P R O C E E D I N G S

ADVISORY COMMITTEE ON RULES

FOR CIVIL PROCEDURE

VOLUME III

April 3-5, 1944
Supreme Court of the United States Building
Washington, D. C.

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

NEW YORK
51 MADISON AVENUE
AShland 4-1827

WASHINGTON
NATIONAL PRESS BUILDING
National 8558

CHICAGO
540 NORTH MICHIGAN AVENUE
Superior 3255

CLEVELAND
STANDARD BUILDING
Main 0894

TABLE OF CONTENTS

Page

Tuesday Morning Session
April 4, 1944

Proposed Rule 71-A. Condemnation of Property for Public Use .. 277

Action on (c)(4) Proof of Service 288, 291

(e) Amendment of Pleading 313

(g)(1) Trial, By Jury 327, 334

(h) Dismissal of Action .. 366, 376

S. 919, Time for demand for jury trial 377

Submission of condemnation rule to bench and bar 378

Effective date 379

1370 Ontario Street Cleveland · 51 Madison Ave. New York · The MASTER REPORTING COMPANY, Inc. Law Stenography • Conventions • General Reporting · 540 No. Michigan Ave. Chicago · National Press Bldg. Washington

Vol 3

1370 Ontario Street Cleveland
51 Madison Ave. New York
The MASTER REPORTING COMPANY, Inc. Law Stenography • Conventions • General Reporting
540 No. Michigan Ave. Chicago
National Press Bldg. Washington

TUESDAY MORNING SESSION

April 4, 1944

The meeting reconvened at 9:30 a.m., Judge Charles E. Clark, Acting Chairman, presiding.

THE ACTING CHAIRMAN: Gentlemen, there have been distributed this morning copies of this memorandum, "Recent Decisions on the Federal Rules." That is mainly for information, so that you can keep up with the hottest reports from the Court. If you find food for thought in any of the cases, that will be fine. I do suggest, however, that you may want to look at the résumé of the Supreme Court decision a week ago on the summary judgment. That is down under Rule 56, the Sartor case, which I should think had some troublesome aspects.

I think our understanding was that we would turn momentarily this morning to the eminent domain rule, the condemnation rule. If there is no objection, we will now take that up. Mr. Hammond, will you present it?

MR. HAMMOND: Yes, sir.

THE ACTING CHAIRMAN: I guess you had better tell us first what we should have before us.

MR. HAMMOND: You want a copy of the October 26 draft that was sent out with the material, and then the list of amendments that went with it. There was a letter, dated January 13, signed by Mr. Tolman.

DEAN MORGAN: Committee comments under date of

February 17, too.

MR. HAMMOND: Yes. The letter of transmittal was dated February 25.

MR. LEMANN: Have you an extra copy of the January 13 communication, Mr. Hammond?

MR. HAMMOND: I will get you a copy. Shall we go ahead?

THE ACTING CHAIRMAN: Yes, I should think we might go ahead.

MR. HAMMOND: As Judge Dobie said yesterday, we have really reached an agreement with the Lands Division as to everything except the dismissal of action rule or paragraph. I think that the way to take the thing up is to put your copy of the October 26 draft in front of you, and also the list of amendments, and we can take up the amendments one by one. Do you all have that?

THE ACTING CHAIRMAN: Why don't we do this, Mr. Hammond? You go down through the amendments and state what you wish. Do we need to take up each one, unless there is objection? I should think that we could consider that, unless some member of the Committee raises objection, we accept it. They have been studied, and I should think they are more or less formal, without stopping for a vote on each one of them.

MR. HAMMOND: Yes. I will read what the amendments are. Shall I do that?

National Press Bldg. Washington 540 No. Michigan Ave. Chicago The MASTER REPORTING COMPANY, Inc. Law Stenography • Conventions • General Reporting 51 Madison Ave. New York 1370 Ontario Street Cleveland

THE ACTING CHAIRMAN: Present it any way that will be clear.

MR. HAMMOND: All right. Amendment No. 1 is just a very minor matter of form, and it is in line 11. It is to begin a new paragraph with that sentence in line 11, if there is no objection to that. The reason for making it a new paragraph is just that the first sentence deals with the title of the action, and the other deals with the body of the complaint.

MR. DODGE: Are these amendments which your committee and the Department of Justice have agreed to?

MR. HAMMOND: All except the one on dismissal of action, and then there are three new amendments suggested by the Lands Division which have never been considered by this Committee, and they are Department of Justice amendments A, B, and C.

MR. DODGE: I would suggest, if you are all agreed, that those that are mere matters of form be not adverted to at all.

MR. HAMMOND: All right, sir. You mean you want me to skip those?

MR. DODGE: I should think so. State only those that are of substance.

