this bit in here, and next month that bit around there."

I drew a pencil line around that, and we counted thirty homes within that first priority of construction work.

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I asked, "Why order the rest of those people out, then?"

"Well, it is government property. We thought that the court had ordered immediate possession."

It wasn't necessary. There we formed a new policy which went through the whole Government, and that established priorities of dispossession so that in these large areas we could concentrate our legal work on the thirty families that were within the first priority area where the construction work was to start; then we would fall back to the next line in advance of construction work to give our attention to the title work and agreements on compensation and all that sort of thing.

Some of those people were in there for a year and a half afterward, because it was a year and a half before the Fort Dix expansion reached the man up there in the corner.

In that way we have tempered this right of possession to a very marked degree, and in the course of those studies over that entire area we would find areas that we could dismiss. I don't remember whether we found any at Fort Dix or not, but in most places we did.

THE CHAIRMAN: You dismissed after you had taken possession?

MR. LITTELL: Right, and to the great relief of property owners. So, actually, this power to dismiss, which seems so harsh the way you state it and can be very, very harsh, has been a great asset to property owners in this emergency

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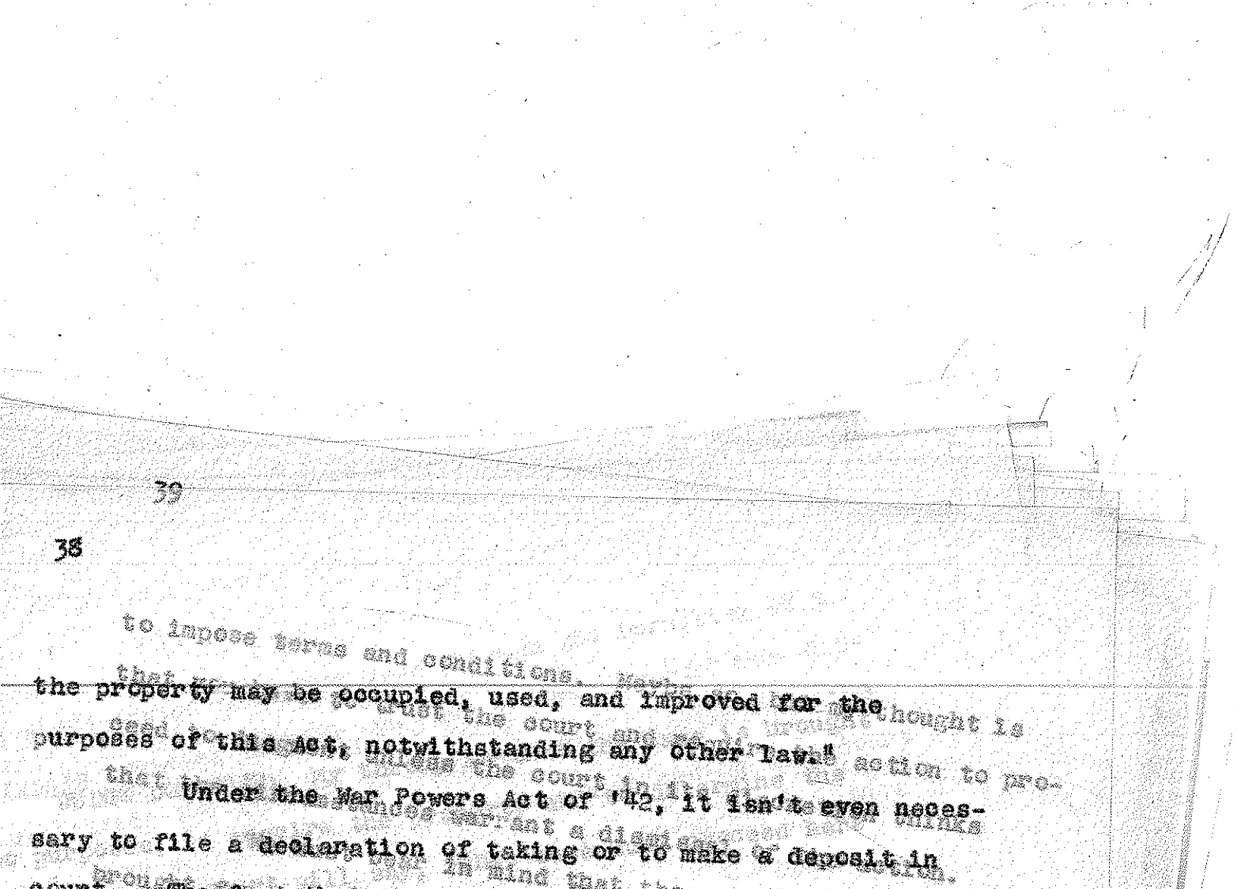
period. We had to take that property. If we had been committed to pay just compensation, a lot of people would have lost their homes and farms, and a working unit would have been destroyed.

THE CHAIRMAN: We are not objecting to the right of dismissal. It is simply a question of whether, if you do dismiss the property you are actually taking possession of, and the man has had some damage and is entitled to something, he ought to be left to chase into the Court of Claims or whether it can be handled in the condemnation case. That is the thing. You say that we are hitting the statute of legal condemnation. There are several statutes that provide for specific procedure in condemnation cases for different agencies of the Government.

MR. LITTELL: One hundred forty-seven different federal statutes.

THE CHAIRMAN: Quite a few of them don't provide for a jury trial at all. They state specifically that when the Government goes into a case for condemning a piece of property for this or that agency, the amount the Government is going to pay is to be determined by a judge or a commission. This rule, with your acquiescence, seems to force on the Government a jury in every case, if anybody wants one. I am wondering if there is any more or any less rabid interference with the statute and the Government's right by forcing a jury on them than there is by saying, "If you dismiss after having damaged



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the property, before you have really taken it, the court is to award the damage."

MR. LITTELL: Even the Miller case held unequivocally that the fixing of just compensation was substantive. We have proposed a statute, which is pending now before both Houses, to abolish the commission system in the nineteen states where it exists.

THE CHAIRMAN: Do you think there is any question about the validity, as far as the United States is concerned, of a rule of procedure that says the Government must submit to jury trial in a condemnation case when the statutes of the United States providing for many condemnations explicitly say you shall not have a jury, but a commission or judge.

MR. LITTELL: If there is a doubt as to those specific statutes, I should think definitely the statute would prevail, wouldn't you?

THE CHAIRMAN: I had the question about a year ago in your Department. I was in doubt, and I was hoping that we would get a statute passed which provided that in these condemnation cases the Government was willing to have a jury try them. I don't know what you have done with that.

MR. LITTELL: That bill passed the House last year. That was the one I mentioned, abolishing the commission system and providing for jury trial.

THE CHAIRMAN: It didn't pass the Senate, did it? It

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didn't become law?

MR. LITTELL: It has passed the Senate this year. It is one of those measures, Mr. Chairman, that you just have to keep behind in the pressure of the legislative hoppers. There is no controversy about it. I have not been aware of any. It seems to be favorably accepted in all my appearances before the committees, and it has now passed both Houses in different Congresses. It will result in enormous savings not only to the Government in delays but to the property owners.

THE CHAIRMAN: Your position, as I get it, then, is that in the case we have illustrated to you, they are few in number. Second, you say that all those would be in the power of the Government to dismiss as a matter of right. In such a condemnation case where they had actually had possession for a time of the property and had done some damage to it, without awarding compensation in that case they have power to do that and to force the man around to the Court of Claims to get what he is entitled to; but you have eased the situation for him and dodged the necessity of forcing him to the Court of Claims by having a petition, one petition or an amended petition, to restrict what you want to the actual use you put the property to for a specified period of time. Is that it?

MR. LITTELL: That is right.

THE CHAIRMAN: Then actually in the condemnation case you have seen to it that you award compensation for this

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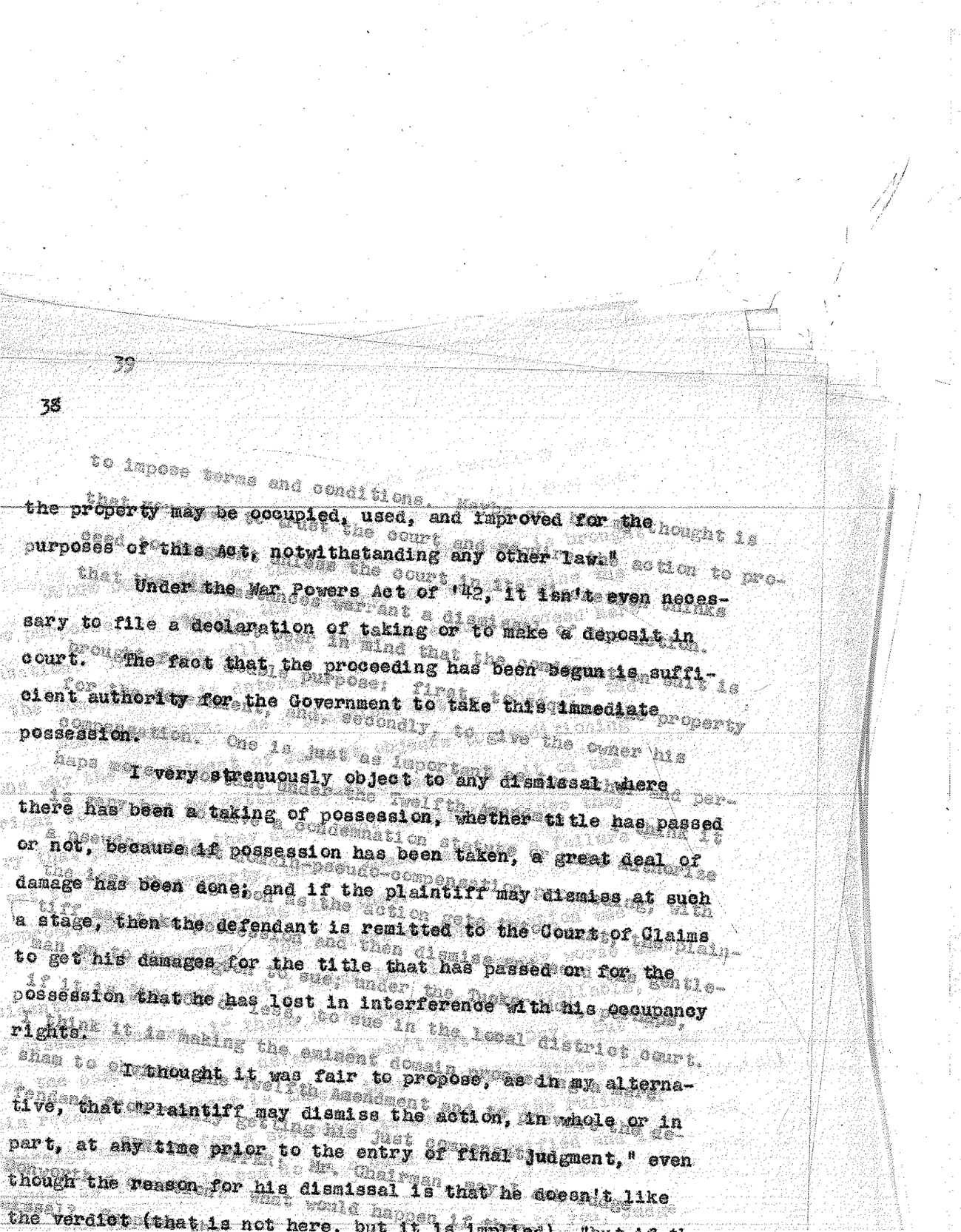
temporary use that we are worried about. In other words, I will put it this way: You can make him go the other route, but you try to be decent to him and fix up your condemnation proceeding so that he really can get compensation in that case for this temporary use and not be relegated around from one court to another. That is about the situation.

MR. LITTELL: That is true. May I ask if you are aware of the Moody case, in which the Supreme Court denied certiorari just last week? That was a case that came up in North Carolina, an agricultural taking, a taking of forest lands, in which the Agriculture Department went into immediate possession and then later dismissed, and the district court sought to appraise damages and actually assessed damages at a few dollars an acre, I believe, and entered judgment in spite of our dismissal. Then they couldn't collect on the judgment, and they sued Secretary Wickard and the Secretary of the Treasury in the district court of this district, and this court held that they could not recover on this judgment.

In the view we take, the decision here turns upon whether the district court in North Carolina in the circumstances outlined had jurisdiction to enter the judgment that they had against the United States. As has been said, the order was a personal judgment against the United States for the payment of money. We think, contrary to the view of the court below, there can be no doubt that, unless the statute under



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which the condemnation was brought specifically authorized such a judgment, it is void and unenforceable, notwithstanding the failure of the United States to take an appeal therefrom. This follows from the well-established principle that jurisdiction to sue the United States or to enforce the withdrawal of money from the Treasury must rest upon an act of Congress.

THE CHAIRMAN: I didn't quite catch what demand the judgment was for.

MR. LITTELL: The judgment was precisely for your case.

THE CHAIRMAN: Temporary occupancy?

MR. LITTELL: Yes. Is that correct?

MR. J. EDWARD WILLIAMS (Attorney, Department of Justice): The value of the land.

MR. LITTELL: I am sorry; it was the value of the land and more than the Government wanted to pay.

THE CHAIRMAN: Oh. Well, they hadn't actually taken it.

MR. LITTELL: We were in possession; oh, yes.

THE CHAIRMAN: After taking title?

MR. LITTELL: The principle is the same, because we were in possession, had taken possession, and the court fixed the value of the land. Then we dismissed it when the verdict was greater than the Government and the Forest Service felt that the land was worth.

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THE CHAIRMAN: But that court hadn't merely confined its award to the compensation for the actual possession that you had exercised, did it?

MR. LITTELL: No, it did not.

THE CHAIRMAN: That is what we are talking about.

MR. LITTELL: That is what we are talking about, but am I not right that the principle is involved here, the principle that I have just read? I think it is.

THE CHAIRMAN: I would agree that if the Government wants to quit a condemnation case after it started a proceeding to take the whole thing, title and all, decides it doesn't want it, I shouldn't think the rule should be made to prevent it from doing that and to say, "You have started it, and you have to go on to the end."

What we are talking about is the case of dismissal which the Government has a right to dismiss, and then ask what has happened up to that date. You had possession and use of the property up to the date of dismissal. You certainly have to pay for that under the Constitution. It brings you right down to the question of whether there is anything wrong about a rule that says that that compensation which is part of the stuff the Government took in the condemnation case shall not be fixed by that court, that it has to go to the Court of Claims. It seems to me to be a very fine-spun distinction as to the question of jurisdiction. You say you can give

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jurisdiction and award compensation for that temporary use by just amending your complaint and saying, "What we wanted all the time was just temporary possession."

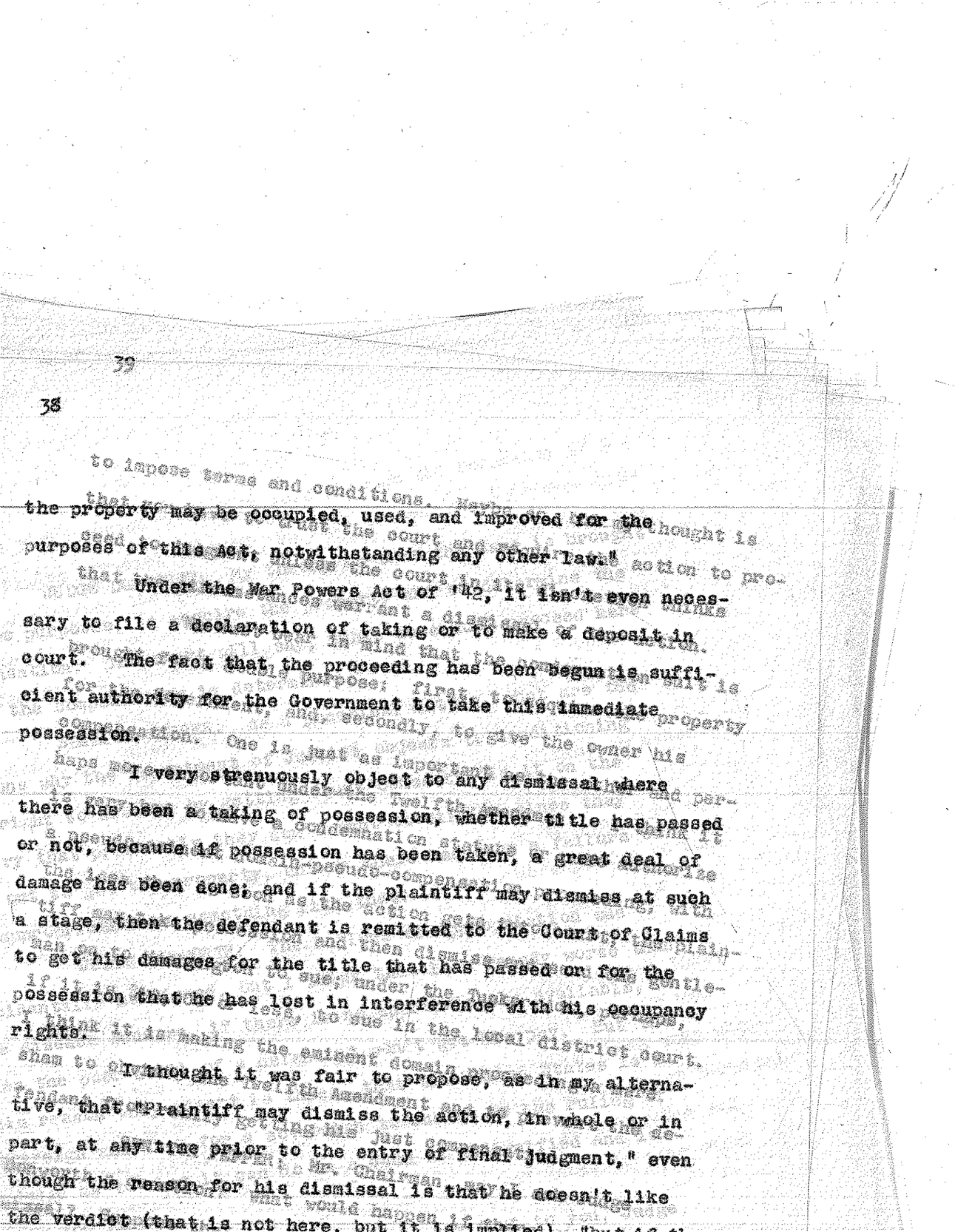
MR. LITTELL: But we have the statutory authority to do that. We have perfect authority to do it. We can take temporary interest. We are within the statute. The jurisdiction of the court is predicated upon determining just compensation under that statute.

THE CHAIRMAN: That is what we want in this case. You have started a condemnation case--

MR. LITTELL (Interposing): But that is substantive law. You can't get away from the fact that that is substantive law.

THE CHAIRMAN: You have started a condemnation case and by virtue of it you have gotten from the court temporary possession of the property. Why isn't it within the terms of the authority that Congress has given the courts in such cases to award compensation for what it did take? Is there any difference between starting out to take the whole thing and quitting after taking only part, quitting by dismissal which restricts what you have taken down in your temporary possession, and a case where, instead of cutting yourself down by dismissal, you cut yourself down by amendment of the complaint? That is the way it strikes me.

MR. LITTELL: The court's jurisdiction is limited to



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the petition. That is all there is to it. There is no greater jurisdiction than can be conveyed by the statute. The petition is filed pursuant to the statute, and the court in the first instance is determining the just compensation for the property taken, and it hasn't been taken. We dismissed it. In the second case, we modified it to a six-month period in order to do justice to this individual.

THE CHAIRMAN: I may be assuming too much here to be asking all the questions. I should like to start around and see what the other members would like to ask about.

MR. LITTELL: If I may say so, I am assuming a little too much, too. My very able general assistant and Mr. Chambers, the head of my legislative section, are here. They have given enormous amounts of their time to this study, more than I possibly could and run the big office that I have been in charge of.

THE CHAIRMAN: You don't seem to be lacking in familiarity with your subject.

MR. LITTELL: That is kind of you.

THE CHAIRMAN: I have asked the questions just to keep the ball rolling, not because I wanted to make trouble for you. Senator, have you anything in your mind that you would like to ask any of these gentlemen?

SENATOR PEPPER: I understand that when the Government, for good and sufficient reasons, has decided to abandon

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its quest of the fee, by amendment it may pray for a condemnation of a much smaller interest, a possessory interest of a certain size.

MR. LITTELL: Yes.

SENATOR PEPPER: Having so done, it is then in a position to pay the compensation for the interest so taken. I was going to inquire what would be the situation if the rules provided that, upon an application for dismissal at large, where the quest of the fee was abandoned and there was no proposal by the Government to amend, the court might condition its consent to dismissal upon the filing of an amendment by the Government for a taking corresponding to the damage actually done. If the Government can do it voluntarily and keep within the terms of the jurisdiction of the court, it occurs to me that it might be put upon the terms of amending in order to accomplish that result as a condition of a requested dismissal.

That is the only question that it occurs to me to ask of any of these gentlemen.

THE CHAIRMAN: Let's go around the line here and get them all out, and then maybe they can answer them all.

MR. LITTELL: If we may answer them as we go along, I think this one has a very short answer.

SENATOR PEPPER: Mr. Chairman, may we proceed so informally that they needn't rise or anything of that sort?

MR. LITTELL: Thank you. The answer is that that power

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is vested by discretion in the Secretary of War, and you would transfer it to the courts. The statute fixes the power in the Secretary of War to determine what sort of interest he will take. I doubt whether by rule of court you could transfer that discretion from the Secretary of War to the court sitting in judgment on a condemnation case, to force the Secretary of War to file. In fact, before the amended petition can be filed, the Secretary of war has to request us to file it.