THE ACTING CHAIRMAN: I guess you will have to use your judgment and state those that you think are important for us to think about. I should think most of these are.

National Press Bldg. Washington 540 No. Michigan Ave. Chicago The MASTER REPORTING COMPANY, Inc. Law Stenography • Conventions • General Reporting 51 Madison Ave. New York 1370 Ontario Street Cleveland

MR. HAMMOND: All right.

Amendment No. 2 arose out of the desire of the Committee to have the complaint state the authority for the taking and the public uses for which the property is sought to be taken, and that sentence in Amendment No. 2 includes those two things.

Shall I go on to the next one? If anybody wants to say anything, just interrupt me, or I shall go right ahead.

Amendment No. 3 will go on page 2 of the 10/26/43 draft and inserts the same provisions regarding a statement in the notice of the authority for taking, the public uses for which the property is sought to be taken.

Amendment No. 4 is purely formal, and 5 and 6 are the same.

Amendment No. 7 is, after the word "attorney" in line 46 of the 10/26/43 draft, insert the words ", in lieu of the service prescribed by Rule 4,". It wasn't clear from the original draft whether that was to be included in the service prescribed by Rule 4 or whether it was to be additional. My recollection is that the Committee wasn't concerned about that at all. They just wanted to know what the Lands Division wanted on it.

Amendment No. 8 is formal, and 9 is formal.

Amendment No. 10 is the insertion of a new subparagraph under subdivision (c)(3). That came up by a statement

National Press Bldg. Washington 540 No. Michigan Ave. Chicago The MASTER REPORTING COMPANY, Inc. Law Stenography • Conventions • General Reporting 51 Madison Ave. New York 1370 Ontario Street Cleveland

National Press Bldg. Washington 540 No. Michigan Ave. Chicago The MASTER REPORTING COMPANY, Inc. Law Stenography • Conventions • General Reporting 51 Madison Ave. New York 1370 Ontario Street Cleveland

Judge Donworth made at the last meeting. He thought that the rule provided that, if you didn't get service upon a person whose name and address were known, there would be a service to "Unknown Owners," but I didn't think that was clear from a reading of the two rules together, the two subparagraphs, (ii) and (iv). This just makes it clear that, even if you know the name and address of the defendant, if you cannot get service that way, then there will be a publication of service to "Unknown Owners." The Lands Division had no objection to that. Of course, if there already has been service to "Unknown Owners," there is no use in starting a new service to them.

Amendment No. 11, line 78. After the word "plaintiff" insert the words "which shall also show the method of service upon each defendant". Then, Amendment No. 12, in line 79, after the word "shall" insert the words "suffice to justify the method of service upon each defendant and shall have like force and effect as the return of the marshal."

DEAN MORGAN: That is what I have objection to. It seems to me that is going beyond the limit to say that the certificate of the attorney shall suffice to justify the method of service because he didn't get an order of the court in a place where he was supposed to have an order of the court. It would cure the thing if he just "certified," but I can't go that far.

PROFESSOR CHERRY: I think we were all opposed to it

when that came up.

DEAN MORGAN: Before, I objected to the attorney's certificate being the equivalent of a marshal's return, but I was overruled on that. This goes even a step farther than that, and it seems to me that goes beyond the verge.

MR. LEMANN: What was the argument? To expedite the proceeding and to obviate any objection to the service? Does the Department of Justice suggest this?

MR. HAMMOND: I think that this was originally worked out before the last meeting, and these particular words were used in a prior draft.

DEAN MORGAN: Oh, no, they weren't used there, Mr. Hammond, because the draft we had last time, as I remember it, merely made the return of the certificate the equivalent of the return of the marshal. That is all.

MR. LEMANN: That is there now.

DEAN MORGAN: The return of the marshal wouldn't do this; it wouldn't suffice to justify the method of service at all.

PROFESSOR CHERRY: No. This is something new.

MR. LEMANN: I wonder why there is a necessity for this, because that is a judicial function, really, isn't it?

DEAN MORGAN: Absolutely.

MR. LEMANN: There is no other method of service upon each defendant. Correct?

National Press Bldg. Washington 540 No. Michigan Ave. Chicago The MASTER REPORTING COMPANY, Inc. Law Stenography • Conventions • General Reporting 51 Madison Ave. New York 1370 Ontario Street Cleveland

MR. DODGE: "Suffice to justify" means conclusive of service.

DEAN MORGAN: Absolutely.

MR. LEMANN: Suppose one of the defendants wants to claim that he wasn't unknown, that he was there and could have been served, and that he never heard of the case. "It is ridiculous to say I was unknown and to publish a notice." In the draft I read, if I saw the latest one, this is to be published only twice, isn't it? The notice of publication is only to be for two weeks, two issues.