THE CHAIRMAN: The Secretary of War has already vacated his authority. You have gone into possession, and you have had the use of it.

SENATOR PEPPER: I was going to suggest in answer to what Mr. Littell has just said that if the Secretary of War asks leave to dismiss after having come in in an effort to condemn the fee, if it is then made a condition of granting his request for dismissal that he do what it is admitted that he can do, namely, amend, that there is nothing unreasonable in conditioning the dismissal upon the voluntary amendment by the Secretary, which would then give the property owner his claim. That was the only suggestion I had.

THE CHAIRMAN: Dean Morgan, have you any question?

DEAN MORGAN: My question would have been just the same, though not so elegantly put as the Senator's.

SENATOR PEPPER: Thank you, Eddie.

DEAN MORGAN: I think the Government is just a

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benevolent despot in these cases. With the present administration, they don't do that they might very well do, because, in the first place, they have the power to dismiss without anything. That is, they can take their dishes and go home any time they don't like it. There isn't any question about that. They can pick up and walk out of the court room, and there is absolutely nothing that could be done, if the court doesn't have any power to do it. The only question I was going to put was the one that the Senator put. Would there be any power, and I think you have answered it that there is no power in your opinion in any court to compel you to amend or to take the same result by a short-cut, because if they could compel you to amend they could condition the dismissal on your paying for it, without going through that formality.

MR. LITTELL: Precisely; or leaving us the alternative of going ahead and taking the fee. They could force us to face that alternative.

DEAN MORGAN: But if you dismiss, then I suppose they couldn't force the title on the Government if the Government didn't want it. In the second place, they couldn't give you a judgment for costs or for anything else that could be collected. So, if I understand it, you have that right as a matter of power. Isn't it right that you have gotten down to the matter of power on the part of the courts?

MR. LITTELL: Yes.

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DEAN MORGAN: The court has no power.

MR. LITTELL: I think that is true, sir; yes.

THE CHAIRMAN: Unless the Secretary of War consents.

DEAN MORGAN: Yes, quite so; unless there is an elective provision for it.

THE CHAIRMAN: Mr. Dodge, do you have anything in mind?

MR. DODGE: After the Secretary of War has exercised his discretion and concluded not to take the fee, isn't his discretion exhausted there, and then it becomes a question of the procedural way in which the constitutional right of the land owner to compensation for the possession which has been taken shall be enforced? He has a right for compensation for that.

MR. LITTELL: Aren't you impaled on the fact that we have taken nothing? After we have decided to dismiss, we dismiss.

MR. DODGE: You have taken possession from him for a period, and he is constitutionally entitled to compensation for it. Isn't it procedural whether he shall go to the Court of Claims or whether the compensation shall be determined in that case?

MR. LITTELL: I think, as this Moody decision says, not where you are suing the United States. It is strictly a substantive matter.

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MR. DODGE: It has been held that the United States, by condemning the land in the first instance or taking the proceeding it has taken, has committed the credit of the United States to paying the land owner for any damages he suffers.

MR. LITTELL: Not yet, not until they take it.

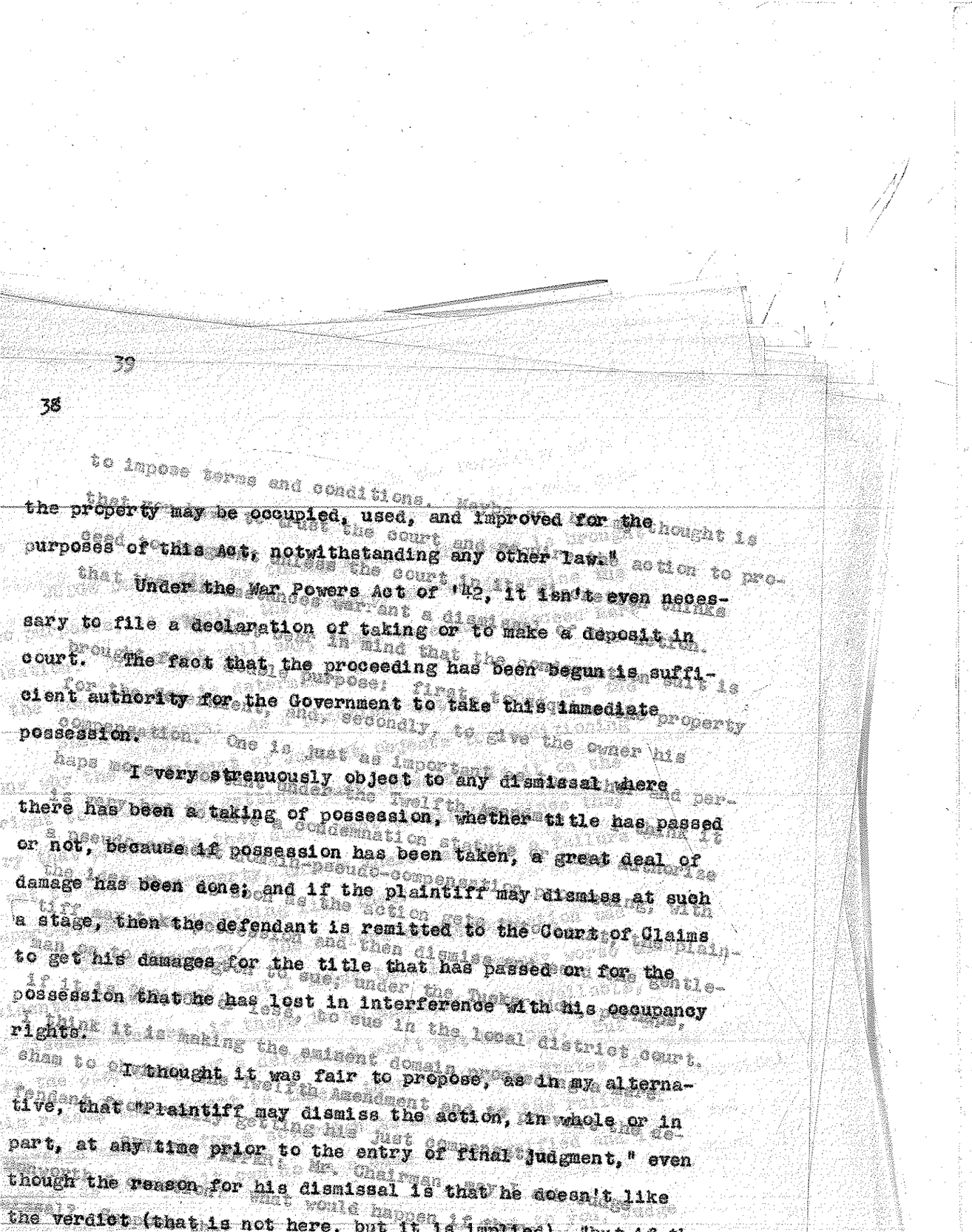
MR. DODGE: They have taken possession.

MR. LITTELL: Well, yes. I see your point; yes.

MR. DODGE: I had one question that wasn't clear to me. Under the Second War Powers Act, when does the Government get title?

MR. LITTELL: Entry of the decree. I don't suppose the actual mechanics of that affect your question. I was going to say that in the actual mechanics of it, looking at that table top again, because the properties taken were just about as messy and overlapping as these papers (I mean the descriptions and all), the War Department goes in there and negotiates a lot of those people and closes them out, and they are dismissed from the condemnation case. All those are distilled out of that by direct purchase proceeding, and only those are left that you can't agree with, by reason of disagreement as to value or by reason of title difficulties. Those are the two main things; those are the ones we inherit. When we go to trial on those and the decree is entered and the award is made, title passes.

MR. DODGE: It is not like the Declaration of Taking



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Act in that respect.

MR. LITTELL: No, sir. No title is vested at all until that final decree.

THE CHAIRMAN: Then, under this rule as the Department has worded it says as of right any time prior to the vesting of title. Then, under that Second War Powers Act, there is a perfect right on the part of the Government under this rule to dismiss at any time up to that final judgment, even though they have actually been in possession of the property pending the condemnation case--

MR. LITTELL (Interposing): That is right.

THE CHAIRMAN: --and have done all sorts of things to it. Your position is that it is beyond the power of a procedural authority to make any rule to have that compensation for what the Government did take in that case decided in that court, that the man under the law has got to go to the Court of Claims, and that you palliate his situation, in a desire to be fair, by producing the same result that we are headed for or aiming at, by simply amending your complaint and saying, "We amend the complaint so as to ask to have vested in us the right of possession which we have already enjoyed."

That is about the gist of it, isn't it?

MR. LITTELL: That is about it, subject to my basic concept that we stand on the statute. We say that the court is thereby granted jurisdiction. This occurs to me right now:

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that your rule goes further and creates new rights that might not be cognizable in the condemnation case.

THE CHAIRMAN: What are they?

MR. LITTELL: Well, damages for entry, possession, or--correct me. Don't hesitate to correct me (to Mr. Chambers and Mr. Williams). I am just thinking out loud here, Mr. Chairman. I don't wish to bind the Department by this statement, because it strikes me only at this moment.

When we fix just compensation for the taking of property, we do not pay so-called disturbance values or factors. That is one of the most troublesome questions in the condemnation law. It can be illustrated in many ways. A dairy farmer moving from his farm has to transport his herd from here 200 miles across the country; he has to rent space on the way; he has to take care of milking arrangements; he loses many pounds of butterfat in the course of moving his livestock; he has a barn full of hay which he can't move as a barn; he has to bale that hay; he has the expense of the baling of the hay.

Stopping with those two illustrations, neither of those is compensated for.

THE CHAIRMAN: Suppose, instead of the farmer doing all that, you go into possession and the Government does it--drags the barn off, sells his hay, and does things like that. When it comes to a showdown and then you decide to quit on the whole business and hand him back his property, there can't be

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any doubt in my mind that that man has a constitutional right to compensation for the difference in value between the property the Government seizes and the property that it turns back.

MR. LITTELL: I say it is a substantive right to which the Government has not consented to be sued in this proceeding, and to make--

THE CHAIRMAN (Interposing): Even though it is the right of eminent domain that they exercise?

MR. LITTELL: No; it is an entirely new set of rights. In these condemnation cases, don't think for a moment that people get full compensation for the taking of their property. They don't. There are all sorts of losses of this character that are not compensated for. Whether it be just or unjust, the fact remains that there are losses which are not compensable in condemnation cases. It is a condition under which we all hold our property.

THE CHAIRMAN: Mr. Cherry, how about you?

PROFESSOR CHERRY: I have a question, Mr. Chairman, but I should like to address it to you so, if you think it is not proper, it will not be asked.

THE CHAIRMAN: I don't want to decide that. I will leave it to Mr. Littell to say whether he ought to answer it or not.

PROFESSOR CHERRY: The question was simply this: We

have been discussing the power to do what has been suggested here by a rule. I should like to ask whether the Government rests on that entirely or whether there would be a similar objection to that being accomplished by an act of Congress.

MR. LITTELL: No.

PROFESSOR CHERRY: We are discussing only power here.

MR. LITTELL: We are. Such a provision would have my support.

PROFESSOR CHERRY: Thank you.

THE CHAIRMAN: Then, in connection with that, we are confronted with the fact that these same rules that we are asked to adopt may run into another snag because they amend the present federal law by forcing a jury on the Government. I have always thought that was a doubtful situation.

MR. LITTELL: Will you answer that, Mr. Williams?

THE CHAIRMAN: If you have to amend the law on that before we can adopt the rule, why should we adopt the rule at all until that is taken care of by statute, and maybe this other thing will be, too.

MR. WILLIAMS: We have hearings by commissions or by the courts only under the Act of August 1, 1888, which provides, in substance, that we conform as near as may be to the practice and the pleadings and forms in the states where the land is situated. In effect, this would be a modification of that provision. It is a uniform practice that will be

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established here, and I don't think that the adoption of these rules would to any appreciable extent be modifying the basic act except as to that procedural question, and in most of the states now there are appeals to juries on exceptions filed to the commission's awards.

THE CHAIRMAN: I wasn't raising any question about it except where the federal law now expressly provides for the procedure. I was under the impression, for instance, that the TVA, which has condemned much property, has a statute applicable to that agency which expressly included a jury, and when, a year or two years ago, we proposed a condemnation rule with a jury trial in it, the TVA yelled its head off and said, "We are satisfied with the commission system and don't want a jury." Am I wrong about that?

MR. LITTELL: It is the one conspicuous example where the commission system has worked well.

JUDGE DOBIE: I think I can go further than that. The commission system has worked well, the district court has worked well, and the circuit court of appeals has worked well, but in the Powelson case the Supreme Court did not work well.

MR. LITTELL: I agree with you except for the last point.

JUDGE DOBIE: I thought you would.

THE CHAIRMAN: Are we up to Mr. Gamble now? What do you have to say, Mr. Gamble?

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MR. GAMBLE: I don't think of a question.

THE CHAIRMAN: Judge Dobie.

JUDGE DOBIE: I think he has covered it, but I just want to make it perfectly clear. You say in these cases it is up to the Secretary of War to decide how he will amend; is that correct?

MR. LITTELL: That is right.

JUDGE DOBIE: Does he always cover the time that you are actually there until you completely move out, or can he say a lesser period than that, or more, or what?

MR. LITTELL: He can say any period that he wants in his discretionary power under the statute.

JUDGE DOBIE: But he usually does cover the time that you have actually occupied the land.

MR. LITTELL: That is our experience, yes. Mr. Williams reminds me that actually the agency does settle with these people and pay them without going to that trouble, which is another administrative qualification, although the gentleman over here would call it "benevolent despotism" or something of the sort. As a practical matter, you have a lot of adjustments in times of emergency, naturally, bearing in mind that we are discussing only this emergency period. As soon as the war is out of the picture (and we are over the hump on land acquisitions now; we are not going to be taking so many more), I think administrative tempering of the statute is proper and

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wholly in order and legitimate. It needs no defense in an emergency period. It is not a permanent program we are discussing. We are discussing this war period.

JUDGE DOBIE: Then there is another one that I think you have already covered, but I want to ask you about this hypothetical case where they cut down a man's trees and tore down his house. That is not just nuisance value or disturbance value. They have destroyed valuable trees and a valuable house. I understand you to say we don't have any power to give to the court or to put in a condition that the same court must go ahead and fix those values and that we can't even say that the United States is liable for them in any court other than the one that it consents to be sued in.

MR. LITTELL: It is creating a new set of rights. I won't pay those same claims in the condemnation case. You can't create them by rule of court to make them payable, now that you are dismissing your condemnation case and getting rid of the situation. That is why I cited the farmer's case. You do not pay for the butterfat nor for the baling of that hay. It is a loss the farmer takes.

JUDGE DOBIE: That, I think, is a little different from the profits that he didn't realize, that he would have realized.

MR. LITTELL: Not profits. He has lost them.

JUDGE DOBIE: The case is just the same, but in this

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case the house has been knocked down, and the trees have been destroyed.

MR. LITTELL: There are rights there that are compensable in a condemnation case. My point, in answer to the Chairman's question, was that this rule as he states it would also create additional substantive rights for a property owner to recover against the Government, which could only be done by statute because the Government hasn't consented to be sued for that butterfat and for the baling of the hay. Now the butterfat and the baling of the hay would clearly come in under your rule. They are damages as a result of immediate possession.

THE CHAIRMAN: Suppose the Government took possession of a piece of farm land that had farm buildings and silos and all sorts of things on it, and you wanted to make an air field. They just requisitioned the value of the use of that farm for the duration, and then they went onto it and tore everything down and put bulldozers on it and flattened it out and made an air field out of it. Then, when the period of use, we will say, had ended, the Government walked off. They have had the use of the field for the war, and during the war and while they were in possession they did all these things to it. What is your idea about what the Government is thinking about paying that man? You say that they don't have to pay for his destroyed buildings or his destroyed silos or his destroyed timber or anything of that kind?

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MR. LITTELL: Our position is that they pay the rental value of the premises during that, as determined at the outset. We are determining it all over the country for six months, a year, or two years, whatever it be, on the basis of the rental value. The law is being determined on that battlefront, and it is a battlefront.

THE CHAIRMAN: The rental value of the piece of property means the rental value of the property for use in the condition in which they take it?

MR. LITTELL: He then has a claim.

THE CHAIRMAN: I don't understand it when you say all you have to do is to pay the rental value when they have moved off all his buildings and don't put them back.

MR. LITTELL: You are telescoping the entire term into one moment, in which you comprehend all the facts, and that is not the way it happens.

THE CHAIRMAN: I just want to know if that man ever gets any money for the buildings that have been destroyed.

MR. LITTELL: All right. I just wanted to explain to you the difficulty. We are discussing this as lawyers. We know that he ought to be paid, and I have said that he ought to be paid, and we all agree on the equity of the situation. But as a practical matter, you are not going to ask him to wait for two years until you see what the damages are, are you? We don't want to do that. The property owner would be the

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first one to holler about that, and justly so. We determine the fair rental value of that property now.

THE CHAIRMAN: At the same time and condition.

MR. LITTELL: Yes, and it is paid, and he, of course, has a claim for anything over and above ordinary wear and tear.

THE CHAIRMAN: For waste, you mean?

MR. LITTELL: But that condemnation case is closed, in our opinion.

THE CHAIRMAN: You mean that you can condemn for rental value, and then you can start tearing down his buildings unless he is smart enough to bring a suit against you to enjoin you immediately for wasting his property?

MR. LITTELL: Which he can't do.

THE CHAIRMAN: All right. He can't do it. All the claim you make when you take it is "I don't want to tear the buildings down. I just want the rental value of present use as it stands," and then you throw the stuff all out, and you intended to do it all the time. In order to get title to the property or use of it, you prove to the court that you are going to make public use of it, or you wouldn't make an air field on it. The way you have your compensation rule fixed, you don't have to allow him anything for the damage and destruction you are planning to do and say you are going to do all the time. Like a landlord against a tenant, he must go to a suit for waste committed under the terms of the lease. I don't

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get it at all.

MR. LITTELL: You can't possibly determine those damages. In all fairness to the property owner, you can't possibly determine those damages now, when you have taken it, and he needs his money now.

JUDGE DOBIE: You have to wait until you turn it back to him.

MR. LITTELL: You have to.

JUDGE DOBIE: Then he has a suit, but that particular condemnation proceeding is gone out the window, and he can't do anything about it.

MR. LITTELL: That is right.

JUDGE DOBIE: He can sue in the Court of Claims or, I suppose, under the Tucker Act if it weren't more than $10,000, in the district court.

MR. LITTELL: That is right.

THE CHAIRMAN: Judge Donworth, how about you?

JUDGE DOBIE: We can't change that, in your opinion?

MR. LITTELL: That is the way it seems to us.

JUDGE DOBIE: Your opinion is what we want.

MR. LITTELL: I am perfectly willing for you to do it if you can, but I don't think you can.

JUDGE DONWORTH: We all know that the number of men in the executive departments is very large and that the Secretary of War, for instance, cannot personally determine

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very many of the executive questions that arise before him. Assuming that the gentlemen in the office of the Secretary of War, instead of being the high-minded and perfectly reliable men that they are, should take a notion that this Government wants to be autocratic and overbearing, is there anything to prevent those gentlemen, acting through your office, from starting a condemnation suit under the Second War Powers Act with the intention of using the suit merely to get possession, because immediate possession may be taken upon the beginning of the suit? Is there anything to prevent their use of that suit merely to get possession and, when they get possession, to dismiss it and relegate the party to the Court of Claims?

MR. LITTELL: No, sir.

JUDGE DONWORTH: Another thing: I notice in the case of Cherokee Nation v. Southern, 135 U.S., the Court used this language: "The Constitution declares that private property shall not be taken for public use without just compensation. It does not provide or require that compensation shall be actually paid in advance of the occupancy of the land to be taken. But the owner is entitled to reasonable, certain and adequate provision for obtaining compensation before his occupancy is disturbed."

As applied in your office, you do not give effect to this clause, "before his occupancy is disturbed."

MR. LITTELL: No, sir, we don't think that is the

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law under the Second War Powers Act.

JUDGE DONWORTH: Suppose a suit is brought by you under this rule or under the existing statute to acquire a tract of land, and you say that the defendant, John Smith, is the owner. It turns out that John Smith does not own in fee but only a 99-year lease. Can John Smith say to the court, "The court has no jurisdiction of this suit because it involves a 99-year lease. All that the Secretary has determined is that the tract of land is needed. Therefore, there is no jurisdiction, and the case must fail." What would you think of that?

MR. LITTELL: If you don't mind, could the reporter read that question?

... The question was read by the reporter ...

MR. LITTELL: Certainly not. That completely converts the condemnation proceeding into an in personam proceeding, whereas we are proceeding in rem against the land. The matter of whether you have John Smith on a 99-year lease or a fee owner before the court is a matter of determining the title evidence to the property to see that you get the proper parties in. We are taking the land.

JUDGE DONWORTH: But if John Smith's position is disturbed, then the greater does not include the lesser, and your prayer for determination of just compensation for the taking of the land does not authorize the court or give the

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court jurisdiction to determine the injury and compensation for injury which, by reason of this suit itself and what you have done under it, enables you to take possession of his land.

MR. LITTELL: If I understand your question correctly, under our contention the court has no jurisdiction, either, to fix the damages for that temporary possession as against the fee owner in a case in which we have dismissed the petition.

JUDGE DONWORTH: But you are moving for dismissal under my assumption. You haven't dismissed. That assumes what you have to prove. You are moving for dismissal, and John Smith in one case says, "Why, they sued here to recover 100 acres of land and, instead of the parties being the owners of the 100 acres of land, they have only a leasehold interest. Therefore, what the plaintiff sues for is not within the jurisdiction of the court, because it is a different and lesser interest." Would that be logical?