MR. HAMMOND: Yes, sir.

MR. LEMANN: It seems very little, according to what I am accustomed to, to have just two newspapers, because you might easily miss two.

MR. DODGE: Would the Government object if we struck these words out?

MR. HAMMOND: I don't know that they would, no, seriously. If you recall, at the last meeting we had a lot of discussion about whether there should be an order of court. Mr. Mitchell suggested to them that they ought to have an order of court in advance, before they could publish against unknown owners. The representatives of the Lands Division were up here, Mr. Lemann, and they stated the reasons that they didn't want that. They seemed to convince the Committee that it would be too burdensome and troublesome to go to the court

National Press Bldg. Washington · 540 No. Michigan Ave. Chicago · The MASTER REPORTING COMPANY, Inc. Law Stenography • Conventions • General Reporting · 51 Madison Ave. New York · 1370 Ontario Street Cleveland

first to get an order for a publication against unknown owners.

MR. DODGE: That has nothing to do with this particular point, has it?

DEAN MORGAN: No.

THE ACTING CHAIRMAN: I had stepped out. May I ask what are the particular words?

JUDGE DOBIE: What you object to, as I understand it, Eddie, is that you don't want the plaintiff's attorney to be in an impartial role and have his certificate conclusive.

DEAN MORGAN: When you say that his certificate shall suffice to justify the method of service upon each defendant, it is just too much for my stomach.

JUDGE DOBIE: In other words, you have the counsel for the United States certifying and stating certain things, and that is practically the same as the marshal's return. Isn't that it?

DEAN MORGAN: It is more than that. The marshal's return never justifies the method of service.

PROFESSOR SUNDERLAND: It just says what he has done.

DEAN MORGAN: It just tells what he has done.

MR. LEMANN: At most, it would be a presumption that what he did was right, and it would be only a presumption.

THE ACTING CHAIRMAN: The original appears in this draft of November. They thought it quite important, and we had quite a discussion about that before.

The MASTER REPORTING COMPANY, Inc. Law Stenography • Conventions • General Reporting
National Press Bldg. Washington — 540 No. Michigan Ave. Chicago — 51 Madison Ave. New York — 1370 Ontario Street Cleveland

DEAN MORGAN: As to the effect of the marshal's return. We had that.

MR. HAMMOND: But Mr. Morgan is not objecting to that now. He is objecting to the insertion before that of the words "suffice to justify the method of service".

THE ACTING CHAIRMAN: I don't quite recall the background of this particularly.

DEAN MORGAN: This wasn't discussed.

THE ACTING CHAIRMAN: That is true. We haven't had it before. But I am not quite sure--

DEAN MORGAN (Interposing): You were in the Committee, Charles. I forgot.

MR. HAMMOND: It was in a prior draft, and there was some discussion of those words at the last meeting. You recall that, Mr. Sunderland, do you?

PROFESSOR SUNDERLAND: I don't recall that.

DEAN MORGAN: No. I am sure there wasn't.

MR. DODGE: I don't recall that we discussed that.

MR. LEMANN: You move to strike it out, Mr. Morgan?

DEAN MORGAN: I move not to adopt that amendment.

PROFESSOR CHERRY: It is a proposed amendment.

MR. LEMANN: I second the motion.

THE ACTING CHAIRMAN: Is there any discussion?

DEAN MORGAN: I gave you my notion, Charles, in the copy that I sent you, at your request.

National Press Bldg. Washington 540 No. Michigan Ave. Chicago The MASTER REPORTING COMPANY, Inc. Law Stenography • Conventions • General Reporting 51 Madison Ave. New York 1370 Ontario Street Cleveland

THE ACTING CHAIRMAN: Yes.

MR. HAMMOND: I tell you what I will do. I will look up the transcript sometime on that from the last meeting, but you can take it out now, if you want to, and just not adopt it. If I find anything in there that would shed any further light--

MR. LEMANN (Interposing): It is strange that Major Tolman didn't discuss it. In his memorandum he says: "Many of those proposals have already been approved by the Committee at its last session. Others are matters of form and style and require no discussion. This communication will not deal with proposals of either of those categories." He assumes, apparently, that this is within one of those categories. I hardly think I would call that form or style.

DEAN MORGAN: That is substantive.

JUDGE DOBIE: There are ample methods of service. If we strike this out, it wouldn't hamstring the Government.

DEAN MORGAN: No.

JUDGE DOBIE: In other words, this is going far beyond anything we have ever done, isn't it, as Mr. Morgan says?