MR. LITTELL: We don't care who owns it at all. We take the fee, and that gives jurisdiction in the thing. There must be some object in your question which I am too obtuse to perceive.

THE CHAIRMAN: You mean that in a proceeding that is an action in rem to get the whole title, when you haven't been able to find out the owner and need to cite some other owner in, you can do it?

MR. LITTELL: Precisely. We are not interested. As

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a matter of fact, in the Bennington decision (which in a way is not in point here because we don't deposit money in court), to illustrate this very principle, the Court said there that the Government has deposited money in the court, has fulfilled its duty, and has no other obligation. We can quit and let the fee owner, the tenants, and the sub-tenants under him come in and quarrel for that money. We are not interested technically and legally.

Actually, as administrative practice, we are interested. I suppose, as I have said to my staff, it is the only time that I have ever had anything like the remotest pressure to reverse the Supreme Court of the United States, because administratively we reverse that policy, and we make it our business to see that the proper people are paid for their interests. We go in there and try to comb those interests out and help them get their money, doing everything short of probating the states for them to straighten out title difficulties.

The situation that you have outlined would come up in a title matter. The title evidence comes in, and we discover that this fellow is a 99-year lease owner. If we are so dumb that we don't discover that, the judge certainly does, because he has to review it before he does anything with the case. That is purely and simply a question of "Are the proper parties before the court?"

JUDGE DONWORTH: Yes. But if you sue to get a tract

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of land and later it proves, after you have taken possession, that all that is needed is six months' use of this tract, then it is not within the jurisdiction of the court, in your opinion, to fix the damages for the six months' use?

MR. LITTELL: If we take a six months' use, yes.

JUDGE DONWORTH: Well, that is all this rule says.

THE CHAIRMAN: If he takes it and amends his complaint and limits his demand to that, but if he takes and doesn't amend his complaint, the court hasn't any jurisdiction. That is the way I get it.

JUDGE DONWORTH: The greater includes the lesser. It seems to me there is no escape from that. If you sought the fee and took possession and held that possession for six months, it seems to me that the lesser interest that you have actually taken there is within the allegations of the complaint.

THE CHAIRMAN: How about you, Mr. Sunderland?

PROFESSOR SUNDERLAND: I think I have no questions to ask.

THE CHAIRMAN: Mr. Moore?

PROFESSOR MOORE: No.

JUDGE CLARK: I want to ask one question on the authority. I don't suppose this is the place to raise much question about that. I was guilty in the Sherwood case, so I know you can't go too far. I suppose that probably Moody v. Wickard is your strong and most direct authority, isn't it?

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I should think it probably is. There are other cases, such as that Chatham County case in Georgia, where the district judge really conditioned your dismissal, as I remember. I was going to ask, in Moody and Wickard, doesn't it make perhaps a difference that there the property owner granted permissive possession by virtue of the option?

JUDGE DONWORTH: Written option.

THE CHAIRMAN: Contract.

MR. LITTELL: I think the Chairman has weakened that decision somewhat, anyway. It isn't a clear case of compensation for possession. It is a case where the court tried to fix compensation for the property and insisted on entering a decree. It still involved judgment against the United States. That is why it is cited. The basic principle is that it involves judgment against the United States, and the United States had not consented to be sued in connection with this possession period.

JUDGE CLARK: About all I wanted to suggest is that that is certainly a fair argument, and very likely the Supreme Court may follow it, but there really isn't anything that absolutely tells us, is there, in the cases? Isn't that rather so? It seems to me it is. The Danforth case that you relied on could really be construed to mean, when they are referring to taking, that there was no appropriation there or no taking of possession at that point.

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THE CHAIRMAN: There hasn't been any possession taken under that.

JUDGE CLARK: Yes.

THE CHAIRMAN: As I have skimmed through this memorandum (I admit I haven't read the decisions), I got the impression that the courts have said time and time again that this right of dismissal is before you take anything and they have said in some cases, before you enter into possession. I got the idea that they meant the right of dismissal wouldn't defeat the owner's right to have compensation awarded for whatever you did take under the suit. If you already, before yourdismissal, have taken something, then you couldn't dismiss except for the rest. You would have at least to allow the court to fix the compensation for what you had actually taken by seizing possession or whatnot up to the time you dismissed.

I think there is a strong inference in the cases. They expressly say "before you take possession." They don't say "vesting of the title." I am not at all sure that there is any authority here that would satisfy us that it ever had been held that, if you have actually gone into possession and taken something by virtue of the power of eminent domain and by virtue of the condemnation case the Government started, by dismissing you could stop in that suit the right of the owner to get compensation for such things as you did take.

MR. LITTELL: Sir, you have not yet answered my

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statement that by doing as you provide here, you are creating a new set of liabilities against the Government in this rule.

THE CHAIRMAN: I am talking now not about cutting down trees, but just plain rental value. Suppose you haven't hurt the property at all but have just been in there and used it, and it is in exactly the same condition now as it was when you went in there. You have had the use of it, and constitutionally you are bound to pay for the use on any measure of damages that the courts should adopt.

MR. LITTELL: I understand that situation. Now go on from there to the hypothetical case that you made of chopping down the trees and removing the buildings or to the farmer case that I gave you, of the butterfat case and the hay case. You are making the Government liable to actions in tort.

THE CHAIRMAN: Let's go back--

MR. LITTELL (Interposing): Aren't you?

THE CHAIRMAN: You haven't answered my question. I am taking the case where there has been no physical damage, but it has just been used. The Government has used the property, has been actually in possession of it for a year, we will say. This is a proceeding to condemn absolute and fee title, and they step in there and seize it, or whatever you call it; go right in without any title or anything and take possession. They keep it a year and then they decide they don't want the property permanently. They dismiss the proceeding. Your

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suggestion is that instead of dismissing or amending the complaint and asking to have condemned the right for use during the period you actually occupied it, you don't do that, that you just dismiss. Are there decisions that hold that when you have done that and take possession and then dismiss, you are not bound in that proceeding to have the compensation determined for what you actually did take? What difference does it make whether you amend your complaint or you don't amend? What you took was a right under the power of eminent domain, for which you had statutory authority to do and which that court has statutory authority to determine the value of, if it wants to do it.

MR. LITTELL: On that division of the subject there is no need for me to reiterate. I have made the best statement I can make, to the effect that we kept within the jurisdiction conveyed to the court by statute in the procedure that we followed, whereas the procedure that you suggest does not. It modifies that. We disagree on that. Let us set that aside.

That still leaves exposed the rest of your hypothetical case and the question you put in connection with it: How do you satisfy this fellow as to damages done by this period of possession?

THE CHAIRMAN: I don't think this committee would attempt to lay down any measure of damages. I should think that is a matter of substantive right.

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MR. LITTELL: Yes.

THE CHAIRMAN: Maybe we sent over the dam and are trying to put you up against a very unconscionable case, but I don't see how we can fix a rule for measuring damages.

SENATOR PEPPER: Mr. Chairman, I should like to express a thought that is in my mind, suggested by what Mr. Littell said a moment ago. He seems to think that the claim, if any, against the Government where possession has been taken and, we will say, trees cut down and a house removed, under those circumstances is a claim for tort committed by the Government. We begin with the assumption that the Government has entered into possession lawfully; it is not a trespasser, it has entered under a sovereign power, and it has entered under a constitutional limitation which creates the liability to make just compensation.

That being so, there are two different interests, each of which might be the subject of compensation: one, the fee which they started out to acquire and which, by supposition, have now abandoned; and the other, the limited or possessory interest carrying with it, we will suppose, what so often happens in the case of possessory interests, a right to deal with the property, to remove trees, to level down the surface and remove buildings, if you please, if that is germane to the purpose of the taking. That is another subject of consideration.

It isn't the creation of a new right or of a new

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liability. It is a question of how you are going to enforce the constitutional guarantee for a taking which in neither instance is lawful. It is admitted that, as to the taking of the fee, the compensation can be granted in the very proceeding which the Government has initiated. I haven't yet heard any good reason why the Government's request for permission to abandon its quest of the fee, where in point of fact there has been the taking of an interest less than the fee, should not be conditioned upon the payment of compensation for what has been taken, as a condition of surrendering the quest of that which has not been taken.

That is the whole question as it presents itself to me, and I do think it confuses the matter to conceive of the Government as having either entered as a trespasser ab initio or converted itself into a trespasser by doing something which I had supposed it was doing under proper authority and law. The whole question is one of constitutional compensation in one case for a complete interest or a fee taken, if that be taken, and in the other case for the lesser or possessory interest, if the fee is not taken and the possessory interest is.

It does seem to me to be pressing technicality pretty far to contend that the constitutional compensation may properly be awarded for the greater interest in the proceeding that is pending and that it may not be awarded for the lesser interest where that has actually been taken.

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THE CHAIRMAN: Unless the Government consents by amending the complaint.

DEAN MORGAN: But suppose that the Government takes a farm with a house and a silo on it. It goes into occupation of the house and silo just as much as it does of the other. If it tears down the house, it has taken the house, which was a piece of real estate when taken. The same way with the silo: If it tears it down, it has taken that piece of real estate.

THE CHAIRMAN: And it is not wrongful taking, because it intended to do it all along.

DEAN MORGAN: It is not wrongful taking, and the owner is entitled to just compensation for it. I don't see how you can call it a tort case.

MR. LITTELL: I think your point is very well taken. What I was trying to illustrate by using that rather strong language, terming as a tort action the case in which Senator Pepper rather presupposes the Government by dismissing becomes a trespasser, was merely that a new set of standards is created if you compensate this man for moving him. It is more than just the factor of paying him compensation for the six months' period on the rental value of his property, which we are paying to other property owners where we take a six months' or a year's interest. It is something more than that. To make him whole, you have to pay him for the loss of the butterfat and taking and cows and bringing them back again. I am trying to

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illustrate that you are getting into a new field in the award of compensation, which the courts have most cautiously steered away from.

THE CHAIRMAN: Suppose you wanted to build an air field and you wanted to rent the property, and you went into court and condemned not for fee but just said, "I want this air field for the duration. In five years the war with Germany and Japan will be over." You start in to condemn the right to use the property for five years, and in your proceeding you tell the court, as you have to do, what you want it for, to wit: "I want to build an air field. I am going to take possession and hold it for five years, raze all the buildings and flatten it out. What compensation ought I to pay to this man for taking his property and flattening the buildings?"

Do you mean that the court can allow the rental value and take no account of the fact that the buildings are going to be wiped out under those circumstances? Is there a great difference between that and becoming a lessee as is and then violating your privileges by ripping the property up?

MR. LITTELL: Yes, we have cases of that sort, and that constitutes a taking. I can't sit here and judge all the states of fact which arise. I mean some of them are on the borderline, of course.

THE CHAIRMAN: That is the kind of case we are talking about, where the Government intended all along to do these

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things to the property.

MR. LITTELL: That man would be paid in the settlement of the case in ninety-nine cases out of a hundred, and if there were a doubt as to whether it was a taking, then it would be submitted to the court. But I supposed that he had had the property taken there.

MR. GAMBLE: I should like to ask you gentlemen this just for information. In the TVA situation, is there any provision for a jury now under the law?

MR. LITTELL: I think it is optional.

MR. WILLIAMS: They may appeal from the commission to a three-judge court and then may appeal to a three-judge circuit court.

MR. GAMBLE: But there is no provision for a jury?

MR. WILLIAMS: No, sir.

JUDGE DOBIE: Three commissioners; then a three-judge district court, which may be three district judges.

MR. GAMBLE: Yes.

JUDGE DOBIE: I speak with some authority because we have just gone into all this. Then from the three-judge district court you have an appeal to the circuit court of appeals. Then the circuit court of appeals reviews the whole thing de novo. The conclusions of the district court of three judges and of the commissioners below that are not presumed to be correct, and you can set them aside. Whether they are

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erroneous or not, you can go into the whole record--the record seldom comprising more than 10,000 pages. (Laughter) That is a special statute.

MR. GAMBLE: I was asking just because I understood you to say that there was only one statute, perhaps, Mr. Williams, in which the commissioner form was still preserved.

MR. LITTELL: There are nineteen states that have such statutes, and under the Conformity Act we have to have commissioners in those states. There we get into some perfectly awful troubles. Up in your state, Senator Pepper, we had a case in which we contended that the value was $5500, and the commissioners brought in an award of $65,000. We appealed to a jury, and we got it back to $6000. I mean we have had perfectly preposterous results with commissioners. Where they are carefully selected, as they have been down in your country, in that TVA enterprise, and in certain other spots (I think Louisville is another one, isn't that right), you have some good results.

MR. WILLIAMS: Yes.

MR. LITTELL: Anyway, in two or three cases where they have been very conscientiously selected, the commissioners have done some good work.

THE CHAIRMAN: We are willing to accept your idea that a jury is desirable. What is troubling us is whether we have a right by procedural rule to force a jury on the

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Government when the statute says you are not required to try a case that way.

There is one other thing we want to ask you before you go. This rule as drafted provides that if the owner is unknown or his address is unknown, a substitute service may be made. There is no provision that there should be any judicial determination, ex parte or otherwise, of the fact that he is unknown or that his address is unknown before the substitute service is resorted to. Most codes and statutes that provide for service by publication or mail or something of that sort provide that, before a lawyer or party can resort to that kind of service, he must go before a judge (ex parte as far as the unknown party is concerned) and make some kind of showing, an explanation of the fact that he doesn't know where the fellow is, and get an order allowing substituted service by publication.

You see, that kind of rule does two things. In the first place, it requires the plaintiff to make a real showing that he doesn't know where the fellow is and is not trying to conceal from the defendant the fact that suit has been brought. But it does something more. It prevents the validity of the substituted service from being later assailed, because, you see, if you don't get some kind of order like that, who is to settle the question of whether he is known or not? Somebody two years hence may come in and set aside the whole proceeding on the ground that he was in fact known or that his address was known,

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and litigate that question then and maybe "bust up" the whole judgment. in rem entirely. It is a little bit different, therefore Our thought here is that, in line with the common practice in situation of this substitute service kind, it would be a protection to the Government's title as well as a protection to the owner's if this rule followed the common practice and made a provision that if you wanted a substituted service because the owner was unknown, you should go to the court, as many codes provide, and make some kind of showing, affidavit or otherwise, and get an order then allowing a substitute service. Unless there is plainly fraud and perjury, that kind of order is full protection as far as the validity of service.

What do you think about that? vision, I believe, (I am sure it i

MR. LITTELL: I will let Mr. Williams answer that question. He has given a lot of study to that problem. ot and force as

MR. WILLIAMS: Under the practice that you mention, of course the order is predicated upon a statement or a certificate or an affidavit of counsel in most instances, and exactly the same situation will follow here where the United States Attorney or the attorneys for the Department of Justice the determine that they cannot serve personally and, therefore, nal- serve by registered mail if they know the man's address, or publish if they don't know it. It amounts to exactly the same thing. THE CHAIRMAN: But if you read the rule on proof of service, we must keep in mind that in these proceedings they

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shall be proved by the certificate of an attorney for the plaintiff." That isn't to certify that a man is unknown or that his address is unknown. It is simply the fact that you have posted it on the land or put it in the post office addressed to so-and-so, or something of that kind. You are suggesting that the certificate of the government lawyer that the man is unknown or his address is unknown, if filed, ought, except for fraud, to be conclusive proof of the fact of his being unknown, just as if the judge had made an order. That is your idea, isn't it?

MR. WILLIAMS: Yes, sir.

THE CHAIRMAN: But the rules don't do that.

PROFESSOR SUNDERLAND: An earlier example of it did do that. They had this provision in an earlier draft: "A certificate shall suffice to justify such notice."

THE CHAIRMAN: That is a different thing.

PROFESSOR SUNDERLAND: That is not in the present draft.

MR. WILLIAMS: That is what I had in mind.

THE CHAIRMAN: I don't blame you for getting confused about this, because I am every minute. I have one draft or another. I don't know which is which. Your idea is that it would serve the safety of the substituted service just as well, instead of having the court say, "I heard the representations and received the affidavits of the government lawyer, and I

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find that the man is unknown" or "that his address is unkown, and I authorize substitute service." You don't want to resort to that practice.

MR. WILLIAMS: I don't believe it is necessary. We all know that in most instances it is predicated on an affidavit of counsel, taken at its face value.

THE CHAIRMAN: You do suggest that we put in, in conformity with the rule, that the fact of his being unknown or his address being unknown shall be accepted upon the certificate of a government counsel?

MR. WILLIAMS: We have no objection to that, I am sure. We provide that the complaint, for example, shall state the names of those persons who are known and whose addresses are known, and all others shall be named as the "unknown owners."

JUDGE DOBIE: That doesn't say anything about what efforts are made.

MR. WILLIAMS: It does not provide for efforts. It does not provide for a showing to the court that we inquired of certain people or that we sent letters to certain people and that they were returned unopened and unclaimed, and all that sort of thing, that you do in some jurisdictions, such as California, for example. We do not require that kind of showing.

JUDGE DOBIE: In other words, there may be thirty owners here whom ten minutes' inquiry in that town would

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disclose, and under the statute, as we understand it, you can just put one in and go right ahead.

MR. WILLIAMS: Conceivably that might happen. I don't think it will happen, because we are interested in getting notices to these people.

JUDGE DOBIE: I understand.

THE CHAIRMAN: When you get the land described, you usually have abstracts of title, haven't you?

MR. WILLIAMS: Yes, sir.

THE CHAIRMAN: The abstracts would show you the owners of record up to date.

MR. WILLIAMS: And also the liens and encumbrances and other charges.

THE CHAIRMAN: Also the man's address.

MR. WILLIAMS: That is correct.

THE CHAIRMAN: Also, inquiry at the office as to who paid the taxes and what his address is. But you don't have to do that.

MR. WILLIAMS: We take all those precautions, and actually 90 per cent of these cases are settled. They are negotiated with the owners and settled on the basis of the abstract of title, which means that all liens and encumbrances are paid and discharged. So, we do find the people. Some of those people, particularly in some of the states--in your territory, for example, Judge Dobie--have bad titles. We have

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to publish against name after name--devisee of so-and-so, deceased.

JUDGE DOBIE: I know that.

MR. WILLIAMS: We do know whether he is living or dead.

MR. LITTELL: Take the mining claims in California.

MR. WILLIAMS: Exactly. To require us to satisfy the district court of the effort we have made and to have some restrictions against our publications would means that we just never would get these cases completed.

THE CHAIRMAN: Anything more?

JUDGE DOBIE: I would like to ask one more question, not about this. I think you can answer it very crisply. You see, these rules apply not only to the United States but to all condemnations. Do you regard it as of very great importance in these rules that we have at the end a provision that says that where the condemnation is had under a state statute or constitution, it needn't be in conformity? Do you regard that as very important? Hasn't that given you a lot of trouble?

MR. WILLIAMS: Personally, we have not considered that feature at all, because it has not affected the Department of Justice or the United States condemnation proceedings. That was suggested by the subcommittee, I believe, and we have not discussed that at all in any of our conversations. To my way of thinking it is a little bit confusing. I will admit that.

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I don't quite follow it exactly, but we have no objection to it particularly.

JUDGE DOBIE: Would you want a provision in here that there need be no conformity to be governed by these rules where the United States is doing it not under a state statute or state constitution?

THE CHAIRMAN: It wouldn't apply to the United States.

JUDGE DOBIE: No. You all do it under the statute, don't you?

MR. WILLIAMS: Yes; under the federal statutes.

JUDGE DOBIE: So it is not very vital.

MR. WILLIAMS: It isn't important to us at all.

MR. LITTELL: May I point out, before we leave the question of the certificate, Mr. Chairman, that the size of these cases is something stupendous, and we have all sorts of claims that have to be concluded that are literally hundreds of miles away. Take the mining claims in California, and there are similar situations in the South that involve mining claims. Those are fresh in my mind. There are overlapping claims. If you should see them on a chart, you would think it would never be possible to unscramble those property interests. The fact is, they don't exist; they have been abandoned long ago, but until those claims are liquidated out by some process--publication of notice--you can't move ahead in that case. You have people actually in possession of a ranch, who need their

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money, need it desperately, and you can't get to them. So every procedural step that is intruded in here, like this certificate, it seems to me operates or may operate more to the prejudice of property owners than in their favor.

THE CHAIRMAN: I think we appreciate that, but we had in mind, really, more the protection of the validity of the service than anything else. But you already have here a provision that the proof of service by publication and posting may be made by a certificate of the plaintiff's attorney, and it wouldn't add anything to the delay or burden if there were right in there a provision that you had to prove that the people served by substitute service were either unknown or their addresses were unknown. It wouldn't make much difference to you, would it, if we did it that way?

MR. LITELL: I think we probably could do that, although in the early stages of these cases attorneys were searching the telephone books in California for days and days and days, to make sure that they could say--

THE CHAIRMAN (Interposing): That they could make a certificate.

MR. LITELL: You can imagine what the Los Angeles telephone directory is like, particularly when you get to the John Smiths. Then try to identify that John Smith with that particular mining claim.

You have to have the conscience of the lawyer in mind,

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too. He wants to serve. We instruct our men to use every effort to serve to locate these people. It is to our interest to do so. The court would do more than slap us over the wrist if we didn't. At the same time, if you make a conscientious lawyer sign a certificate that he has tried to find those owners, then he is going back to the telephone book again.

THE CHAIRMAN: Publication or posting would probably be constitutionally sufficient, without any mailing or anything else at all, or any personal service.

MR. LITTELL: Oh, yes, yes.

THE CHAIRMAN: We are grateful to you for coming here. We thought before you came here, "Oh, my, the Government is gouging these people dreadfully." Now that we have heard you, it seems that you are spending all your time protecting their interests. So we don't know what to think about it.

MR. LITTELL: I am glad if I was able to get that over, Mr. Chairman.

JUDGE DONWORTH: In a Pickwickian sense.

MR. LITTELL: Since this is the last time I shall appear, I want to take the opportunity to express the appreciation of the Department for the fine work that Major Tolman and his subcommittee have done. They have been indefatigable and patient, and they have been very indulgent with our eccentric views.

... The representatives of the Department of Justice

left the room at this point ...

THE CHAIRMAN: Does the committee want to take a vote on any of these condemnation problems tonight, before you go?

DEAN MORGAN: I should like to hear what the Senator has to say, if he is not going to be here tomorrow.

SENATOR PEPPER: Gentlemen, I haven't any flood of light to throw on the situation. It does come down pretty close to a question of original apprehension, I think. Government counsel I think are honestly convinced that there is a lack of power to do the thing that we think convenience and simple justice require. I think, if their views are not justified by the authorities (and about that I can express no opinion), then the way is open for us to condition the right to dismiss in cases where there has been a factual taking of something less than that which was the aim of the proceeding, the way is open to us to condition the granting of the request for dismissal with a requirement on the plaintiff to amend his complaint so that it will be a complaint seeking the condemnation of that which has actually been taken.

THE CHAIRMAN: It sort of strikes me that that is a good deal like our deeming the court has reserved the question. If you do it by forcing him to amend his complaint, you can do it without forcing him to amend the complaint. My idea would be to say right here that you can dismiss this proceeding at

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any time before final judgment, but the dismissal shall not operate to prevent the court from proceeding to award compensation for whatever the Government has taken up to the time of dismissal, and there you have it.

SENATOR PEPPER: My thought, Mr. Chairman, is that there ought to be, before there is any determination of compensation due the property owner, something in the pleadings to show that there has been a taking by the Government of property or a right in property which is the subject of compensation; and I think if there is a desire to make compensation for what has been taken, that the pleading ought to show that the Government has sought to take and has taken that which is pressed by the property owner as a subject for compensation.

THE CHAIRMAN: The record would show that they took it.

SENATOR PEPPER: Would it?

THE CHAIRMAN: Yes, if you went before the court, if you had a rule such as that I speak of, saying that the dismissal shall not apply, notwithstanding that, the court may proceed to award compensation for what has actually been taken by the Government under the proceeding up to the date of dismissal, and while he is in hearing on the thing the court is informed of it, the record will show that the Government did go into possession and has been there ever since.

SENATOR PEPPER: I thought that it would be a little

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more regular and it would overcome the objection that there had been a lack of official action on the part of the Secretary of War or the Secretary of the Navy if he, in requesting that order of dismissal, were to amend his complaint in such fashion as to show that he had sought to take and had taken.

THE CHAIRMAN: I would agree with you if the amendment was voluntary, but if you cram it down his neck by an order of the court, it is not a voluntary act of the Secretary, and that is what these fellows are urging.

SENATOR PEPPER: It is voluntary, because all he has to do is to withdraw his request for an order of dismissal.

JUDGE DONWORTH: I think it would weaken our situation very much, Senator, if we required the plaintiff to amend his complaint in a way that he doesn't want to do. The point of my subdivision there is this clause in the War Powers Act, and Mr. Littell admits that a bad-minded Secretary of War would just use this Act to kick a man into the Court of Claims after depriving him of his property.

The Act says: "Upon or after the filing of the condemnation petition, immediate possession may be taken and the property may be occupied, used and improved for the purposes of this Act notwithstanding any other law."

So he uses the condemnation proceeding for the very purpose of getting possession, as you so clearly put it. He is getting a part of what he demanded. It seems to me that

the Chairman's suggestion is better, qualifying my language here by inserting something along the line that the Chairman suggested, that a motion to dismiss by the plaintiff shall not deprive the court of the right to determine the compensation for any taking that has been made by virtue of this proceeding.

SENATOR PEPPER: I withdraw my suggestion in the light of what you have said.

MR. DODGE: I would make it more mandatory than that negative provision that it shall not interfere with the right. I drew this up, and I just threw it into the hopper as carrying out Senator Pepper's idea.

"But if the plaintiff has taken possession, dismissal shall be only by court order requiring as a condition that plaintiff shall amend its complaint so as to limit it to the possessory rights which have actually been taken, compensation for which shall be determined in the action before dismissal."

JUDGE DONWORTH: We are all aiming at the same mark. I had thought that the proposition that the greater includes the lesser was sufficient, without the specific amendment, but I would yield to others on that.

MR. DODGE: He admits the jurisdiction is conferred upon the court if he does amend.

THE CHAIRMAN: Yes.

DEAN MORGAN: He has to have the consent of the Secretary to amend.

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JUDGE DONWORTH: I don't think his admission amounts to a continental.

MR. TOLMAN: I think that this amendment could be so phrased that it would relieve their fears of this situation. I can see it because I have been in it myself in condemnation cases where I represented the condemnor. There are damages that are classified in condemnation law as incidental damages or secondary damages or consequential damages, which can never be recovered in a condemnation suit. If you condemn a place where a man is carrying on a business, if you widen the street and take his house completely away, he cannot recover for the damages which he suffers by the loss of doing business there. They are afraid that if, in condemnation, you leave this matter open of a remedy for the taking and destroying, and so forth, they may have to pay those consequential damages, which are not recoverable in any state that I know of.

THE CHAIRMAN: Isn't it a very simple matter so to word the provision that just compensation for what is taken shall be fixed according to established law?

MR. TOLMAN: Yes, I think it is. That is just what I am coming to. I believe they might be persuaded to change their position if there were a careful drafting of that proposition.

THE CHAIRMAN: I understand it is the sense of the meeting, then, probably, that we shall make some change in this

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draft of the Condemnation Rule so as to provide that the court shall proceed to award just compensation, under ordinary, established rules, for such taking as has occurred up to the date of the dismissal--in some way, whether we word it one way or another.

Then, are you content to accept, after their representation, to accept the provision which requires no certificate of proof at all of lack of knowledge of the defendant's name or whereabouts?

SENATOR PEPPER: They were content to have inserted in these rules the phrase read by Professor Sunderland, which was in an earlier draft, requiring a certificate, and I think we ought to go that far.

THE CHAIRMAN: Yes; let's agree to that.

Now, this business that I raised about the default. If you amend your condemnation complaint, it says you have to serve notice of the amendment only on the parties affected thereby who are not in default. But suppose you increase the description of these properties that you want, or you are going to take less than you specified. He ought to have notice of it, whether he is in default or not. I spoke to these gentlemen about it, and they said they didn't put in that language. We must have stuck it in there, because it is similar to our own rule. So they agreed to strike out "and not in default" to make it clear.

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I don't know of anything else of importance here that we are in any sort of disagreement about.

MR. DODGE: We are satisfied that it is a question of practice and not substantive.

THE CHAIRMAN: What is?

MR. DODGE: This change we are making, this fundamental change in the dismissal provision.

THE CHAIRMAN: I am satisfied from what I have heard here today that nobody would say the rule is invalid. It provides that the court shall proceed to award compensation for the very thing they brought the suit for. If it happens to be less than they originally asked--

MR. DODGE (Interposing): As they said in answer to the Chairman's question, they are entirely willing to have it done if we have the power.

... The committee adjourned at 6:15 p.m. ...

THURSDAY MORNING SESSION

October 28, 1943

The committee reconvened at 9:22 a.m., Chairman Mitchell presiding.

JUDGE DONWORTH: Mr. Chairman, I should like to add to the discussion on eminent domain the fact that in the well-developed rule that we tentatively adopted prior to 1938, and which the Department agreed to, there is this clause. I am reading from Moore's Federal Practice, Volume 3, page 3720. It provides for a preliminary order of the court that the condemnation is proper and that the case should proceed to the ascertainment of just compensation. Then follows this clause:

"After the entry of such an order, no objection to the exercise of the right of condemnation should be filed or heard, and the plaintiff shall not be permitted to dismiss or discontinue the proceedings except on such terms as the court fixes."

MR. HAMOND: What is that? From a decision?

THE CHAIRMAN: That is our draft.

DEAN MORGAN: They objected violently to that last time. We had it in before.

THE CHAIRMAN: Let me ask Judge Donworth a question. Are you familiar with this emergency act of World War II under which they are requisitioning property?

JUDGE DONWORTH: Yes.

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THE CHAIRMAN: Does that provide that the seizure, temporary immediate seizure or possession, is done on an order of court or may it be done before?

JUDGE DONWORTH: No. It is done without any order of the court.

THE CHAIRMAN: Without any condemnation suit having been started?

JUDGE DONWORTH: No, to the contrary. My great point is this--

THE CHAIRMAN (Interposing): I should like to know what the fact is. Do you have to have a proceeding started in order to seize it---

JUDGE DONWORTH: You do.

THE CHAIRMAN: ---or can you seize and then start your suit?

JUDGE DONWORTH: No. I can read you the language. I have it, if you would like to hear it.

THE CHAIRMAN: All right.

JUDGE DONWORTH: I am reading from the Second War Powers Act, approved March 27, 1942. Title II of the Act relates to the acquisition and disposition of property.

"The Secretary of War, the Secretary of the Navy, or any other officer, board, commission or governmental agency authorized by the President may cause proceedings to be instituted in any court to acquire by condemnation any real property

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or the temporary use thereof."

Then the clause proceeds, quoting: "Upon or immediately after the filing of the condemnation petition, immediate possession may be taken and the property may be occupied, used, and improved for the purpose of this Act, notwithstanding any other law."

THE CHAIRMAN: I am glad you said that, because I would like to make a statement, not for discussion but so we will have a record of it and won't forget it, and so I won't forget it as I did yesterday.

The Attorney General's position is based on the theory of the Government's immunity from suit, that if they waive their immunity to permit a suit, they may do so on any conditions the Government prescribes as to when and where and how the suit may be brought. That is his whole position fundamentally.

There is a rule that he has forgotten, and I completely forgot it myself yesterday. The Supreme Court has announced it over and over again. That is all well enough when the citizen sues the Government, but this is a suit by the Government against the citizen.

DEAN MORGAN: That is exactly it.

THE CHAIRMAN: They have held again and again that when the Government steps down off its pedestal and goes into court and sues a citizen, it isn't a question of waiving

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immunity at all, and then the Government is bound by all the rules of equity and law and justice that an ordinary plaintiff is.

My point is brought out by the fact that, in order to get possession in this case, temporary possession, by the terms of that statute the Government has to institute this suit. The result is that the possession is obtained by virtue of the suit; it is an incident of the suit. I say that, having brought such a suit as a weapon to get possession, the Government being the plaintiff and not the citizen being the plaintiff, the Government is bound by every rule of equity and justice and that it should be estopped, having started this proceeding to get possession and having got it, from running out the door and not paying for it.

I think that that argument, in addition to everything else we said, makes it perfectly clear that there is no law that the Government can't be required, as a matter of substantive right, to dig up compensation or have it awarded in a situation like that.

I just wanted to put that down in the reporter's notes.

MR. TOLMAN: May I say one word now in regard to this matter as to further proceeding? Our subcommittee on condemnation will try to get and submit to the committee these amendments that have been voted on, and will try to do it very

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promptly.

THE CHAIRMAN: That is it. I have two things I should like to bring up and just record, and then anybody else can bring up anything he wants.

Another one is in line 100 on page 4, where it says if the Government amends its complaint (which means adding or subtracting property or changing the nature of the interest, I suppose), it must serve notice of the amendment upon the parties affected thereby, and then the rule read: "and not in default."

We made the point yesterday that the person might be defaulting because he was satisfied for the Government to take what they asked for or what they wanted, but an amendment might increase that or even diminish it and he might feel differently about appearing there. So we talked about striking out the term "and not in default", which would require the service upon anybody of such an amendment where he was affected by the amendment, whether he was in default or not.

But my point is that striking out "and not in default" would leave the inference that you don't have to serve a man who is in default. So I would suggest that it be "served upon any party affected thereby, whether or not in default."

My other question is one we didn't dispose of last night, and that is the matter of jury trial. A year or so ago I went into this thing pretty thoroughly and had all the

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statutes authorizing condemnation suits by various government departments brought to my attention. There are a great many of them that provide specifically, like the TVA law, that there shall not be a jury trial. A very serious question arose in my mind as to whether that is a mere matter of procedure or whether it isn't a real right as to the character of the tribunal. We talk about the right to jury trial. We have gotten into the habit of doing that, and there is an atmosphere of right, and not mere procedure, about it.

I wrote the Attorney General more than a year ago, suggesting that that rule that had provided for a jury trial and repealed all these federal statutes that you shouldn't have a jury trial was open to serious question as to its validity as a mere matter of practice, especially in view of the Supreme Court's decision in that case involving physical examination, where they split five to four as to whether that was a procedural matter or a matter of substantive right.

The Attorney General agreed with me at that time. He at least went so far as to say that it was a serious problem, and he agreed with me that it ought to be taken care of by statute. The bill was introduced in Congress, and it has never been passed. Yesterday, when I brought the thing up again, Mr. Littell seemed rather surprised, and he apparently didn't realize that that jury provision was in this rule. I understood him to say that he rather felt that the imposition of a

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jury on the Government by rule, in the face of these statutes, was a doubtful thing.

I should like to know, in the first place, did they ask for this jury trial provision or did your committee put it in here?

MR. TOLMAN: This jury trial provision was in the original rule which this committee adopted, and it came as the result of a conference in 1938 with the Lands Division. They expressed a preference for trial by jury. Among other things, they pointed out the fact that in some states jury trial of the land in the state was provided to be necessary in condemnation. They feared the question might arise that, if they took land in a state where the right of trial by jury was a constitutional right of the owner, they would not be able to take it without it.

THE CHAIRMAN: You mean if somebody other than the Federal Government took it?

MR. TOLMAN: No. Well, yes.

THE CHAIRMAN: You don't mean the Federal Government.

MR. TOLMAN: They feared it both ways. They feared it might possibly be held. In Madisonville Traction Company v. Mining Company the Supreme Court had before it this question. It had before it the question of whether the federal law or the state law would govern, and by a divided Court it was held that the federal law would govern. But it did not then involve this

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question that you raise as to whether there is a right of trial by jury or not. It did, however, decide the question that land in a state might be proceeded against in condemnation by a corporation of a state under the federal practice, the federal statutes, and that is as far as that went. But the case was tried before a jury. There are about eight cases that the Supreme Court has passed on in which jury trial as at common law, a twelve-man jury, was used. In another one, this Maryland case condemning for the site of a lighthouse on the shore--

THE CHAIRMAN (Interposing): You are talking about condemnations by the United States under the federal power of eminent domain or state power of eminent domain?

MR. TOLMAN: Both of these cases that I referred to are condemnations by state governments.

THE CHAIRMAN: Oh, yes. Well, I am talking now about the federal right of eminent domain. The Supreme Court has held a dozen or fifteen times that, if the Federal Government is exercising its right of eminent domain, it doesn't have to provide for a jury trial, that the amendment that provides for jury trial has no application.

The only question you are discussing, it seems to me, is whether, if the condemnation suit is brought not by the Federal Government but by some state or corporation under the state power of eminent domain, the jury trial must be had if the state law provides for it. That question doesn't arise

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under this rule, because you have expressly said that in cases like that the state practice and not this rule should be followed.

So we get right down to the question as to whether we know that the Federal Government doesn't have to grant a jury trial when it is condemning. That is clear enough.

DEAN MORGAN: What about these numerous corporations?

THE CHAIRMAN: Federal agencies?

DEAN MORGAN: Does the act incorporating them give them the power of eminent domain?

THE CHAIRMAN: It does in instances where they need it, and that is the federal power.

DEAN MORGAN: That is the federal power, but for a great many purposes a great many of them are regarded as private corporations, with the Federal Government merely owning the stock. I was just asking whether that is just the same as if the Federal Government itself were proceeding.

THE CHAIRMAN: They haven't the power of eminent domain unless the Federal Government gives it to them.

DEAN MORGAN: That is right.

THE CHAIRMAN: And it is the federal power of eminent domain that is being exercised.

DEAN MORGAN: I see.

THE CHAIRMAN: But what we are boiling this thing down to is the question of whether or not, there being several

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statutes (they tried to belittle it, but there are a whole lot of them, and the TVA yelled about the jury trial at the time they tried it before) in which the Government says, "We will authorize this, that, and the other department to exercise the power of eminent domain," when the Government gets into court it shall be subjected to jury trial or whether or not the condemnation shall be fixed, we will say, by a commission or jury of three, with a direct appeal to a three-judge court in some cases. There are other variations of that. When the Attorney General practically concedes that he is worried about proposing that by statute, what are we going to do about it?

MR. GAMBLE: The Attorney General, Mr. Chairman, indicated yesterday that there were laws that provided for the determination of the award other than by a jury. Where they worked well, they liked them; but they didn't work well in most cases. Consequently, he indicated, to my mind, that he would like to have the jury trial provided, but that provision for jury trial by rule worries me very much.

THE CHAIRMAN: I brought it up because I didn't want to have the record show that we had approved the idea of doing it by rule, without a statute. Suppose we do this: I think we ought to hold our hand on that. Maybe we can submit this proposed rule, when it is finished, to the bench and bar with a note stating that there is a question whether or not a statute is necessary to substitute a jury trial for other means

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prescribed by law and that it will be considered later, and let it go at that. Then, by the time the rule comes back to us, maybe the Attorney General will get a bill.

JUDGE DONWORTH: This may not be logical. If we were taking away the right of trial by jury and doing the reverse of what we are doing, we would have considerable doubt about taking away what is often regarded as a fundamental right, but it seems to me offhand that introducing that right where it didn't exist before is not open to the objection that the Chair has stated. Maybe I am wrong.

THE CHAIRMAN: Take this five to four vote on our physical examination. There were four of the Justices of that Court who are there yet (and some others along the same trend of thought) who held that when you were dealing with such a fundamental thing as whether you felt a man should be subjected to a physical examination, that it was so fundamental a matter of policy, only Congress could answer. When you are dealing with such a fundamental question as that of whether the Government is going to subject itself to a twelve-man jury or whether it is going to get the judgment on the facts of a three-man federal court, I would count on those four against our power at once, and there might be a couple more.

MR. TOLMAN: Mr. Chairman, the Government has given us a brief on the subject of whether or not that common law right of trial by jury exists in condemnation cases, and, of

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course, it doesn't.

THE CHAIRMAN: We concede that it doesn't.

MR. TOLMAN: Yes. Of course, it doesn't. But, incidentally, they have the material there for a quick research of this matter, and I will undertake to see that the question which you raise, which they have never considered--

THE CHAIRMAN (Interposing): Why, they have considered it. I wrote them a letter two years ago, a long memorandum, and referred to the statutes and raised the question about the attitude of the Court in the personal injury thing. My point is that they had that laid in their lap a year or more ago, and now they come in and--

MR. TOLMAN (Interposing): They don't have it in mind now.

THE CHAIRMAN: This is a late date for them to be examining the law on that. That is what makes me angry.

MR. GAMBLE: It is my recollection, Mr. Chairman, that we did have some objection from the TVA people two years ago.

DEAN MORGAN: Oh, yes, we did. We had violent objection.

THE CHAIRMAN: That is one of the grounds. They liked their own procedure and said so.

MR. GAMBLE: Yes.

THE CHAIRMAN: The fact that there were so many yells

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from these agencies that had their own private methods under the law was the reason that the Attorney General laid it down and wrote us a letter and said, "There is so much disagreement about this, I had better drop it." We are headed for the same thing. Well, let's reserve it.

I wanted to make it clear that we are not now deciding that we can, by a practice rule under this enabling act, compel the Government to take a jury when the statute says it shall not. That is the only thing I brought it up for. I am sorry to have taken so much time.

DEAN MORGAN: If we are going to have it, we have in this a provision that we were careful to take out in private litigation. That was that a person who had demanded a trial by jury couldn't withdraw it without the consent of the other party, and this allows them to do it. If the Government wanted to play a trick on a fellow, they could do just what they used to do in Massachusetts, just stamp on the complaint, "Jury Demanded," and then after the time for claiming a jury had gone by for the defendant, the Government would withdraw, and he would be left holding that bag. That happened in Massachusetts time and again in the early cases, so we covered that in our rule for private litigation.

THE CHAIRMAN: The trouble is that the rule requires some state procedure where the action involves the taking of property. It doesn't go far enough. It says, "the foregoing

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provisions of this Rule 71-A shall not apply", and what we mean is that neither 71-A nor any other provision applies.

DEAN MORGAN: Why, yes.

THE CHAIRMAN: That takes all this difficulty out, doesn't it?

DEAN MORGAN: Oh, no; because this says specifically, in lines 113 and 114, "and may be withdrawn by any party by filing a notice of withdrawal", which is just exactly what we tried to prevent in litigation.

THE CHAIRMAN: The last rule says that that rule you just read doesn't apply. It applies to private litigation.

DEAN MORGAN: Yes, that is what I say. Oh, yes; it applies to private litigation, but I say, if you are going to have a jury in a matter of this kind, it seems to me that you ought to provide that, if a person has demanded a jury so that the other side relies upon it, there ought not to be a withdrawal of that without the consent of the other party. That is all.

JUDGE DONWORTH: Won't the wise lawyer for the defendant, when he sees the plaintiff has demanded a jury, also put in his demand?

DEAN MORGAN: He may, but--

PROFESSOR CHERRY (Interposing): We didn't think that was sufficient, Judge, when we were discussing the rule generally.