THE ACTING CHAIRMAN: I have an idea that probably it is more innocent than we are thinking, but it is true that the words do sound pretty pretentious. I wonder if the Department doesn't have some different idea, that this is just going to take the place of the order of publication, so to speak. I don't believe they intend it, but I can't say from background

1370 Ontario Street Cleveland 51 Madison Ave. New York The MASTER REPORTING COMPANY, Inc. Law Stenography • Conventions • General Reporting 540 No. Michigan Ave. Chicago National Press Bldg. Washington

just what they did intend to accomplish. It is true, the words standing all alone could be stretched pretty far. I can't quite visualize. I suppose it is that the certificate of the attorney shall be in effect proof of compliance with the order of publication, and I doubt that it would be much more than that.

DEAN MORGAN: You don't have an order of publication.

PROFESSOR CHERRY: You don't have an order at all.

THE ACTING CHAIRMAN: You can have.

DEAN MORGAN: Oh, yes, you can have. I noticed that one place.

JUDGE DOBIE: You want to strike out lines 77--

DEAN MORGAN (Interposing): I want to move that the proposed amendment in line 79 be not adopted.

JUDGE DOBIE: You are willing to leave 77 and 78 in?

DEAN MORGAN: Oh, yes; that is all right.

JUDGE DOBIE: It is all right to prove it by certificate; it is proof, but you don't want it to have the effect of the marshal's return.

MR. DODGE: You don't want it to have more than the effect of the marshal's return. We want to leave it with the same effect as a marshal's return, and not to be conclusive of proper service.

DEAN MORGAN: Of the method of service. Do you get the point there, Judge? They are proposing to put in after

National Press Bldg. Washington 540 No. Michigan Ave. Chicago The MASTER REPORTING COMPANY, Inc. Law Stenography • Conventions • General Reporting 51 Madison Ave. New York 1370 Ontario Street Cleveland

"shall" in line 79 the words "suffice to justify the method of service upon each defendant and shall".

JUDGE DOBIE: No, I didn't have those words.

DEAN MORGAN: That is what I don't want.

THE ACTING CHAIRMAN: Of course, in one sense it may mean nothing more than what is in (3), which gives a good deal of choice, and (ii) says "At his election". This is a kind of endorsement of what he has elected, I suppose.

MR. HAMMOND: I think that was it.

DEAN MORGAN: If you have it in already, you don't need this.

PROFESSOR CHERRY: This would go way beyond mailing to his address.

THE ACTING CHAIRMAN: I think we might strike it out, subject to whatever you may find.

MR. HAMMOND: All right.

THE ACTING CHAIRMAN: I don't really think they need it. Of course, it is a kind of threatening thing, you see. I don't think they probably intend to carry it as far as the words might justify, but you can look it up and see if you find anything later.

All those in favor of the motion will say "aye"; those opposed. The "ayes" have it, and that particular amendment, Amendment No. 12, line 79, is not approved.

PROFESSOR SUNDERLAND: There is another slight point

National Press Bldg. Washington 540 No. Michigan Ave. Chicago The MASTER REPORTING COMPANY, Inc. Law Stenography • Conventions • General Reporting 51 Madison Ave. New York 1370 Ontario Street Cleveland

there. I notice they use the term "official return" in lines 76 and 77 for the statement of the service made by one specially appointed by the court. He is not an official, and in Rule 4 we expressly state that in that case it will be an affidavit, not a return. In other words, we are not sticking to our definition of what we mean by a return. I don't think it can be a return when it is made by a person specially appointed, who is not an official.

DEAN MORGAN: "one specially appointed by the court".

PROFESSOR SUNDERLAND: He can't make a return. He has to make an affidavit. We provide in our Rule 4 that the one specially appointed shall make an affidavit.

DEAN MORGAN: I see. That is right.

PROFESSOR SUNDERLAND: We are just using the wrong word here, that is all.

JUDGE DOBIE: Would you say "by return or by affidavit"?

PROFESSOR SUNDERLAND: Yes.

JUDGE DOBIE: It is an official return when you have it by the marshal or the deputy, but it is an affidavit when it is by a person specially designated.

PROFESSOR SUNDERLAND: Yes.

THE ACTING CHAIRMAN: Do you want to put that in the form of a definite suggestion?

PROFESSOR SUNDERLAND: I think it would be clear

National Press Bldg. Washington 540 No. Michigan Ave. Chicago The MASTER REPORTING COMPANY, Inc. Law Stenography • Conventions • General Reporting 51 Madison Ave. New York 1370 Ontario Street Cleveland

enough if we said "shall be proved by official return or affidavit."

DEAN MORGAN: You move to insert that in line 77?

PROFESSOR SUNDERLAND: Yes.

DEAN MORGAN: I second the motion.

THE ACTING CHAIRMAN: What do you say to that, Mr. Hammond?