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JUDGE DONWORTH: I don't.

PROFESSOR CHERRY: We put in the provision, and I think we should have it here.

DEAN MORGAN: I am just calling attention to the difference. Of course, it always irks me when the Government wants a lot of privileges that nobody else gets.

THE CHAIRMAN: May I have gone off the track here. Line 111?

MR. HAMMOND: "may be withdrawn". That is what he is talking about.

DEAN MORGAN: That is the only part I am talking about.

MR. HAMMOND: It allows them to withdraw it without the consent.

PROFESSOR CHERRY: The Government withdraws it after the defendant could have put in a demand.

THE CHAIRMAN: I see. That allows a juggling. One party can withdraw after the other fellow has lost his right.

PROFESSOR CHERRY: That is right.

THE CHAIRMAN: Why should that be in there?

MR. GAMBLE: What is our general rule on it?

THE CHAIRMAN: Our general rule is that if one man demands a jury, he can't withdraw his demand without the consent of the other fellow.

MR. HAMMOND: Rule 38, I think.

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DEAN MORGAN: Yes.

THE CHAIRMAN: Why did you allow that trick to be played in a condemnation suit when it is guarded against in an ordinary suit?

DEAN MORGAN: That is all I want to know. I am just asking.

THE CHAIRMAN: How about it, Judge Donworth? Do you happen to know what your purpose was or what the committee's purpose may have been in saying you could play that kind of game in this kind of suit?

JUDGE DONWORTH: My recollection, which is not very clear, is this: that when they submitted this particular section to Major Tolman and to me (Judge Clark was absent at the time), we didn't see any particular objection to it. The notion came from the Government, and we passed it; isn't that so?

MR. TOLMAN: That is correct, of course. There are some things here that we didn't see the very first day, and this is one we didn't even see until it was brought up here.

THE CHAIRMAN: Brought up where?

MR. TOLMAN: By you, and put in here.

JUDGE DONWORTH: We never thought of it.

THE CHAIRMAN: I see. Then you will agree that the clause about withdrawing ought to be stricken out, won't you?

JUDGE DONWORTH: Or made to conform to our general

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rule.

THE CHAIRMAN: It does, anyway. If you don't leave it in there, the general rules apply, don't they?

MR. TOLMAN: Yes. You can do either.

THE CHAIRMAN: Let's raise this question and vote on it, and let the draftsmanship follow the result. Are we in favor of sticking in the principle we had in our original rules of not letting the one man who has demanded a jury withdraw it without the consent of the other? We did that in the general rules because it laid a trap for the man. Do you want it the way the general rules have it or do you want them to have the privilege of withdrawing?

MR. TOLMAN: I think the committee would believe it the better way to put the rule in.

JUDGE DOBIE: I second that motion.

THE CHAIRMAN: To follow the principle in our main rule, properly embodied in this rule. All in favor say "aye." That is agreed to.

I should like to raise one more question, I am sorry. You see, I didn't see this thing until yesterday. I was busy. Things are beginning to bob up in my mind about it.

When it comes to the matter of phraseology of subdivision (h), there are two alternates here. The Attorney General's draft is that the Government may dismiss as a matter of right at any time prior to the vesting of title. The title

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may vest long before the final judgment, because under some statutes you file a declaration of taking before you have any judgment, and that operates by the terms of the law to vest the title immediately in the United States. Then you go on and render final judgment fixing the compensation and adjudicating that the Government has got the ownership. There is another type of case that comes up where there is no vesting of title by a declaration of taking, but you get into possession and go on to the end of the case, and the final judgment is what vests the title.

It seems to me that Judge Donworth's draft goes to the entry of final judgment. It says that a plaintiff may dismiss the action at any time prior to the entry of final judgment. That means that he can dismiss it, as a matter of right, after the Government has filed a declaration of taking, before final judgment has been had and the title vested.

So my idea is that the Government's use of the date of the vesting of the title instead of the date of the final judgment is more favorable to the property owner than our alternative. Isn't that so?

JUDGE DONWORTH: In reading my proposal, you read only the first two lines, but line 138 begins with the words "but if". I could have said "provided that", of course. It is a limitation, you see. The last three lines are a limitation on the first two.

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DEAN MORGAN: "has taken title or possession".

JUDGE DONWORTH: "but if". That is "except if" or "provided."

THE CHAIRMAN: Oh, I see. I guess it is all right.

JUDGE CLARK: Isn't Judge Donworth's a little too broad on the line we were talking last night? Judge Donworth's would permit of a condition forcing title on the Government. It should be merely a requirement of paying for use and occupation.

THE CHAIRMAN: Didn't we agree that we didn't intend by our draft to say that the district court, after the Government had once started, could force it to go on and acquire title? I understood the committee to agree on this: merely that when the Government dismissed, they at least had to allow the court to go on and award compensation for whatever taking there had been up to the date of the dismissal, not to compel the Government to go on and take more than this temporary possession.

DEAN MORGAN: That is right. We didn't approve Judge Donworth's.

THE CHAIRMAN: When it is redrafted, that will be covered.

JUDGE DONWORTH: That is understood. Of course, my idea was to have it covered by vesting in the judge the determination of that matter, what might be called minutia, but

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I am perfectly willing to have it go as the Chair suggests.

MR. GAMBLE: Mr. Chairman, what did we do, if anything, on the substitution of parties, subparagraph (f) on page 4?

MR. HAMMOND: There is no substitution of parties, as Senator Pepper said.

MR. GAMBLE: There ain't no such thing.

MR. HAMMOND: There can't be.

JUDGE DONWORTH: What line is that?

MR. GAMBLE: Line 105 on page 4. It is headed "SUBSTITUTION OF PARTIES." If you read the text, it doesn't provide that there shall be substitution.

JUDGE DOBIE: On death or incompetence; like frogs in Iowa.

DEAN MORGAN: Like snakes in Ireland.

THE CHAIRMAN: As I read this rule, it simply provides that death or incompetence of the defendant shall not abate the action or require substitution. Where an interested party is dead, there is nothing in that rule to prevent his executor from coming into the case with the right to take the place of the dead man. I don't think it prohibits that, does it. It is a protection to the Government that it doesn't have to substitute in order to make the judgment valid.

JUDGE DOBIE: That is the idea. They have a hundred parties sometimes in some of these condemnations. In Norfolk

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I know one of them involved over 200. They haven't got to keep up with the deaths. If one of them becomes incompetent or one of them dies, the Government can go right ahead.

THE CHAIRMAN: It says, "nor shall the death or incompetency of any defendant abate the action or require any other person to be substituted as a party."

JUDGE DOBIE: It doesn't say it can't be, if he suggests it, as I understand it.

THE CHAIRMAN: The ordinary rules, mentioned in our other rules, would allow him to come in as a matter of right, don't you think?

JUDGE DOBIE: I think he can do it, as I understand. The idea was just that it didn't require the Government to keep up with the deaths and incompetencies of all these defendants, and if by any chance they don't know about one of them, that doesn't affect the proceeding; but I don't understand the rule to be that, if a man does die and the executor comes in and suggests the substitution, it doesn't permit his substitution.

THE CHAIRMAN: You can make it clear by saying, "The death of a party shall not require substitution, but it may be permitted."

JUDGE DOBIE: Yes.

THE CHAIRMAN: Something like that.

JUDGE DONWORTH: Of course, the members of the committee bear in mind that in the federal practice there is no

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requirement for filing and recording what is called a notice of lis pendens. The pendency of the action is notice to everybody. So, if a man buys a piece of land that is under a proceeding for condemnation, he is bound by the result even though he doesn't know anything about it. That is a part of the general federal practice, as I understand it.

THE CHAIRMAN: I thought there were federal laws that said that, if there was a state law that provided for the recording of lis pendens in the state or county, then the proceedings in the federal court wouldn't be notice to anybody unless the state law was complied with.

JUDGE DONWORTH: That is true as to the lien judgment, but I don't recall any such statute as to lis pendens. Am I right?

DEAN MORGAN: As to the lien of judgment certainly it is true.

JUDGE DONWORTH: Yes.

DEAN MORGAN: I understood it that way. I hadn't gone into the statutes at all.

MR. GAMBLE: I just brought the question up because I had a note that Mr. Morgan raised the question.

THE CHAIRMAN: Shall we now go back to Rule 75?

DEAN MORGAN: I raise one point which you may want to consider, and that is on page 3, lines 78 and 79, about the certificate of the plaintiff's attorney having the same effect

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as the return of the marshal. I think that might well be deleted. Let it stand as proof of service in the same way that proof of publications or other unofficial return does.

JUDGE CLARK: Your objection is not to there being a certificate.

DEAN MORGAN: Oh, no.

JUDGE CLARK: There must be something.

DEAN MORGAN: It is all right, but I don't want it to be given any artificial effect, Charlie; that is all. That sentence there just says that the certificate of the plaintiff's attorney shall have like force and effect as the return of the marshal. I don't object to the statement: "Service by mailing, posting and publishing shall be proved by the certificate of an attorney for the plaintiff."

THE CHAIRMAN: We were proposing to add something to that. This certificate, as I pointed out to the Attorney General here, is a certificate that you have mailed. It isn't a certificate that you don't know who he is or where he lives. He didn't seem to object to amending 77 and 78 by adding that in the certificate of proof of service the plaintiff's attorney shall make certain that the party so served either was unknown or his address was unknown.

DEAN MORGAN: That is all right, but I don't want that to have the same effect as the return of a marshal.

THE CHAIRMAN: What is the law about a marshal's re-

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return? It is conclusive, isn't it?

DEAN MORGAN: I suppose it isn't. At common law it was. There isn't any question about that, and in some states it is yet.

JUDGE DONWORTH: I have looked up that point now. As this was tendered to us by the Government, it said explicitly that the certificate of the attorney as to service shall be conclusive.

THE CHAIRMAN: I see.

JUDGE DONWORTH: I have checked up the authorities, and Major Tolman and I corresponded. There is a decision in Pennsylvania that says that in all but two states the return of a sheriff or marshal is merely presumptive evidence, and it can be questioned.

DEAN MORGAN: That isn't right. That isn't right by a long shot.

PROFESSOR SUNDERLAND: There are at least eight states that hold that.

DEAN MORGAN: It can be questioned in almost every state now, but it puts a heavy burden of proof on the person questioning it. As you all know, the English rule, and the rule in this country to begin with, was that the return of the sheriff was conclusive. Connecticut was the first state that broke into that. The last I heard, it was conclusive still in Virginia. I am not sure whether Indiana has changed it.

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MR. GAMBLE: I think it is in Missouri.

DEAN MORGAN: In Missouri it was the last time I looked it up.

THE CHAIRMAN: Your idea is that because of that--

DEAN MORGAN (Interposing): I don't think you need to give it any more than the common law effect, whatever the effect would be of a proof of service by statutory means; that is, by affidavit.

THE CHAIRMAN: What is the common law effect in the case of service like this?

DEAN MORGAN: If it is by affidavit, it of course makes a prima facie case, and of course anybody who attacks the return of the sheriff or the return of the marshal would undoubtedly have the burden of proof, but he wouldn't have the burden of proof by any heavy preponderance of evidence or anything of that sort.

THE CHAIRMAN: I am wondering, if we struck out the reference to the effect of the return of the marshal and said nothing about the weight of the certificate of the attorney, what your conclusion would be as to what weight that would have.

DEAN MORGAN: It would be just what the Major said. It would be just prima facie evidence; that is all.

THE CHAIRMAN: You mean if we said nothing about it?

DEAN MORGAN: If we said nothing about it, it would be prima facie evidence, yes.

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PROFESSOR SUNDERLAND: The effect would be just the same as the effect of service of process under our Rule 4, where it is served by an unofficial person.

DEAN MORGAN: That is exactly it.

PROFESSOR SUNDERLAND: And we say nothing in that rule about the effect when it is served by an unofficial person.

JUDGE DONWORTH: I should like to read into the record a few lines from my letter to Major Tolman.

"The extensive annotation in 107 A.L.R. cites Knowles v. Gaslight and Coke Company, 19 Wallace 58, 22 L.Ed. 70, as holding that the defendant when sued on a judgment can attack it collaterally by showing that he has never been served by process, though the record contains a sheriff's return of due service. It is my impression that the rule upheld by the great weight of modern authority is that while an official return of service creates a strong presumption of verity, it is not conclusive."

DEAN MORGAN: That is right. There is a strong presumption of verity.

THE CHAIRMAN: Then what is the objection to the rule, if that is the law?

MR. TOLMAN: That is what we thought.

DEAN MORGAN: Wait a minute. That is the sheriff's return he is talking about.

THE CHAIRMAN: I know it, but "The certificate of the

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plaintiff's attorney shall have like force and effect as the return of the marshal", and he just read us the law that says it is presumptive.

DEAN MORGAN: That it puts a heavy burden of proof on the attacker.

THE CHAIRMAN: It ought to.

PROFESSOR CHERRY: They are talking about clear and convincing evidence there, Mr. Chairman, whereas they don't talk about that in the case of your ordinary affidavit.

THE CHAIRMAN: I see.

JUDGE CLARK: I think it still ought to stand. As a matter of fact, this is a matter of title, and I think that the certificate of an official of the United States, who is under oath and who has to be doing his duty, should be given the same effect. This is an official matter. It is quite a different thing from getting an office boy to go out and leave a letter.

DEAN MORGAN: What about Rule 4, then?

JUDGE CLARK: What about Rule 4?

DEAN MORGAN: "If service is made by a person other than a United States marshal" ...., "he shall make an affidavit thereof." We don't say that that shall have the same effect.

JUDGE CLARK: I think there is all the difference in the world in getting your office boy, a kid of eighteen or so, and getting an assistant United States attorney.

DEAN MORGAN: This isn't an office boy. This is a

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person appointed.

PROFESSOR CHERRY: Appointed by the court.

JUDGE CLARK: I still say the same.

THE CHAIRMAN: What reason, I would like to know, is there to suppose that an ordinary deputy United States marshal is any more reliable in a matter of this sort than the counsel for the United States? I don't quite know what halo there is about a marshal that gives him such--

DEAN MORGAN (Interposing): It is just a historical halo; that is all.

THE CHAIRMAN: There are a good many historical things we are dumping overboard. My original proposal was to have the government lawyer go to the court and make his showing, on affidavit or otherwise, that these people were unknown, and to have him get an order, which order would be conclusive, as in those substituted service cases. Once you get that order, the right for substituted service is there, and it can't be afterwards impeached. It struck me that there was mighty little shade of difference in giving at least a strong presumption to the government lawyer's certificate where he doesn't go to the court when he could go to the court and, on the very same information that he is making his certificate, get a conclusive order and get it as a matter of court.

DEAN MORGAN: Ordinarily, his application to the court would have to show what steps he took in order to

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determine the identity or address, and his mere statement that "I can't find him" would not go down.

THE CHAIRMAN: I think that would be so where you had an individual defendant in a single case, like a divorce action or something, where the court would be conclusive about it, but when you walk in with a condemnation suit, with a package of defendants living all over the state, I don't believe the court is going to sift it out. He will ask the Government's attorney whether he is making a representation there that he has done his best and can't locate these people, and that will be the end of it for the judge.

DEAN MORGAN: It may be.

JUDGE DOBIE: Littell's whole idea is that this is a streamlined, high-speed thing, and while you want to do essential justice to the parties, don't put anything in there that will put sand in the gearbox.

DEAN MORGAN: That is all right, if you want to do it.

JUDGE CLARK: It seems to me that in addition to the lack of necessity of casting doubt on this, there is a problem really casting doubt. This is a matter of title. If you strike this out, what will the situation be? I make a guess that probably three-quarters of the courts will still hold it prima facie, because that is the natural thing to do. It is a regular and official thing. How else could you treat it? It must have some effect because it is in the rule.

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DEAN MORGAN: Of course it has.

JUDGE CLARK: If you really want a rule, you ought to put in that the certificate shall have no effect.

DEAN MORGAN: Oh, no; not at all.

THE CHAIRMAN: No; they are drawing a line between the prima facie case which may be set aside by weight of evidence and the marshal's return, which still can be set aside but has a lot of presumption in its favor and requires a heavier weight of evidence. That is where the distinction is.

JUDGE CLARK: As we all know, though, those distinctions don't really mean anything. What you do is to cast an unnecessary doubt on government titles, without any justification, really, it seems to me.

DEAN MORGAN: It isn't casting any doubt at all.

JUDGE CLARK: Of course you are.

DEAN MORGAN: If you just leave it out, it has the effect that would naturally be given to any official return or affidavit.

THE CHAIRMAN: What is your pleasure about it? It is getting along toward noon.

DEAN MORGAN: Go ahead. I won't fight over it.

MR. GAMBLE: I move that we let the rule stand.

JUDGE DOBIE: I second the motion.

THE CHAIRMAN: For the record, that refers to the clause in lines 78 and 79.

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MR. TOLMAN: What is the motion, please?

THE CHAIRMAN: That the provision be left in the rule that the certificate of the plaintiff's attorney shall have like force and effect as the return of the marshal, whatever that is. All in favor say "aye"; opposed, "no." That seems to be carried.

Now we are up to Rule 75.

JUDGE CLARK: I think we are up to (d), are we not, in 75? I think we discussed the others quite extensively.

THE CHAIRMAN: There is nothing there. We are just emphasizing the fact that no assignment of errors need be incorporated. That is for the mere purpose of pointing out that this statement, when an incomplete record is asked for, is really not an assignment of errors. It is a warning to the other fellow.

Now we come to (g).

JUDGE CLARK: I suppose in (g) the only change is at the end, dealing with this extra copy, and (g), I suppose, will want to continue to conform to whatever we do in (b).

THE CHAIRMAN: I should like to make this suggestion. I think somewhere in the rule (and I think (g) is the place for it) there ought to be an express statement that this copy supplied shall be used by the clerk as his original certified copy. Some of these clerks have been capturing that copy and then compelling the other fellows to pay for copying it, and

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they keep that transcript as a permanent record in the district court. I see nothing in that at all. Many of them don't.

Now we go on to (h).

MR. HAMMOND: Mr. Chairman, may I make a suggestion while we are changing this rule?

THE CHAIRMAN: (b)?

MR. HAMMOND: (g). We originally omitted something that I think should have gone in there, in the list to be sent up by the clerk.

THE CHAIRMAN: What is that?

MR. HAMMOND: We originally omitted something from our list of things that the clerk should always send up, the docket entries. I think they always do it, but I don't know. As long as we are stating what should, as a necessary thing, go up, we might add it.

THE CHAIRMAN: They always are sent up, are they?

MR. HAMMOND: They always are.

THE CHAIRMAN: Why not say so in the rule, then?

JUDGE CLARK: Actually, they are not always done. I think perhaps it would be a handy thing to have them, but I know, from the records we get, that sometimes it is done very carefully and sometimes it isn't. In our court we have a special C.C.A. rule that there should be a statement of the case at the beginning, which is supposed to state what has happened.

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THE CHAIRMAN: A brief or in the record?

JUDGE CLARK: In the record. You remember, there is a paragraph at the beginning. Sometimes that is done very briefly, leaving out whatever the lawyers think is nonessential, and sometimes it is done very extensively. But there isn't any great regularity here. In the criminal cases I think they do very carefully put in the docket entries. In the civil cases, sometimes yes and sometimes no.

DEAN MORGAN: Do the docket entries help you out a lot?

JUDGE CLARK: It is hard to say.

DEAN MORGAN: I mean suppose you had what you thought was an inadequate statement of fact.

JUDGE CLARK: Every little while, of course, you turn to them, and it is helpful. All I could say is that it helps out when you want to know something. A lot of times you don't need it.

THE CHAIRMAN: When you want to know the date on which a step was taken, it is useful, but beyond that it doesn't have much use.

JUDGE CLARK: That is just about it, I suppose.

THE CHAIRMAN: If the date becomes important and the record doesn't show it, it is a simple matter to have an additional record certified up; and if either party thinks the date in the docket is important, he can call for the docket

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entries in his designation.

MR. HAMMOND: I thought they were always done. If they are not, I agree with you. I think probably we could just let the rule stand.

JUDGE DONWORTH: We agree, do we not, to adopt the suggestion of Senator Pepper, which was a conclusion of the general debate, that the district court may make rules regarding the preparation of the record, not inconsistent with the rules of the C.C.A.?

THE CHAIRMAN: No, we didn't go that far. We simply said that we would prescribe the minimum requirement as to copies of transcripts, that the C.C.A. could add to that, and that the district court by local rule could add some more copies, but we didn't give the district court power to put a lot of other steps in in connection with the appeal that aren't specified here. It was simply the copy business.

JUDGE DONWORTH: All right.

THE CHAIRMAN: That covers (g). "(h) POWER OF COURT TO CORRECT OR MODIFY RECORD."

JUDGE CLARK: This is simply clarification. I think it would be rather helpful. The parties tend to run to the district judges. We have had one party in our court, and the other side running to the district judge. There is a conflict there which isn't very worth while.

THE CHAIRMAN: There is an exception here now on

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account of this in forma pauperis business.

JUDGE CLARK: Yes.

THE CHAIRMAN: (h) is all right. Let's go to the in forma pauperis. You remember we voted at the last meeting to put a rule here that when cases appealed in forma pauperis were allowed, the record might be made up under the direction of the district court in the cheapest way possible, regardless of the requirements in ordinary cases.

JUDGE CLARK: You see, we have given you two forms. We were directed to prepare a draft and, therefore, you may want to look at the two forms. In our note to the committee on page 6 right at the end you will see we say:

"The first sentence of the alternative rule proposed is perhaps more in line with the express suggestion made by Mr. Mitchell at the committee meeting with regard to in forma pauperis appeals. The original proposal, however, is not contrary to that suggestion but merely spells out the procedure a little more for the benefit of attorneys, and is substantially in accord with what was done in Hall v. Gordon."

THE CHAIRMAN: The original or first draft that you have beginning with line 68 rather ties the court down to special methods of preparing the sort of settled cases, as we call it under the code, bill of exceptions. The second alternative suggestion gives the district court the power to wiggle the thing any way he wants to to get the essential things, the

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necessary matter, up. Don't you think, Charlie, it would be safer to give the district court broad power himself to specify the way the record should be made up? He may call in the lawyers, and one of them might ask leave to do it a certain way.

JUDGE CLARK: I think that is true. We had in mind making suggestions to the lawyers as to what was to be done, suggestions to the court, but maybe that is not necessary.

JUDGE DONWORTH: Is it entirely fair to the poor man who gets the right of appeal at government expense? Is it right to cut down his transcript to a different limit from what the fellow who has the money can get? If it is in forma pauperis, shouldn't he have as good a record as the well-to-do man?

THE CHAIRMAN: I am a little bit uninformed about the forma pauperis. If an appeal is taken, does it mean that the man who appeals in forma pauperis has his case paid for by the Government? Is that it?

JUDGE CLARK: No. As I understand it, he has to take care of his own case just the same, but he is relieved of certain things.

THE CHAIRMAN: Fees.

JUDGE CLARK: Printing, and so forth. But there is nobody to pay his way, so to speak.

JUDGE DONWORTH: Somebody must be paid for a service rendered, mustn't they?

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JUDGE CLARK: Not always. We often get hold of a lawyer and assign him and say he has to do it.

JUDGE DOBIE: We do that a great deal, and I think we probably have a great many of them down there now, particularly habeas corpus cases in state custody, under the Supreme Court decisions, you know; Johnston v. Burall?, and all. Judge Pollard has these things almost every day because the state penitentiary is in Richmond. We have a great many of these in forma pauperis appeals and habeas corpus cases. Some of them are meritorious--about one in four hundred.

THE CHAIRMAN: Who pays? When he gets leave to appeal in forma pauperis, does the Government or some court fund pay the entire cost of getting up the record?

JUDGE DOBIE: I understand it does, and very often it is a pretty badly scrambled thing.

THE CHAIRMAN: The Government pays for it, or is it paid out of the court fund that you get from fees or something?

JUDGE DOBIE: I don't know who pays for it. I don't know about the bookkeeping. I know the man doesn't pay for it. We always appoint a man to represent him, and in Richmond we have no trouble getting an active young lawyer to represent him pretty ably.

JUDGE DONWORTH: The lawyer would take care of himself. It is the record that is the difficulty.

JUDGE CLARK: I may be wrong; I don't know much about

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how these come out, but I think nobody pays for it. That is one reason we get a skimpy record.

MR. TOLMAN: There is a recent decision of the Supreme Court on that matter, in which in a forma pauperis case the requirement was greatly relaxed, and there was practically a new code. I think you must have it there. Maybe that is what Professor Moore is getting. No, it can't be. It is later than that.

THE CHAIRMAN: Our question is this: Suppose you relax it, who pays for the "relaxed" record, the reduced record, the cost of getting it up?

JUDGE DOBIE: I think the Government pays for it in the sense that the clerk has it made up and just doesn't get anything from the man.

THE CHAIRMAN: Gets no fees for it?

JUDGE DOBIE: Yes.

JUDGE CLARK: Here is the statute, page 832. It provides first for the requirements as to the affidavit, and so on, and then goes on: "In any criminal case the court may, upon the filing in said court of the affidavit hereinbefore mentioned, direct that the expense of printing the record on appeal or writ of error be paid by the United States and the same shall be paid when authorized by the Attorney General."

THE CHAIRMAN: Not in a civil case.

JUDGE CLARK: Not in a civil case. It certainly is

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my recollection that nobody pays it there.

THE CHAIRMAN: That is, if there is any paying to be done, the pauper pays it--

JUDGE CLARK (Interposing): That is it.

THE CHAIRMAN: --and he is relieved to the extent of having his steps simplified and his expense reduced. This rule is drawn on that supposition. You remember a forma pauperis case came up in the 5th Circuit, and Judge Sibley called attention to the fact that there wasn't anything in these rules (and that there ought to be) that enabled the district court to reduce the expense of getting up the record in the ordinary way.

The other provision in this new rule is to provide for a case where there was a hiatus in our original rule, where there isn't any stenographic report at all. We didn't provide for what would happen there. There is a stopgap provision here that in that case the appellant may prepare a statement of the evidence or proceedings from the best available means, including his recollection, to be used in lieu of a stenographic transcript and to be submitted to the appellee, the whole thereof to be submitted to the district court for settelement. That seems to be all right.

JUDGE DOBIE: In a number of these habeas corpus cases we have, General, the state court record is practically nil. They don't have the required stenographers in Virginia, and I know in one case Judge Pollard got the Commonwealth's

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attorney (as we call him) and the judge before him to testify as to how they conducted their trial, and they testified from memory.

THE CHAIRMAN: Do you think this rule would fit in well enough with that?

JUDGE DOBIE: Yes. I think the rule is all right.

JUDGE CLARK: I take it that the alternative one is the one you take.

THE CHAIRMAN: No, we didn't settle that. There are two alternatives about forma pauperis cases. One is a specific description of how you could go at it, and the second one is more broad. The first one is in lines 68 to 78, and the alternative with the broad power to the district court is in lines 79 to 83. In other words, the first proposal specifies that the appellant should prepare a statement, and so on, and do this and that, which is all right and may be always right. The other one provides merely that "the district court may by order specify some different and more economical manner by which the record on appeal may be prepared and settled". The question is between those two.

MR. DODGE: The second one gives the court a little more trouble, probably, but I believe it is the wiser.

THE CHAIRMAN: I do, too. He may temper the wool to the shorn lamb.

MR. TOLMAN: I move the adoption of the alternative.

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It seems to me to be exactly in accordance with the decision of the Supreme Court recently in a habeas corpus case where it was tempered. I am sorry that I don't remember the title of the case.

JUDGE CLARK: Wasn't that Miller v. United States, the case we cited in the previous notes?

MR. TOLMAN: I think probably it was. But this is in accordance with that case, isn't it?

JUDGE DOBIE: It may interest some of you to know that Judge Parker's bill, which will cut habeas corpus cases in two, has received the approval of the Conference of Senior Circuit Judges, and I think it stands an excellent chance of passing Congress. It is an infernal nuisance with us, and I imagine you have some of it.

JUDGE CLARK: It is. I know Judge Parker says it stands an excellent chance. I thought there was still some doubt.

JUDGE DOBIE: The worst place in the world is Maryland. There is no res judicata there. I wrote an opinion where one man had applied thirty-two times for habeas corpus.

THE CHAIRMAN: I understand it has been moved that we use the second proposal in lines 79 to 91. All in favor of that motion say "aye"; opposed. That is agreed to.

Now we come over to Rule 79. There are some technical alterations in the names of the books that we agreed to

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before, to correspond to what is actually being done. Is that it?

JUDGE CLARK: Yes, and also to give the Administrative Office a little more power that they suggested. (d) does that.

THE CHAIRMAN: Is there any objection to (b) as it stands? How about (d)? Is (d) new?

JUDGE CLARK: Yes; (d) is new. That was suggested by the Administrative Office. I wrote down and asked if there was anything they thought would be helpful to their work, and they replied that this would be, and then we adopted it.

THE CHAIRMAN: I don't think that we ought to word it this way. I don't think that we can confer power on the Administrative Office to order anything that the statute creating them doesn't order. I think we can say that "The clerk shall also keep such other records as may be required by the Administrative Office," and so on. That implies that they are doing it under Congressional authority. This would seem to be by rule to enlarge the statutory powers of the Administrative Office.

JUDGE DOBIE: I think the history of that is chiefly in bankruptcy cases. I know they have had a little trouble down in our Circuit. What is the technical name for that account that they have, Moore? Do you remember?

PROFESSOR MOORE: Indemnity account.

JUDGE DOBIE: That is it; indemnity account. There

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was some trouble. I think there was a one-armed Confederate veteran in one of those offices. They want to have more or less uniform methods. I think it is a good rule, but I agree with you, General, that we ought not to seem to confer any more power on them but, instead, where they have it, to authorize its use.

THE CHAIRMAN: That says what the clerk will have to do, and these rules don't relieve him of it; that is the point.

JUDGE DOBIE: Yes.

THE CHAIRMAN: Rule 80.

JUDGE DONWORTH: We agreed to change the wording of (d), did we?

THE CHAIRMAN: We agreed to make it read substantially this way: "The clerk shall also keep such other books or records as may from time to time be required by the Administrative Office of the United States Courts," which presumptively means properly and lawfully required by the Administrative Office.

Now, Rule 80. You remember that Judge Sibley ruled that our rule about appeals of cases which were stenographically reported didn't apply to the stenographic report of a shorthand reporter who had been just simply employed and brought in by one of the parties, there being no other official reporter present, although that reporter's work might be even more

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accurate, and usually is, than the official reporter's, the official reporter usually or quite often being the judge's secretary and maybe not always so skillful.

This amendment was made to make it clear that if there isn't an official reporter and if one of the parties does bring in a reporter and he makes a transcript, it may be used, in the discretion of the court, for all purposes under these rules. In other words, he can use it if he thinks the fellow is reasonably competent, and of course he always has the power with any reporter, under one of our rules, to correct any misstatements that he thinks there are in the reporter's transcript.

What did we do about fees here, the cost of the transcript? We say, "His fees shall be fixed by the court", and then we strike out the provision, "and may be taxed ultimately as costs, in the discretion of the court", and we have substituted for it, "and the fees of the stenographer may be taxed ultimately as costs, in the discretion of the court." That is just a transposition, is it?

MR. GAMBLE: It occurs to me that there is a little difference. "The cost of the transcript shall be paid in the first instance by the party ordering the transcript, and the fees of the stenographer may be taxed ultimately as costs, in the discretion of the court." That means fees fixed by the court. I don't think there is much difference, but it might

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possibly be that a private litigant would pay more than the court would allow.

JUDGE DONWORTH: Doesn't "in the discretion of the court" take care of it?

MR. GAMBLE: That is stricken out.

JUDGE CLARK: That is restored at the bottom.

MR. GAMBLE: Oh, I see.

THE CHAIRMAN: It is transposed.

MR. GAMBLE: I think it is all right.

THE CHAIRMAN: Then we go to (b). You remember that our rule in (b) about official stenographers being appointed by the district court was just a verbatim copy of a resolution passed at the Judicial Conference, and a case arose in Pennsylvania where the court appointed an official reporter and the Government (as has been done in fifteen or twenty important districts, and has been done for years) on competitive bidding had awarded a contract to a shorthand man to report government cases. The Government brought in the contract reporter and wanted to use him, and I think it was Judge Kirkpatrick who threw him out and said that only the official reporter could serve. In other words, he held that this rule is intended by necessary implication to forbid the Government to do that and to wipe out the contract system.

In fact, the truth is that we never thought about it or had any idea. That case is still pending over in the

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circuit court of appeals, undecided. When I got down to this rule in my discussion the other day, I popped on to it and then I thought I had better shy off of it. I asked if the case had been decided, and they said, "No." Then I said I would pass on and say nothing, but they wouldn't let me. The circuit court of appeals said they wanted some help. I said, "I haven't any help to give." I wrote a letter once about the thing, and I believe it was printed in the briefs. I don't know about that.

MR. HAMMOND: It was.

THE CHAIRMAN: There is a bill pending in Congress now to provide salaried reporters employed by the Government. If that is done, of course these rules will all have to be recast. I think the idea is that we had better let these amendments stand in our tentative draft and put a note in that such a bill is pending and that if it passes these rules will have to be altered very considerably, and just let it go at that. We can't say it will be passed. It has been defeated for fifty years or more. They say it has a good chance this time, however.

JUDGE DOBIE: Judge Parker is interested in that bill, too, General, and he thinks it has an excellent chance of passing.

THE CHAIRMAN: In these days when they are spending money like drunken sailors for everything, a few thousand dollars a year don't look as big as they did awhile ago. For

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the record, the bill referred to is S. 620, in the 78th Congress, First Session, "A Bill to authorize the appointment of court reporters in the district courts of the United States, to fix their duties, to provide for their compensation, and for other purposes."

DEAN MORGAN: The Government sometimes makes money out of this, I understand. In the Socony case, the lowest bid was $300 paid by the reporter for the privilege of reporting.

THE CHAIRMAN: For the privilege of soaking the parties. In my letter to the Administrative Office, I called attention to that, and I said that under this contract system they certainly ought to require the contract reporter to furnish the service to private litigants at the same rate as to the Government.

MR. GAMBLE: They don't do it, none of them.

THE CHAIRMAN: I know they don't.

JUDGE DONWORTH: May I ask again for the number of that bill? I didn't get it.

THE CHAIRMAN: Senate 620, the present Congress, 78th Congress, First Session. There was a hearing of the subcommittee on it, held June 30, 1943. I have a copy of the hearings. I will turn it over to anybody who wants it. You can get extra copies at the Administrative Office.

If that is left that way, then, we will let these amendments tentatively stand and see whether the bill passes or

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not.

Now we are up to 81.

JUDGE CLARK: You may remember that we were asked to prepare a note referring to the statutes on subpoenas by administrative agencies.

THE CHAIRMAN: This is subdivision (a), Rule 81?

JUDGE CLARK: That is it.

THE CHAIRMAN: As to the applicability of the rules?

JUDGE CLARK: That is it. If you want to refer again to that note that we supplied on the condition of the law, it was sent out on the date of June 24. There is a note of several pages, and at the end we suggested that you ought to consider other alternatives to this form. I rather think we would recommend the one that is printed here, but you want to look at our alternative.

THE CHAIRMAN: What page is the alternative on?

JUDGE CLARK: Page 8. You will have to get the one of June 24.

THE CHAIRMAN: This is the one you recommend, is it?

JUDGE CLARK: I think so, yes.

THE CHAIRMAN: I have the June 24 "Note to the Committee on Rule 81(a)(3), page 8 of that note.

JUDGE CLARK: The difference is really almost at the end. In the draft that we put in originally we say that "these rules apply to appeals therefrom, and to such other

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matters of procedure as are not provided for by statute to the extent provided by rules of the district court or by order in a particular case."

The first alternative says that "these rules apply in so far as they are not inconsistent with the nature of the proceedings and shall be followed as nearly as may be."

The alternative numbered two excludes them from everything except appeals.

I might say I should think on the whole it would be rather undesirable to have that final alternative. I think either one of the first two--

THE CHAIRMAN (Interposing): I have only two before me.

MR. HAMMOND: There is one in June 17 and there are two in June 24.

THE CHAIRMAN: I thought in the notes one was repeating the other. We have three, then?

JUDGE CLARK: Yes.

JUDGE DONWORTH: Which one do you favor, Mr. Reporter?

JUDGE CLARK: Either one of the first two, perhaps a little the original one, but either one of the first two. I don't recommend the last one, which exoludes the procedure. I think there isn't a great difference between one and two except in the matter of wording. I think the general intent and probable result are much the same and, shortly stated, either

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one of those applies the federal rules as much as possible to the proceedings of administrative subpoena.

THE CHAIRMAN: The exact wording of it puzzles me a little bit. It says: "In proceedings to compel the giving of testimony or production of documents in accordance with a subpoena issued by an officer or agency of the United States under any statute of the United States, these rules apply to appeals therefrom". That means appeal from the proceedings? I don't know whether you mean that or appeal from the judgment.

JUDGE CLARK: I think it should be.

THE CHAIRMAN: What I was coming to is this: "and to such other matters of procedure as are not provided for by statute to the extent provided by rules of the district court". That is a confused sentence. I don't get it. "to such other matters"...."as are not provided for by statute".

JUDGE CLARK: The statute which controls.

THE CHAIRMAN: What you mean is that these rules shall apply to other matters to the extent--

JUDGE CLARK (Interposing): That the originating, authorizing statutes don't specify.

THE CHAIRMAN: Just get your nose down to the language there. Do you mean they are not provided for by statute or are not provided for by rules of the district court?

DEAN MORGAN: May I suggest a rephrasing of it, Mr. Mitchell. I don't know whether I have the exact meaning.

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THE CHAIRMAN: How about Mr. Morgan's draft?

"These rules shall apply (1) to proceedings to compel the giving of testimony or production of documents in accordance with a subpoena issued by an officer or agency of the United States under any statute of the United States except as otherwise provided by statute or by rules of the district court or by order of the court in the proceedings".

That makes the point clear.

DEAN MORGAN: Is that what you meant?

JUDGE CLARK: I think that is it.

JUDGE DOBIE: I think that is clear, because it is a little unclear yet just what "to the extent provided" qualifies. You have several verbs up ahead there.

THE CHAIRMAN: Are you satisfied with the Morgan draft here?

JUDGE CLARK: That will be quite all right.

THE CHAIRMAN: Without objection, that may be substituted?

JUDGE CLARK: I suggest you might compare it with that first alternative and see which of the languages you like.

THE CHAIRMAN: That is the first alternative of June 24?

JUDGE CLARK: That is it.

THE CHAIRMAN: Page 8. That alternative says this: "In proceedings to compel the giving of testimony or production

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of documents in accordance with a subpoena issued by an officer or agency of the United States under any statute of the United States, these rules apply to appeals therefrom". Morgan's is a little better, because he says "to appeals in such proceedings."

JUDGE CLARK: I think that is true.

THE CHAIRMAN: That is a minor thing.

"and as to such other matters of procedure as are not provided for by statute, these rules apply in so far as they are not inconsistent with the nature of the proceedings and shall be followed as nearly as may be."

JUDGE DOBIE: Let's not bring in that old "as nearly as may be."

THE CHAIRMAN: In the Morgan draft you say the district court may abrogate this thing by rule or by order in a particular proceeding. That covers that very explicitly, I think.

Which do you want, the Morgan draft of the alternative?

JUDGE DOBIE: I move the Morgan draft.

JUDGE DONWORTH: Second.

THE CHAIRMAN: If there is no objection, that is agreed to. Have you a copy of the Morgan draft?

JUDGE CLARK: Yes.

DEAN MORGAN: It was mimeographed and sent out.

THE CHAIRMAN: Now, subdivision (6) of Rule 81.

JUDGE CLARK: That just brings that statute down to

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date.

THE CHAIRMAN: The statute has been amended as to the time of answer, has it?

JUDGE CLARK: No. In the last line, the section number of the statute has been changed.

THE CHAIRMAN: Oh, yes.

JUDGE CLARK: And up in line 21. I believe they have a bill pending.

THE CHAIRMAN: That may change the time?

JUDGE CLARK: That is it.

THE CHAIRMAN: So they want this broad enough to hit that bill, if it is passed.

JUDGE CLARK: That is it.

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

Now we come to subdivision (8) on page 2 of our preliminary draft of Rule 81.

JUDGE CLARK: That is the Tucker Act cases. We wanted to say as much as we could as to the applicability. That matter is still somewhat in doubt. In the Sherwood case, our court ruled that they did apply, and the Government, in its brief in that case, said they did apply, but the Supreme Court very carefully didn't say anything on that, but reversed us.

JUDGE DOBIE: There is no reason that they shouldn't apply under the Tucker Act, that you can see?

JUDGE DONWORTH: Except the jury trial.

THE CHAIRMAN: The Government admitted in their brief, as a general proposition on procedural matters, that these rules apply to Tucker Act cases, and they expressly repudiated the dictum or opinion of Judge Sibley in the 5th Circuit that said that none of these rules apply to any Tucker Act case.

DEAN MORGAN: Yes.

THE CHAIRMAN: So that is all right. What the Supreme Court did in that particular case was to say that the particular thing that they were quarreling about prescribed by the Tucker Act was not a matter of procedure but a matter of immunity from suit and a limitation on jurisdiction in connection with the waiver of immunity. What was the particular thing that was involved there?

JUDGE CLARK: The joinder of another defendant with the United States.

THE CHAIRMAN: That is it. They said that under the Tucker Act and the Court of Claims Act, which were identical in meaning, the Government consented to be sued as the sole defendant and did not consent to have any interpleader of any third party, with any side controversies dragged in. They said that, although these rules provided for third-party defendants, and so on, in that particular situation where the Government had waived its immunity to suit under conditions

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which specified that the Government alone should be sued and that one controversy decided, there was a limitation on the jurisdiction of the court which the Government authorized to entertain suits against it, that it was not a matter of procedure. So they haven't held that these rules in procedural matters don't apply to Tucker Act cases.

JUDGE CLARK: That is right.

THE CHAIRMAN: I think the Court will strike that out, because they will think we are trying to edge in on that decision in that particular case. I think it is so perfectly obvious from these rules, taken from end to end, that they apply to all actions by or against the Government where the matter is procedural, that I don't think we ought to be raising an issue by saying it over.

JUDGE CLARK: Might I suggest this? In the first place, I suggest that you take a look at the note which we have prepared, which follows this. It seems to me that is a fair statement and one which no one, including the Supreme Court, would object to.

THE CHAIRMAN: The note to subdivision (5)?

JUDGE CLARK: That is it. Further, it has always seemed to us on the committee, I think, that there wasn't any question but that the rules did apply to Tucker Act cases, but nevertheless it has been explicitly held that they do not. That is, some judges have seen to the contrary.

THE CHAIRMAN: Aside from Sibley's statement in that case in the 5th Circuit in that Lynn case--

JUDGE CLARK (Interposing): Yes, that is the Lynn case.