MR. HAMMOND: I was just looking back to the other rule, our own rule.

PROFESSOR SUNDERLAND: Rule 4(g) provides: "If service is made by a person other than a United States marshal or his deputy, he shall make affidavit thereof."

MR. HAMMOND: Yes, I see. What do you want to insert?

DEAN MORGAN: Just "or affidavit" after "return".

MR. HAMMOND: I see.

PROFESSOR SUNDERLAND: Mr. Moore suggests "shall be proved as provided in Rule 4(g)." How about that?

PROFESSOR CHERRY: That would be better, because "return or affidavit" is a little awkward.

PROFESSOR SUNDERLAND: It is a little bit awkward.

PROFESSOR CHERRY: It isn't meant to be an alternative. It is one return.

PROFESSOR SUNDERLAND: I suggest the wording: "shall be proved as provided in Rule 4(g)."

National Press Bldg. Washington 540 No. Michigan Ave. Chicago The MASTER REPORTING COMPANY, Inc. Law Stenography • Conventions • General Reporting 51 Madison Ave. New York 1370 Ontario Street Cleveland

JUDGE DOBIE: Substitute that for "by his official return"?

PROFESSOR SUNDERLAND: Yes.

... The motion was regularly seconded ...

THE ACTING CHAIRMAN: Any discussion? All those in favor will say "aye"; those opposed. So voted. (Carried)

MR. HAMMOND: Shall be proved as provided in?

JUDGE DOBIE: Rule 4(g).

DEAN MORGAN: Or (d).

THE ACTING CHAIRMAN: That is in lines 76 and 77 of the October 26 draft.

DEAN MORGAN: Right.

MR. HAMMOND: Of course, 4(g) doesn't say--

DEAN MORGAN (Interposing): Rule 4(d), isn't it?

PROFESSOR MOORE: (g).

DEAN MORGAN: Is it (g)?

MR. LEMANN: Yes.

PROFESSOR SUNDERLAND: As a matter of fact, (g) isn't very complete.

PROFESSOR MOORE: It ought to be made complete.

PROFESSOR SUNDERLAND: Yes.

DEAN MORGAN: Yes.

PROFESSOR SUNDERLAND: It is just an implication. It doesn't say in terms that the marshal shall make the return, but it implies it.

National Press Bldg. Washington 540 No. Michigan Ave. Chicago The MASTER REPORTING COMPANY, Inc. Law Stenography • Conventions • General Reporting 51 Madison Ave. New York 1370 Ontario Street Cleveland

THE ACTING CHAIRMAN: Is there anything more on that?

JUDGE DOBIE: I think that will take care of it. That won't give any trouble.

PROFESSOR SUNDERLAND: It hasn't given any trouble heretofore.

THE ACTING CHAIRMAN: All right, let's go ahead, then.

MR. HAMMOND: The next one is Department of Justice Amendment A. This is a new amendment of theirs in line 98. They want to change the words "final judgment" to "compensation is determined and paid", so that the sentence will read: "The plaintiff may as a matter of course and without order of court amend the complaint at any time before compensation is determined and paid."

JUDGE DOBIE: In other words, they can amend under this after the compensation is determined, but before it is paid.

DEAN MORGAN: Just what is the purpose of that, Mr. Hammond?

MR. HAMMOND: They say--there is an exhibit to this, Exhibit A, you see, attached to the list of amendments.

DEAN MORGAN: I know. They don't like the term "final judgment." I grant that. But I want to know why they want to amend as of course after compensation has once been determined, without any order of court or anything of that sort. They might amend the description by cutting out one piece and

National Press Bldg. Washington 540 No. Michigan Ave. Chicago The MASTER REPORTING COMPANY, Inc. Law Stenography • Conventions • General Reporting 51 Madison Ave. New York 1370 Ontario Street Cleveland

thereby effect a dismissal.

THE ACTING CHAIRMAN: According to their memorandum, it is a little different from that. They say that it has been held in my Circuit, as well as others, that an appeal lies from the judgment of taking, not from the fixing of money but just from the formal judgment of taking.

DEAN MORGAN: That is right.

THE ACTING CHAIRMAN: Actually, that is one of the earliest of the steps. It comes very soon. As a matter of fact, I think very often it looks as though it were a matter of form. I don't suppose it is, but I mean as a practical matter.

DEAN MORGAN: It is under our present procedure; it is just a matter of form now, isn't it?

MR. LEMANN: I am a little confused as to how they do this thing. I got the impression, reading this memorandum of the Department, that after compensation is fixed, if the Government doesn't like it, they can say, "We don't want the property. It is too much money. The jury has brought in an excess valuation, and to hell with it. We don't want it."

DEAN MORGAN: That is right.

MR. LEMANN: That is what they mean, that until it is paid, even after it has been fixed, the thing isn't finished. Is that right, Mr. Hammond? On the other hand, we talk about a declaration of taking that may come even before the

National Press Bldg. Washington 540 No. Michigan Ave. Chicago The MASTER REPORTING COMPANY, Inc. Law Stenography • Conventions • General Reporting 51 Madison Ave. New York 1370 Ontario Street Cleveland

compensation is fixed. When that is done, they are irrevocably committed to take it. Is that right?

THE ACTING CHAIRMAN: That is correct, yes.

MR. LEMANN: They take a chance, then, on what the jury does vote. They say, "We have to have the property. We absolutely have to have the property." They go in and get a judgment of taking, and they take it before they pay for it, before it is even determined how much they are to pay for it, but they have to have it for some paramount purpose and need, so they enter this judgment of taking.

Am I analyzing this right? Is that the way it goes?

SENATOR LOFTIN: Yes, that is quite right. They have done that all over the State of Florida.

MR. LEMANN: Then after they have done that, Scott, they can't recede.

SENATOR LOFTIN: There are some right nice questions involved as to how far they can recede after they go to trial and on the question of compensation.

MR. LEMANN: After they take a judgment of taking, they can't recede, can they?

SENATOR LOFTIN: They might not recede. They might take it up at a certain time. They usually take it either outright or by the year.

MR. LEMANN: For the use of it; but whatever they say they are taking in that judgment, they are bound to take.

The MASTER REPORTING COMPANY, Inc. Law Stenography • Conventions • General Reporting
National Press Bldg. Washington 540 No. Michigan Ave. Chicago 51 Madison Ave. New York 1370 Ontario Street Cleveland

SENATOR LOFTIN: At least they have to pay for it as long as they keep it.

MR. LEMANN: Yes.

DEAN MORGAN: But suppose they don't want to keep it; suppose they back out.

JUDGE DOBIE: I understand that is the later one.

DEAN MORGAN: That is the later one.

JUDGE DOBIE: The Government want the right to go in and take it and do everything they want. They say, "We think this is a $50,000 piece of property, and if the jury doesn't agree with them and says, "No, you have to pay $75,000," the Government wants the right, after putting the owner to all that expense, to end the trial, to go in and dismiss.

PROFESSOR CHERRY: They wouldn't need to dismiss if they can do this. They could amend it down to dismiss the things that cause the trouble.

MR. HAMMOND: Mr. Morgan brought up that point, and I felt more or less the same way. Why should they be able to dismiss at any such late date as that? Suppose I read you a little memorandum I wrote about this amendment.

"The excerpt from the letter of Mr. Littell to Mr. Tolman, dated January 8, 1944, and quoted in Exhibit A, further demonstrates, I think, the ambiguity of the words 'final judgment' in condemnation actions. So, as between 'before final judgment' and 'before compensation is determined and paid'

National Press Bldg. Washington 540 No. Michigan Ave. Chicago The MASTER REPORTING COMPANY, Inc. Law Stenography • Conventions • General Reporting 51 Madison Ave. New York 1370 Ontario Street Cleveland

I think the latter is preferable. But I fail to see the reason, and have never heard any, why the Government should have the right, as a matter of course and without court order, to amend the complaint up to any such late date in the proceeding as final judgment or before compensation is determined and paid, and I am particularly concerned about what the Government may do in the following situation if it is given the power to so amend the complaint up to either of such late dates.

"The Government files a complaint in condemnation. Thereafter, and before a final judgment, and before compensation is determined and paid, it enters into possession and actually takes some of the property included in the complaint. Can the Government thereafter, under this amendment provision, amend the complaint so as to exclude the property taken and dismiss as to that property? I don't see why not. And that it may want and attempt to do so is shown by United States v. Sunset Cemetery Company" (which you gave us a reference to), "where they attempted to do so even in a case where a declaration of taking had been filed.

"Of course, if subdivision (h), Dismissal of the Action, is amended by any one of the three suggested amendments, it might be argued that the Government could not dismiss in this situation, but with the amendment provision reading the way it does, it would at least be doubtful, and some court might with some justification hold that by the amendment provision

The MASTER REPORTING COMPANY, Inc. Law Stenography • Conventions • General Reporting
National Press Bldg. Washington · 540 No. Michigan Ave. Chicago · 51 Madison Ave. New York · 1370 Ontario Street Cleveland

we have given the Government power to eliminate from the proceeding the property taken, and therefore, after that is done, the Government can dismiss in spite of what subdivision (h), Dismissal of the Action, says.