THE CHAIRMAN: --is there any other federal case?

JUDGE CLARK: That one cited there.

THE CHAIRMAN: Mount Tivy Winery?

JUDGE CLARK: Yes.

THE CHAIRMAN: Was that a dictum like Sibley's, or was it a holding?

JUDGE CLARK: What was that, Mr. Moore? I have forgotten for the moment. That is in the original notes. I will get that in just a minute.

THE CHAIRMAN: The Supreme Court of the United States has never suggested that these rules don't apply to procedural matters in suits against the United States. They have simply said in that one case that that particular thing wasn't a matter of procedure, because it was a waiver of immunity coupled with a limitation on jurisdiction, as to the power of the court in a case against the United States to couple up with the claim against the United States side issues and a third party. I disagree with them as to whether that is procedural or a limitation, but I concede that there is an argument there. That is really as far as they have gone.

JUDGE CLARK: It doesn't seem to me that anything we

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say here is inconsistent with the Sherwood case, and it seems to me it does have the advantage of avoiding these questions in the district courts. You see, the Government's concession in its brief in the Sherwood case is not a matter that gets to the ordinary judge's notice. It is in a brief, and it isn't stated in the Supreme Court's opinion. It seems to me that this is rather the clarifying of a point that has come up.

In the Mount Tivy Winery case, the other case cited here, Judge St. Sure said "that the federal rules are inapplicable to actions under the Tucker Act." The question involved "was whether the filing of an action under the Tucker Act, within the period of limitation, without immediate service of process, would operate as the commencement of the action within Federal Rule 3 and save the cause from the statutory bar where service was made after the statute had run." He held "that the running of the statute could be stopped only by service of summons as provided in the Tucker Act" .... "and that the cause was barred." I don't know that he needed to do that.

THE CHAIRMAN: Has any other court passed on that particular question about the statute of limitations starting?

PROFESSOR MOORE: They have held both ways as to whether the action is within the statutory period, if the complaint is filed within, and some say it isn't for the purposes of the Tucker Act unless summons are served.

THE CHAIRMAN: You are not going to settle that by

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reiterating that the rules apply, because when it gets right up to the Supreme Court of the United States, they are going to get their noses down on it and say, "Well, is that a mere matter of procedure or is it a condition that is imposed on the litigant as a condition to the Government's waiving immunity?"

Frankly, what troubles me about this thing is that the case in which they made that rule was a matter of limitation on jurisdiction and not a mere matter of procedure, and therefore couldn't be set aside by federal rules. It came up from the 2nd Circuit, and the opinion was written by our Reporter. I am afraid, frankly, that if we shove this thing up to them again this way, they will sort of feel, because of all the circumstances, that we are trying to edge in on them and sort of slap them down, by their own rules slap down their own decision.

JUDGE DONWORTH: Wouldn't we meet your point and at the same time cover the idea that the Reporter has by this? I am reading now from (8). I don't know about these different drafts, but as I have it here, (8) would read: "These rules apply in all civil actions by or against the United States, except as otherwise provided herein."

Do you have that draft before you?

THE CHAIRMAN: Yes.

JUDGE DONWORTH: I was going to suggest inserting after the word "apply" the words "to the procedure". "These

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rules apply to the procedure in all civil actions by or against the United States, except as otherwise provided herein." That is as far as we can go, to regulate procedure, and why not just say that?

THE CHAIRMAN: The overwhelming weight of authority in the federal courts has already announced that rule. There are only two cases which question it, and one is a dictum by Judge Sibley, which has been repudiated by the Government in a brief, and the other is this district court case in California.

JUDGE DOBIE: I want to adopt the prevailing weight of authority, definitely. These rules apply to the procedure in all civil actions.

JUDGE CLARK: May I just suggest this? I don't want to go back to what we have done too much, but still I think we might refer to it where it is helpful, and this is part of the discussion.

"Mr. Lemann: The only thought that occurred to me was whether the average lawyer who had a suit under the Tucker Act would know that. The Supreme Court, as I understand it, had not passed on it, but the briefs for the Government, which are not available to the average lawyer, contained a repudiation under the decision. Take a man in the 5th Circuit who has a case against the Government under the Tucker Act. He turns to that decision, and he will naturally assume that in the 5th Circuit at least his

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proceeding wasn't governed by these rules."

Then Judge Dobie moved the adoption, and it was agreed to. Then:

"The Chairman: We have adopted it. And be sure to put in your note as to the rule that the purpose of that was to make it clear that the Tucker Act cases procedure is governed by this rule.

"Mr. Lemann: And say the Government repudiated its contrary expression in the Sherwood case."

It shouldn't have been the Sherwood case. I guess it should have been the Lynn case.

JUDGE DOBIE: We have a great many of these down our way on small claims. The farther you get from Washington, I suppose the jurisdiction increases.

JUDGE DONWORTH: My present suggestion is just what the Chair suggested in the record.

THE CHAIRMAN: All right; I am guilty. Let me ask you this: Which is the case of the Supreme Court which came up from the 2nd Circuit?

JUDGE CLARK: The Sherwood case.

THE CHAIRMAN: Is that mentioned?

JUDGE CLARK: It is mentioned here. You might look at the note again and see if you think it is adequate.

JUDGE DONWORTH: I should like to ask the Reporter if he wouldn't change the past tense to the present about two-

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thirds the way down in his note to subdivision (a)(8), "conceded that the rules apply".

JUDGE CLARK: Oh, yes.

THE CHAIRMAN: I would also suggest to the Reporter that the note to subdivision (a)(8) ought to be enlarged by calling the attention of the bar to exactly what the Sherwood case held, so as to warn the bar that some of these so-called procedural things might be considered as limitations on jurisdiction. You ought to say specifically that such-and-such was the problem and that the Court held that, where the Government was waiving its immunity to suit, to place such a condition around the waiver was not a mere procedural matter but a matter of jurisdiction or right or whatnot. Then you would have the bar on the right track.

JUDGE CLARK: We could put that right in the note. You see, we say, "Paragraph (8) does not, of course, operate to extend jurisdiction or venue. See Rule 82; see also United States v. Sherwood". We could put at the end: "holding that the Government's immunity to suit does not...."

THE CHAIRMAN: I think you ought to go into it very clearly as to just what it said and what it held. I am not trying to suggest the details of it, but I think you ought to make it very clear.

DEAN MORGAN: I think so, too, Charles, because it is a very nice point the way they worked it out.

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JUDGE CLARK: I think we could add it without taking too much space.

THE CHAIRMAN: Coupled with a caveat to the bar, so they will realize that under that decision some matters which appear to be procedural may not be, because that is the effect.

MR. HAMMOND: Mr. Chairman, may I say something? You have already voted to adopt this thing?

THE CHAIRMAN: I don't know that they have, except that my opposition faded away because they crammed my own words down my throat here. I am still opposed to it.

MR. HAMMOND: I have another reason, too, along the same line. It seems to me it would be a little absurd for the Supreme Court, after having adopted rules in which they mention the United States--

THE CHAIRMAN (Interposing): Fifty times.

MR. HAMMOND: --to come along later and say that they didn't know what they were doing, that they didn't make it clear, and that now they have got to make it clear. I don't think this committee ought to recommend that the Supreme Court do anything so absurd as that.

JUDGE DONWORTH: As what, Mr. Hammond?

MR. HAMMOND: As to say that these rules apply to the United States, when already they have stated it in the rules time and time again. They have mentioned the United States.

THE CHAIRMAN: As a defendant and as a plaintiff. In

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fact, that is my feeling about it. I wrote a long letter at the time this question came up in the Sibley decision. I went down through these rules, rule by rule, and I picked out about fifty different instances where the rules dealt with the Government as plaintiff or as defendant, over and over again, and it is perfectly clear that they do apply to government actions, all government actions, by or against the Government, unless there is some express limitation. That is a procedural matter.

What is procedure and what is a limitation on jurisdiction granted by the Government waiving immunity is another thing, but I agree with Mr. Hammond precisely and I think, in view of what all these rules say, that the only purpose of sticking in a clause like that would be to slap at the dictum by Judge Sibley, which is utterly unfounded.

MR. HAMMOND: The Solicitor General is never going to contend that the rules don't apply. He has stated in a brief--

JUDGE CLARK (Interposing): He did so contend in our court. Of course, I am quite sure that I know what went on. There was a good deal of discussion in the Department of Justice as to making just that claim and reiterating it in the Supreme Court. The decision immediately involved was the Sherwood case. The Claims Division wanted that. I know the Tax Division wanted the rules to apply. There was quite a division, and the Solicitor General and the Supreme Court

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settled it as he did. But in our court there isn't any question but that the Lands Division made a complete claim that the rules did not apply at all. Of course, I think it is probably settled now as far as the Department of Justice is concerned, but there was certainly that division of view there.

On the argument as to absurdity, really I don't quite see that, because if that is a sound argument perhaps nine-tenths of our suggested amendments here should go out. Our amendments are clarifying amendments almost entirely, and we put them in to tell the bench and bar, if we can, what the rules mean. We are trying to meet the difficulties. This is one. I don't think we can make a particular choice. I do think, myself, that the rules originally were clear on this point, but I felt they were clear on many other points where question has been raised.

PROFESSOR CHERRY: Mr. Chairman, is this an appropriate place to have a note about this rule, just as a general note to 81, on applicability? I think the material in the note very properly may be brought to the attention of the profession in connection with our work.

THE CHAIRMAN: I think there ought to be a note on this subject of the Tucker Act cases--

PROFESSOR CHERRY (Interposing): Yes.

THE CHAIRMAN: --but instead of amending the rule, I think the note ought to say that it is perfectly obvious, if

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you read the rules through from end to end, that they make it perfectly clear they apply to suits by or against the Government. Then cite these cases, and then caution the bar by referring to this Sherwood case and saying, "You must look out because under some circumstances" (then cite the facts of that case), "the Supreme Court might hold that a thing that may seem to you procedural is really a limitation on jurisdiction connected with the waiver of immunity." Then you have it.

But I am not willing to vote in favor of any reiteration that these rules are intended to apply to government suits. I think Judge Sibley's dictum was absolutely ridiculous.

MR. GAMBLE: Mr. Chairman, I wasn't present when this was acted on, so individually I haven't said any words that can be thrown down my throat. I move that paragraph (8) be deleted and that the matter be included in the note.

JUDGE DONWORTH: You wouldn't exclude the note.

MR. GAMBLE: That the matter in the note be included.

THE CHAIRMAN: Well, I really ought not to get worked up about it. I am not trying to cram this thing down anybody's throat. Go ahead and put it in if you like. I should like to vote against it, and I should like to have my dissent recorded in the notes for that reason.

PROFESSOR CHERRY: We have a motion, and I will second it.

JUDGE DONWORTH: Your objection, Mr. Chairman, is that

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what is in this proposed (8) is obvious, anyway.

THE CHAIRMAN: That is it. It isn't a real ambiguity in the rules, as we have dealt with in other cases where there is some chance for mistake. I say anybody who runs can read on this proposition. And there is back of my idea, also, as I said a minute ago, the fear I have that the Court may think we are trying to edge in on that Sherwood case again, which is contrary to the committee's views as to what that law is.

JUDGE DONWORTH: I thought my suggestion obviated the last point, that we were edging in, because we say "apply to the procedure", and so forth.

THE CHAIRMAN: That is a self-obvious thing, because the Supreme Court isn't going to have to make a rule that says that these apply to procedural matters when the statute under which they were organized limits them to that. They don't have to say we are not dealing with substances. They won't do that. I should think they wouldn't.

JUDGE DONWORTH: They did say that in the Sherwood case, that in so far as the 2nd Circuit tried to include this as to the party, it was dealing with a matter beyond procedure.

PROFESSOR CHERRY: Judge Donworth, how about the implication, then, as to parties other than the United States? The rules apply to substantive rights. I don't like that.

JUDGE DONWORTH: All right.

THE CHAIRMAN: Really, Charlie, I would be content if

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you drew a careful note, stated the whole thing, stated that whenever there is a doubt under the rules, refer to section so-and-so, that they apply to government cases by and against, then said that the only suggestion to the contrary are these two decisions, that one of them is a dictum, and then went on to talk about the Sherwood case and said that the Government's brief didn't apply at all to Tucker Act cases, that all they asserted was that the particular thing there was a limitation on jurisdiction in connection with the waiver of immunity, and that is all the Court held.

JUDGE CLARK: Of course, I don't want to be in the position of appearing to insist on this. This is one of the ambiguities that had come up. If you think that is adequate, all right. You all, of course, recall that the notes are not official and, as I take it, they are really put out as the obligation of the Reporter, and even the committee doesn't take official responsibility for them. The introductory statement says they were prepared by the Reporter and his staff to aid the Supreme Court.

THE CHAIRMAN: We don't repudiate them.

JUDGE CLARK: No; that is true. "They have no official sanction, and can have no controlling weight", and so on. The notes are now published in order to preserve the material which has been so industriously gathered, and so forth.

THE CHAIRMAN: But the notes under each rule of our

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tentative draft to the bench and bar, and they will be on their face notes submitted by the committee, for which the whole committee are responsible, or are supposed to be.

Well, I think it has been moved and seconded that we put this material about suits against the United States under the Tucker Act under the note rather than adopt subdivision (8). All in favor of that say "aye." (Carried.)

Rule 84, Forms.

JUDGE CLARK: I suppose (c) is something we voted.

THE CHAIRMAN: What is that?

JUDGE CLARK: That was voted before.

THE CHAIRMAN: You remember, that was a special limitation about the time for answering in the removed cases. That arose in some states where under the state laws there was another term of court before you had to answer.

MR. GAMBLE: I think that is a very good amendment.

JUDGE DOBIE: I am very strong for that.

THE CHAIRMAN: What state was that?

JUDGE CLARK: Georgia was the particular one. There may be other states, but the question arose in Georgia. One of the judges wrote in from there.

THE CHAIRMAN: I think it was a lawyer.

JUDGE CLARK: Georgia was the example. Judge Bascom S. Deaver, of the Middle District of Georgia, wrote in about it.

JUDGE DOBIE: The same thing is true about Virginia.

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We have an excellent type of procedure down there that would work very well in 15 and 38, and that would clean up beautifully that infernal rule there, Charlie.

THE CHAIRMAN: Your note makes that clear. With no objection, (c) will stand as written here.

We will go on to 84.

MR. GAMBLE: Mr. Chairman, I have no doubt that the changes in 84 were considered and voted at the other meeting. Personally, I dislike to see us undertake to prescribe forms. It seems to me that our office is better performed by prescribing the rules and leaving the matter of forms out, except as we did before to make them a mere indication of the simplicity and brevity of statement which the rules contemplate. That is changed by this amendment to prescribe by rule that the forms are sufficient. They are not absolutely complete. We do not propose to submit forms that cover everything that may arise under the rules and to my mind it seems out of place.

I merely wish to make that statement. I don't want to press it any further.

THE CHAIRMAN: I don't know how we split on the thing before. We certainly did split before, because this point was made before and sticks in my crop. Under the original form of Rule 84, question was raised as to whether, if you adopted the form, that was a complete defense to a motion to make more definite and certain, or something of that kind, and in order

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to avoid that situation we said that they are intended to indicate, "subject to the provisions of these rules". That "subject to the provisions of these rules" was put in our original rule to make it clear that all these steps you might take to strike from the complaint or to make it more definite, or whatnot, could be made against the form, where the form attached to the rule was follows.

Now we step in and say they are "sufficient under the rules" and strike out the provision that they are in any way subject to the provisions of these rules.

It seems to me to be a good deal worse to do that now than it would have been if we had done it in the first place, because I don't see how a court can fail to say, "Well, you see what they have done. Previously these forms were subject to all these rules about more definite statements and bills of particulars or whatnot. Now they wipe that all out and say they are good and they are not subject to the provisions of the rules. So I deny your motion for a more definite statement," or for this or that. How do we answer that argument?

DEAN MORGAN: I don't answer it. I say it ought to be true, that if these forms are subject to a motion to make more definite and certain, they are wrong. That is all.

THE CHAIRMAN: In every case?

DEAN MORGAN: In every case, every case you have. They are subject to the provisions of the rules for discovery,

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because there is no question about that in my mind; but so far as more definite and certain and dismissal for insufficient facts, and so forth, it seems to me that if they aren't sufficient, they ought not to be here. I think it is just foolish to put them in otherwise.

JUDGE DOBIE: I remember we debated that at great length last time.

DEAN MORGAN: Last time; surely.

THE CHAIRMAN: The trouble is really what we are thinking about is whether they are sufficient under all circumstances or whether they aren't.

DEAN MORGAN: As pleadings, they are; and as process, they are. Of course they are subject to all the other provisions, the provisions for getting evidence, discovery, and so forth. But our whole purpose in simplifying pleadings this way was to make the pleadings as nearly like notice pleading as we could make it, practically. Our provisions for discovery are what take the surprise out of trial, and so forth.

THE CHAIRMAN: Have the courts held that any form that you prescribe here is sufficient?

DEAN MORGAN: Yes. That is what caused us to do it.

JUDGE CLARK: There weren't very many, but there were some. There are some references here.

THE CHAIRMAN: How did it come up?

JUDGE CLARK: Different particular forms. That

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Washburn one was one on the so-called implied contract provision that you have to get out each one and refer to it. I might say that, as I recall, particularly on the negligence form, it was rather widely approved.

THE CHAIRMAN: There are four cases cited here in which they have held that under the present rule the forms are not good?

JUDGE CLARK: Yes; different particular ones.

THE CHAIRMAN: In particular cases. Can you tell us just how it arose and what was the respect in which they said it was insufficient? What kind of attack was being made on the complaint or pleading?

MR. GAMBLE: Where is that list of cases?

THE CHAIRMAN: They are on Rule 84, Preliminary Draft of Amendments, dated June 19, 1943.

JUDGE DOBIE: I must confess I think Mr. Morgan's position is entirely logical. If we put these things out as model forms, then to have a man come right into court and attack the model and say it doesn't give enough and that he has to give further particulars seems to me to be perfectly sound. If they are not proof against attack on that motion, I don't think they are right.

JUDGE CLARK: I can't give those cases right off, but I will ask Mr. Oglebay to do it.

JUDGE DONWORTH: The bill of particulars has been

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abolished anyway.

JUDGE DOBIE: Of course, as Mr. Morgan says, in connection with discovery, that doesn't attack the pleading at all or require a change of the pleading.

JUDGE CLARK: While Mr. Oglebay is looking up some examples, I wonder if I might speak of this just a little. While I agree with Mr. Morgan's logic and fundamentally with his position, I am inclined to think he puts it a little more dramatically than he quite needs to for the sake of argument. I am perfectly willing to confess that I think "subject to the provisions of these rules" should not have been in originally, and I tried not to have it in, but, after all, this was somewhat a matter of development and of education. I think the forms have fulfilled their purpose in the main and have been an excellent and very important part of the rules. They have showed what we had in mind, and they have showed it pretty generally. I think that the general acceptance of them has been a fine thing, and it is possible, of course, to say that we don't very much need to change. I think in the long run that is true. But this is another one of those clarifying steps. While most of the courts have taken to these forms and the rules and back them up very well, there are a few that still drag their feet, and in a small way it is a trap if a judge does that. It is a trap for the lawyer who uses the forms if the judge still thinks he can throw them over.

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I might say that we have given more chance to modify forms than is usual in a statement of forms. The bankruptcy rules contain forms, and the statement there is very direct, as I recall--what is it? That they are sufficient?

MR. COLEBAY: Yes.

JUDGE CLARK: The new criminal rules contain forms, and their statement is stronger than what we have. The usual way of putting this is the stronger one, and it seems to me that the forms apply only where you have the case to which they apply. Of course, there is something in the thought, as Mr. Morgan said, that in the case where they apply, they ought to be held sufficient because we have said they are sufficient. I mean by putting them out we have said that. That is a little bit of a trap. I don't feel that it was fair to take the development we have taken.

While I shouldn't have done it originally, yet this was a matter of education; now almost all the courts and the lawyers in general have been educated and now is the time to make it quite clear.

MR. GAMBLE: May I make this observation? I am looking at the form for the third-party complaint, paragraph 2: "Here state the grounds upon which C. D. is entitled to recover from E. F., all or part of what A. B. may recover from C. D." or an alternative basis.

JUDGE DONWORTH: What form is that? Number what?

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DEAN MORGAN: A new amended form.

MR. GAMBLE: Form 22. Can it be possible that a motion for more definite statement should not be directed to the complaint, if it was put on this form, because of an insufficiency of statement in paragraph 2?

DEAN MORGAN: Of course--

MR. GAMBLE (Interposing): Then I don't understand.

DEAN MORGAN: Of course, the form there doesn't purport to do in that case anything more than give you an outline, and the way you fill in the outline might be subject to a statement that it didn't state a ground for relief, and so forth. But where we purport to state the ground for relief in a particular form, it seems to me absurd to say that it is not sufficient. Of course, I shouldn't be greatly disturbed if you didn't make the amendment; understand that. But I do think that when we put them out even in this form, we really indicate that they are sufficient. Otherwise, it seems to me we are providing traps for pleaders, saying, "Here are some forms that may get by the court. If you follow this, you may get by, but you had better be watching your step."

PROFESSOR CHERRY: Mr. Chairman, may I ask the Reporter if there aren't really two things involved in this proposed change? One is the addition of the underlined new matter, and the other is the omission of the bracketed matter. It seems to me that we ought to stand by these forms by saying

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and having the court say that they are sufficient under the rules.

DEAN MORGAN: That is what I think.