"I therefore think that at least something should be done in the amendment subdivision about this particular situation and, in the absence of any knowledge on my part of any reason why the Government should be given this power to amend as of course and without court order up until any such late events in the proceeding, I am not in favor of giving it to them."

JUDGE DOBIE: How late do you think they ought to be allowed to amend, to have the right to amend as a matter of course?

MR. HAMMOND: If you will let me go on with this, I smoked them out on it a little bit.

JUDGE DOBIE: I beg your pardon.

MR. HAMMOND: "If it is not to be given them, I see no reason why the general rule on amendment of pleadings, Rule 15, should not be applicable to condemnation proceedings." Then I state how that could be done.

"If sufficient reasons are shown for the Government's need of this power, I would add a qualifying or 'except' clause to the amendment subdivision of the condemnation rule covering the particular situation I have hereinbefore referred

National Press Bldg. Washington · 540 No. Michigan Ave. Chicago · The MASTER REPORTING COMPANY, Inc. Law Stenography • Conventions • General Reporting · 51 Madison Ave. New York · 1370 Ontario Street Cleveland

to so as to eliminate any doubt or question as to whether the Government has the power to amend and then dismiss in that situation. Thus, the following clause could be added after the words 'before compensation is determined and paid': "but the plaintiff may not amend the complaint so as to exclude from the action anything as to which there has been a taking under the condemnation statute used or as to which there has been an actual taking.'"

Then I suggest to Mr. Tolman that he write to Mr. Littell and ask him why he needs that power to amend at any such late date, and I have a letter here from Mr. Littell. "Dear Major Tolman:

"This will acknowledge receipt of your letter of February 8, 1944, in regard to subdivision (e), Amendment of Pleadings, in which you suggest that in lieu of the terms 'final judgment' or 'compensation is determined and paid' the provisions of Rule 15 of the Federal Rules of Civil Procedure perhaps should be left to apply." That is the general rule on amendments.

"Almost from the beginning of our study of a proposed condemnation rule, careful consideration has been given to working out a provision as to the time after which the plaintiff should not be allowed to amend as of course. As an abstract proposition the right to amend as of course at any time before the determination and payment of compensation has the semblance

National Press Bldg. Washington 540 No. Michigan Ave. Chicago The MASTER REPORTING COMPANY, Inc. Law Stenography • Conventions • General Reporting 51 Madison Ave. New York 1370 Ontario Street Cleveland

of being unduly favorable to the plaintiff. I believe, however, that we should be very careful to distinguish a condemnation proceeding from the ordinary action, and viewed in this perspective there are, I think, strong reasons to support the draft of the subdivision which I sent to you with my letter of December 27.

"It has been our experience that the vast majority of all amendments which are made by the plaintiff provide merely for formal and technical changes which do not affect any substantial change in the character of the proceedings. I believe that I can say safely that at least 75 per cent of the amendments which we make are for the purpose of clarifying or correcting the description of the property taken; I use the term 'clarifying or correcting' in the sense of rendering certain a description which while probably sufficient as a matter of law may, due to the pressure of work or for some other reason, contain errors which are clerical or even typographic. It would seem to me to be entirely unnecessary in respect to such a class of amendments to require leave of court or consent of the parties in advance as would be required by the provisions of Rule 15.

"Turning to a classification of the remaining 25 per cent of amendments which we have found from experience to be made in condemnation proceedings, I will say that nearly all of them involve such matters as the inclusion or exclusion of

National Press Bldg. Washington 540 No. Michigan Ave. Chicago The MASTER REPORTING COMPANY, Inc. Law Stenography • Conventions • General Reporting 51 Madison Ave. New York 1370 Ontario Street Cleveland

certain interests in the property condemned or a change in the quantum or character of the estate to be acquired. For instance, we may be advised by the War Department that an unencumbered fee simple title is necessary and will proceed to file a petition accordingly. Subsequently that Department will decide that there is no occasion for the forced removal of an existing power line, road or related easement, and so we will amend the petition to provide for a fee title subject to such easement.

"An exceedingly small number of amendments (which I judge will be made not more often than once in one hundred times) involve a substantial right of the landowner. In such cases the proposed draft of subdivision (e) which I sent you would nevertheless seem to protect the landowner. While it is true that under the proposal neither leave of court nor consent is required in advance, the plaintiff is required to serve notice of the filing upon the parties affected thereby, and at least one copy of the amendment is required to be furnished to the clerk for the use of the defendants. Any party affected thereby is given the same time to answer, if he believes an answer necessary, as he is given to answer the original complaint. Moreover, although under the proposal the amendment would be made as of course, there would seem to be no question that any party after receiving notice of the filing of the amendment could appear, move to have it stricken and secure

National Press Bldg. Washington 540 No. Michigan Ave. Chicago The MASTER REPORTING COMPANY, Inc. Law Stenography • Conventions • General Reporting 51 Madison Ave. New York 1370 Ontario Street Cleveland

adjudication of any right prejudiced by the amendment.