PROFESSOR CHERRY: As has been said quite rightly by Mr. Morgan, they ought not to be a trap. The Supreme Court says this is a sufficient pleading of the situation, and no lawyer ought to be in the position of having his statement for affirmative relief, say, dismissed as insufficient. I think that that was always implicit there anyway, even though we didn't say it.

But I am inclined to doubt whether we ought to eliminate the matter about "subject to the provisions of these rules". I think that stands on an altogether different footing. I think in the individual case the circumstances are not contemplated in a general form. Having in mind that the form is a sufficient pleading, having in mind that with discovery in view we have now eliminated the bill of particulars, have eliminated the talk about preparation for trial, and have limited the moving party to a showing in his particular case as against a sufficient pleading that he in that case, in order to be able to respond to it, for that purpose only, needs something more, bearing in mind the restriction that we have already put on the whole business, I think that with those restrictions it ought to be open to the moving party to move as against what we say is a sufficient pleading because, if he

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can't, then all that a man has to do to defeat any such motion, which we still permit by the rule, is to use the form, and if he doesn't use the form he is open to the motion. I can't see the sense in that.

THE CHAIRMAN: I have examined these cases, and you might be interested in knowing just what they hold. It is enlightening to me. All but one was a case where a man wasn't demurring to the complaint or moving to dismiss for failure to state a good claim, but was a case of a motion for a bill of particulars or more definite statement, and in each case the court held that, on the particular facts and circumstances, under our bill of particulars rule, he was entitled to a more definite statement, and merely concluded that even though the complaint was good against a demurrer, still the definite statement rule could be invoked.

There is one of these cases, in the 5th Circuit, which held the complaint insufficient against a motion to dismiss for failure to state a claim. I don't find anything in this report of decisions that says that the complaint was one of the forms attached. It simply says that the complaint was bad. There is nothing here that says that it was a form complaint, as I superficially read it. So I don't think the decision holds that a form complaint is bad against a motion to dismiss for failure to state a claim, and really, when you come down to analyze the thing, it seems to me that we have

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always understood that one of these forms was good against a demurrer or the equivalent of a demurrer, and what we were guarding against by saying "subject to the provisions of these rules" when we did this before, as I recollect it, is that, although good against a demurrer, you might apply for additional information. Now the bill of particulars has been wiped out, and that limits that field of controversy very considerably.

DEAN MORGAN: And the new phrasing, as Cherry points out, of the motion to make more definite and certain will limit that.

THE CHAIRMAN: If I am right in the fact that there isn't a one of these cases cited in this note which held that a complaint drawn according to our form was bad against a demurrer, not one of them, but it was simply the question of whether they could be supplemented by additional information, there isn't much left to this thing. That is all we had in mind before.

JUDGE DONWORTH: When we had our lengthy debate at the prior session, I preferred retaining the rule as it was. I was among those who voted in the minority, and with the restricted number of the committee here, I don't feel like moving for rehearing. The only point that I made was that the proposed change in the form of the rule would seem to freeze situations which we do not foresee. Dean Morgan prepared a

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fine set of forms, and we said in our former rule that the forms contained in the appendix are intended to indicate, subject to the provisions of these rules, the simplicity and brevity of statement which the rules contemplate. I hardly endorse that. I thought it was going too far to say that in the complexity of modern life, all the things that you can go to court about are sufficiently alleged "as nearly as may be," with due deference, and that you must adhere to these forms. I think the forms are splendid things, but to undertake to anticipate what people are going to sue each other about and to try to freeze the thing into this particular set of forms I thought was going too far. But I don't ask for any rehearing. I regard the matter as settled.

THE CHAIRMAN: I should correct the statement I made in saying that none of these cases held a complaint bad against a demurrer where the forms werefollowed. They come pretty close to it, though. In this district court case in California in 1938, all the court said was that he held the complaint bad against a motion to dismiss because it didn't state a claim, but with respect to the form the only information is that the defendant calls attention to the forms given and claims, in effect, to have copied one of them. That is as near as he got to the form. Whether he did or not I don't know.

DEAN MORGAN: It is my recollection that one of the courts held flatly that the form was, but I am not prepared to

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say that I analyzed it very carefully on that basis.

THE CHAIRMAN: What is your pleasure, gentlemen? Shall we let it stand as it is now?

JUDGE CLARK: I might recall to your mind that our original recommendation was to use the language of the bankruptcy order, which says that they shall be observed and used, with such alterations as may be necessary to suit the circumstances of any particular case.

JUDGE DONWORTH: That was my thought.

JUDGE CLARK: Our original suggestion, which appears in the material we gave you for the May meeting, page 230, was to leave out the words "subject to the provisions of these rules" as being rather ambiguous. It is rather hard to tell what it means, and the full rule as we recommended would read this way: "The forms contained in the Appendix of Forms are intended to indicate the simplicity and brevity of statement which the rules indicate. They shall be observed and used with such alterations as may be necessary to suit the circumstances of any particular case."

THE CHAIRMAN: That doesn't help you against these cases.

DEAN MORGAN: I am afraid of that.

THE CHAIRMAN: The judge will say, "Well, under the facts of this particular case, they are not good."

DEAN MORGAN: I am afraid of it on this account: The

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bankruptcy forms purport to be complete. They cover the whole business. These don't purport to be complete. The answer to Judge Donworth's objection is simply that the situations that we picked out are recurring situations where simplicity and brevity are particularly helpful and necessary.

PROFESSOR MOORE: Dean Morgan, the bankruptcy forms do not cover every situation.

DEAN MORGAN: Don't they? I thought they did.

PROFESSOR MOORE: They give much more coverage than our forms do; that is true.

DEAN MORGAN: I supposed they did, because it seems to me that that statement is altogether too broad.

THE CHAIRMAN: Eddie, if it were conceded that these forms are sufficient as against a demurrer--and I have always supposed they were--what do you say to the idea that the use of them doesn't prevent the opposing party in a proper case, under the particular circumstances, from moving for a more definite statement? Do you think they ought to be good against that kind of motion?

DEAN MORGAN: Absolutely, because if they aren't good against that, that means that they are not good enough for him to prepare an answer to them.

THE CHAIRMAN: They might not be particular enough for preparation for trial.

DEAN MORGAN: They might not be particular enough

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for preparation for trial, but that is where our discovery comes in. Before, of course, we did have the provision in the bill of particulars rule that you could require the bill of particulars even though it was sufficient for an answer but not sufficient for preparation for trial, and then the courts, on the whole, read that right out of the rule.

THE CHAIRMAN: Then in our motion for a more definite statement we ought to put in a clause that this motion may not be resorted to if the pleading conforms to the attached forms, just laying a trap for the lawyer there.

DEAN MORGAN: If we haven't said that when we say that the pleading is so vague and ambiguous that he can't frame an answer to it, if these forms don't meet that, then I think they ought to be erased, and I have no brief for the forms. If you pick out any of the forms and say they are so bad as that in any situation you can think of, I say, "For God's sake, put them out."

PROFESSOR CHERRY: Oh, no. You are going too far, Eddie. I should like to follow what I said awhile ago with a motion, if it is in order.

THE CHAIRMAN: What is your motion?

PROFESSOR CHERRY: It is that the underlined matter, the new matter, be adopted but that the bracketed matter be retained.

JUDGE DOBIE: Do you object to that, Eddie?

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THE CHAIRMAN: He must object to it, because in one breath you say it is sufficient and in the next breath you say they are not sufficient against a motion to make more definite and certain.

PROFESSOR CHERRY: My point is that that is not a necessary inconsistency at all. Take one of Eddie's statements. Say that you have a personal injury case, and he says that the thing happened at the corner of X Street and Y Avenue, or something like that, and in the particular case there are two X streets in a large city. The man wants to know at which one that is said to have occurred. Why not? That is nothing against the form at all.

JUDGE DOBIE: Two X Streets flowing into Y Avenue? (Laughter)

PROFESSOR CHERRY: He said anything I could assume, so I am going to assume. You have lots of possibilities that wouldn't derogate from the validity of these forms at all. Taking all the possibilities of the situation, the judge concedes, "Yes, he ought to have more information than that before he answers."

THE CHAIRMAN: Well, the motion is to adopt Rule 84 as it is now written, except that we restore the clause bracketed, which reads, "subject to the provisions of these rules," so that it would read this way: "The forms contained in the Appendix of Forms are sufficient under the rules and are

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intended to indicate, subject to the provisions of these rules, the simplicity and brevity of statement which the rules contemplate."

DEAN MORGAN: Let me answer Mr. Cherry on the form. There is no X Street or Y Street. It is Boylston Street in Boston, Massachusetts. I don't think you are going to find two Boylston Streets.

PROFESSOR CHERRY: We haven't got a Boylston Street in some other places, but we have a numerical situation in Minneapolis where that darned thing could happen.

DEAN MORGAN: Sure.

THE CHAIRMAN: Suppose it was S Street in the complaint, and it was a good complaint, but the fellow wanted to know whether it was Northwest or Southwest, and so forth.

PROFESSOR CHERRY: That is what we have in Minneapolis and here in Washington, and so on.

THE CHAIRMAN: Coming back to Mr. Cherry's motion--

MR. GAMBLE (Interposing): Let me call attention again to this Form 22. Take paragraph 2. The form doesn't prescribe what shall be stated. Suppose someone follows the form, and in paragraph 2 the statement is so vague that you can't frame an answer. Wouldn't a motion for more definite statement be applicable?

THE CHAIRMAN: Form 22?

MR. GAMBLE: Yes, sir.

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JUDGE DOBIE: If he doesn't state the ground, he doesn't follow the form. Mr. Morgan's statement indicates that the grounds are so varied that he can't follow the form. If he makes an adequate statement of the grounds, it is good; if he doesn't make an adequate statement of the grounds, then he doesn't carry out the directions of the form.

THE CHAIRMAN: Isn't that sound? What is the paragraph of the form that you are referring to?

MR. GAMBLE: Paragraph 2.

DEAN MORGAN: He is talking about this bringing in a third party, Form 22. Isn't that it, Mr. Gamble?

MR. GAMBLE: Yes.

DEAN MORGAN: It says, "Here state the grounds upon which C. D. is entitled to recover from E. F., all or part of what A. B. may recover from C. D."

THE CHAIRMAN: If you do state the grounds, you are complying with the form and it is good. If you don't state them, you are not complying with the form. That is Judge Dobie's point, isn't it?

JUDGE DOBIE: That is it, exactly.

THE CHAIRMAN: I wouldn't consider that this amendment that we have here would raise any difficulty in that case.

JUDGE DOBIE: The difficulty is where he has a hard and fast, stereotyped statement there, as in the automobile case.

THE CHAIRMAN: All those in favor of Mr. Cherry's

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motion will say "aye"--

MR. TOLMAN (Interposing): What is the motion?

THE CHAIRMAN: The motion is to adopt Rule 84 as written, except that we will restore the words "subject to the provisions of these rules," and we retain the new matter which says they are sufficient under the rules. All in favor say "aye"; opposed.

JUDGE DOBIE: No.

THE CHAIRMAN: The vote was two to one. I will raise my hand and say "No" for the purpose of making a tie.

MR. TOLMAN: No. I didn't vote.

THE CHAIRMAN: I think you ought to vote on it.

JUDGE CLARK: It is a little hard. I would like to vote on the original one. If the original one didn't pass, I would take Cherry's. How can I vote? I don't quite see how.

JUDGE DOBIE: I vote "No" on this, and then if that fails I am going to make a motion that we adopt it omitting what is in brackets.

THE CHAIRMAN: Will you consent to have the other question presented first?

PROFESSOR CHERRY: Yes.

THE CHAIRMAN: What is the other motion?

JUDGE DOBIE: I move that we adopt the rule as it is drawn there, which means that you omit "subject to the provisions of these rules" and include "sufficient under the rules

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and are".

THE CHAIRMAN: All in favor of that motion raise their hands.

... Four hands were raised ...

THE CHAIRMAN: Opposed? Carried. We don't have to submit your motion, Mr. Cherry. Are we through?

JUDGE CLARK: I don't know whether you want to look at the forms any or not. There are two small matters on the forms that we changed. One was to bring the third-party practice up to date with the difference we are making there. We had to make that change if we were going to change the third-party practice rule. The other was to add something to the form on infringement and unfair competition. One of the judges in New York had held that form insufficient as not stating the grounds of unfair competition.

DEAN MORGAN: He stated the grounds for it, but he hadn't asked for the right relief. Wasn't that it, Charlie?

JUDGE CLARK: One or the other. I have forgotten. Therefore, we asked Mr. Morgan to amplify it. We didn't put in a reference to that decision because, really, we didn't want to approve of it specifically, as it might have gone too far, but we more or less left a blank, so to speak. That is Form 17, and the new matter is in paragraph 10 particularly and also in the prayers for relief. Those are the only things.

THE CHAIRMAN: Has anybody any opposition to any of

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these forms?

MR. HAMMOND: I have a suggestion. I think there is a typographical error in Form 25. In the note to it, "Rule 26" ought to be "Rule 36."

DEAN MORGAN: Yes, that is right. That is your rule for admission, isn't it, Edson?

MR. HAMMOND: Then up in the form itself I thought it would be a little better to say, instead of "receipt of copy hereof", "service of this request". That is really minor.

THE CHAIRMAN: What is it? I don't get it.

MR. HAMMOND: I don't think it is worth bothering about. Just say "service of this request".

JUDGE CLARK: Where is that?

MR. HAMMOND: It is in the second line, "within .... days after receipt of copy hereof".

THE CHAIRMAN: It ought to be service.

MR. HAMMOND: "service of this request".

JUDGE CLARK: I guess that is it, isn't it?

DEAN MORGAN: The Reporter suggested this, and I haven't any objection.

PROFESSOR SUNDERLAND: In the note you say, "Under Rule 36 such a period may be fixed in the request". I think it must be fixed in the request.

JUDGE CLARK: I can't remember specifically. Let's go back and see.

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DEAN MORGAN: Yes, it does.

PROFESSOR SUNDERLAND: "Each of the matters of which an admission is requested shall be deemed admitted unless, within a period designated in the request, not less than 10 days after service thereof", and so on. I think it is obligatory to state it.

DEAN MORGAN: Yes; "is fixed".

JUDGE CLARK: "must be fixed".

PROFESSOR CHERRY: Simply "is fixed".

JUDGE CLARK: That is all.

Back in May I made some suggestions about possible amendments of the statute. That never was gotten to before. I don't know, but I suppose the committee isn't very anxious to consider it. I think sooner or later we ought to consider the question whether we ought to recommend a statute which makes the amending process clear and reasonable. It is not reasonable now.

THE CHAIRMAN: How do you mean? Amend the Enabling Act as to the steps to be taken?

JUDGE CLARK: Exactly.

THE CHAIRMAN: What, in substance, do you propose? Do you propose to make it unnecessary to file it with Congress any more?

JUDGE CLARK: No, I don't think I would propose that now, because there has been too much history on that; but I

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would propose that it be filed with Congress at any time and be effective unless action is taken within, oh, thirty days or sixty days. That allows everything to be done that is necessary.

THE CHAIRMAN: Instead of being filed at the opening of a session, you would say it ought to be filed at least sixty days before the end of it? That is the way you would do that, isn't it?

JUDGE CLARK: No, I wouldn't even do that. I would provide that it may be filed at any time that Congress is in session, although there may be modifications.

THE CHAIRMAN: Suppose you file it three days before the end of a session? If you are going to give them a certain time to consider it, it would have to be served that length of time before the end of the session. Otherwise they wouldn't have that much time to consider it.

JUDGE CLARK: Without definitely trying to specify that, the thing I think we ought to get away from is the kind of arbitrary machinery which now means that it is at least two years before even the simplest rule can take effect, and the main difficulty is this machinery that it must be done at the opening of a session and remain until the close. That always means that you have to aim at the first of January, and then, since the Congressional sessions are about a year, it means it must lie there all during the year.

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THE CHAIRMAN: You haven't presented any report on that, have you?

JUDGE CLARK: Yes, I have. I presented it to the May meeting.

THE CHAIRMAN: An actual draft of a statute?

JUDGE CLARK: Yes. Let me see where that is now. I presented that at the May meeting, with a draft, as a matter of suggestion for discussion, and we really didn't get to it at that time.

THE CHAIRMAN: Did you consider in the same connection amending our Enabling Act to broaden it out as much as the present Enabling Act of the criminal rules, which explicitly give the Supreme Court power not only to promulgate the criminal rules for the district courts but to follow the thing right up and hook the thing up with the proceedings in the circuit courts of appeals? We have been hampered by that, by our lack of express authority. We have done it in a half-baked way, but there are several situations in which we would like to say bluntly what the circuit court can or can't do. The circuit court judges might be rather loathe to have a law passed allowing the Supreme Court to tell them what their rules ought to be, and I sympathize with that. I think the different localities have different problems, and having these circuit judges try one thing and another in an experimental way makes them sort of laboratories for the development of the practice.

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JUDGE CLARK: This was made to the May meeting. You will find it in the appendix to the notes of the May meeting.

JUDGE DOBIE: I think it is very excellent. I think that thing about the beginning is perfectly absurd. It doesn't accomplish any useful purpose. It is useless and extends the time. I don't think Congress will object to that. They may have to be handled with gloves in other ways, but there is nothing sacred about the beginning of a session.

THE CHAIRMAN: My own feeling about the political situation, if you want to call it that, is this: We had better go ahead with these rules we have and not raise any issue in Congress as to what they are going to do with them or how they are going to deal with them. Just take the law as it stands and get these rules up there and get them through, if they don't pass a bill disapproving them. Then we have them all over the dam, we are settling down for another year or so without any amendments, having these safely by, and then we can bring up to Congress the question of how they consider the thing. I am afraid, if you brought it up in advance of the submission of these rules, the Congress might jump in and make some amendments to our proposed bill and leave us worse than we are today.

JUDGE CLARK: May I make a suggestion or perhaps ask a question? As I understand, there has been some discussion, no action taken but some thought at least, that since we can't

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get these in until the first of January, we might get them in later and ask for a joint resolution on these particular rules. If we are going to do that, why wouldn't the thing to do be to come in with our joint resolution, if we wish, but also go to the law and say to the members of the Judiciary Committee, "This shows what we have to do. If you want to do it only for this particular occasion, we can't say otherwise, but wouldn't it be simpler, instead of a joint resolution, to pass an act which does the thing completely?" I should think if the thought is that we are going to them and ask for a joint resolution, we ought certainly to put up as an alternative the doing of it for the future.

THE CHAIRMAN: We will have to meet again, of course. We probably will have to meet again to consider this tentative draft before we publish it for the bar, but certainly we will have to meet again before we make a final report to the Court.

JUDGE DOBIE: Have you any idea when that will be, General? I mean broadly, not before Christmas?

THE CHAIRMAN: I can't say. It depends. If it is a meeting to prepare a final report after the bar has considered our draft, it will not be until after the first of the year--obviously, because you have to give the bench and bar more than two or three weeks to consider this thing. But if we have to have an additional meeting to consider the revisions we have made here this week in our tentative draft for distribution,

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then we ought to hold that, I suppose, as soon as the Reporter can get out his draft. It may be, when he has it out and distributed it and you all look it over, that you may find it isn't necessary to meet, but if you have some minor suggestions or changes you can do it by correspondence; we can have those suggestions distributed and a mail vote taken on them, which will simplify things for all of us. I hope that is going to be the way we can do it. We will try it that way, and if we find we are in a tangle and haven't got an agreement about some of these things on the tentative draft, then we will have to meet. If we can do that by mail and then get it out to the bar, our final meeting to consider suggestions from the bar and to prepare our report to the Court certainly would not take place until along in the winter, because we have to give the bench and bar some time to consider it if we want to get any results from it.

JUDGE DOBIE: I wasn't recommending another meeting. I was asking for information, because I have a pretty busy fall ahead of me, to be sitting down here in Washington.

THE CHAIRMAN: Your idea was that you didn't like to have it too soon, and I was trying to show that we are not likely to have it until after the first of the year. Isn't that the way you size it up?

JUDGE CLARK: Yes. I am going to be well tied up myself. As a matter of fact, you gave us a good deal to study

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here. There is quite a little.

THE CHAIRMAN: Yes.

JUDGE CLARK: If you feel you need another meeting on this material before it goes out, I don't believe we can have it until after the first of the year.

THE CHAIRMAN: I am afraid we may need another meeting. We have gotten into a lot of discussions, and we haven't agreed on form. We have just tried to give you general principle, and that has left you somewhat in the air.

JUDGE CLARK: Yes, and there is quite a little here, I think.

I should like to ask one question of detail. Before, we tried to hurry, and we sent the material out in driblets. We were doing it to try to save time. There has been a suggestion that we have had a diarrhea of drafts, which to a certain extent is true. Would you prefer that it all go out at one time?

THE CHAIRMAN: How do the members feel about it?

JUDGE DONWORTH: I would rather have the entire proposal, I think.

PROFESSOR SUNDERLAND: I would, too.

THE CHAIRMAN: I won't look at it until I get it all, because I can't pick a thing up and drop it and pick it up again. I have to go through it.

JUDGE DOBIE: I think that is desirable.

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JUDGE CLARK: It is easier for us.

JUDGE DOBIE: It would take longer.

JUDGE CLARK: We are doing it in the thought of saving time for you gentlemen.

THE CHAIRMAN: Get it all up in a nice book, with covers on it.

JUDGE CLARK: Maybe Mrs. Dennis can get the books down here.

THE CHAIRMAN: If it looks nice, we will pick it up and read it all.

... Off the record ...

THE CHAIRMAN: If there is no objection, we will stand adjourned, to meet on call or the vote of the committee as to when we meet again.

... The committee adjourned at 11:55 p.m., Thursday, October 28, 1943 ...

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