"When one considers the numerous defendants involved in an ordinary condemnation proceeding, the experience of this Division that at least three-fourths of all amendments relate to simple matters of description or other formal matters, and the fact that the defendants are not deprived of their day in court in any event, I feel that the right to amend as of course at any time before compensation is ascertained and paid is quite reasonable. The provisions of Rule 15 would, on the other hand, cast a great burden upon the plaintiff and the court, which I believe is unwarranted. In the event, however, that the Committee concludes that the determinative time should be put forward, I suggest that the time of trial on the issue of compensation be used. I am unable to suggest any earlier time without going back to Rule 15, and if some compromise is made, the time of trial would be, I think, the most reasonable point to select.

"With kind regards, I am

"Sincerely,

"Norman M. Littell

"Assistant Attorney General"

DEAN MORGAN: It seems to me that you would accomplish their objective if you provided that the notice of amendment should be served upon the parties as they do here, provided the amendment should not go into effect until a certain

National Press Bldg. Washington 540 No. Michigan Ave. Chicago The MASTER REPORTING COMPANY, Inc. Law Stenography • Conventions • General Reporting 51 Madison Ave. New York 1370 Ontario Street Cleveland

time thereafter, in which time the parties would have a chance to appear and object.

MR. DODGE: All we are afraid of is that by the amendment they will in effect dismiss part of the case.

DEAN MORGAN: Partly that, and partly affect the interests of the landowner.

THE ACTING CHAIRMAN: Of course, you want to have in mind that this may be very often and of great interest to the landowner, and you don't want to stop that.

DEAN MORGAN: After two months.

THE ACTING CHAIRMAN: As you know, nothing is going to stop the War Department, and Littell has to do what he is told, or he isn't doing the job.

Their practice, as I see it and as Littell more or less indicates, is that the War Department says, "We have to have this big tract," and then they file the formal taking. It is taken within a few hours. Littell has a record he is very proud of, of the time when the Government takes title. I have acted as district judge and have signed some of those orders. The first thing the property owner may know is that the Government has the property. But in a sense nothing has happened yet. That is on paper.

Then, the War Department often finds that it doesn't need all that it has claimed. Then they start a process of withdrawing.

National Press Bldg. Washington 540 No. Michigan Ave. Chicago The MASTER REPORTING COMPANY, Inc. Law Stenography • Conventions • General Reporting 51 Madison Ave. New York 1370 Ontario Street Cleveland

National Press Bldg. Washington 540 No. Michigan Ave. Chicago The MASTER REPORTING COMPANY, Inc. Law Stenography • Conventions • General Reporting 51 Madison Ave. New York 1370 Ontario Street Cleveland

It isn't going to do us any good to sit here and say the War Department ought not to do that way. They are just going to, as we know, and if we push them further, the War Department will be worse, I think. I mean, the War Department isn't going to be hampered, and if it is going to sacrifice the property owner more to grab and keep, it will. Therefore, we have to deal with them in reality somewhat, and we want to have it some way that when Littell works it out and can relieve some property owner from some details of it or perhaps relieve him altogether, he can do it, by all means.

MR. DODGE: If the other fellow agrees. Suppose that the Government has taken the land for one year, has kept the farmer from raising any crops on it and from doing anything with it, and then after that year has expired, by amendment seeks to discontinue as to three-quarters of the land, the use of which the owner has been deprived. That is in effect a dismissal after it has caused damage.

THE ACTING CHAIRMAN: Of course, I would agree that they certainly ought to pay, but isn't that the other point? Isn't that the matter of the dismissal rule that we have been worrying about?

MR. DODGE: That is what we are afraid of, really, here. Suppose we should add to the words they propose: "provided, however, that no amendment shall have the effect of a dismissal which would not be permitted under Rule 8," or

whatever it is.

THE ACTING CHAIRMAN: That, I should think, would be the idea. Isn't that it, Mr. Hammond?

MR. HAMMOND: Something like that.

DEAN MORGAN: That is it.

MR. LEMANN: If they come in and amend it at any time as they propose before compensation has been paid, the case has really already been tried, hasn't it, and the compensation fixed. Logically, they could come in and say, "We didn't object to certain easements originally." Then they change their mind after compensation has been fixed, and they say, "No, we can't have these telegraph lines, we can't have these drainage ditches, we can't have oil wells on the property. We find we have to get rid of them." So they amend then to take more than they originally proposed to take. If you adopted their language, they could do that, I suppose, even after compensation had been fixed. Yet, it wouldn't make any sense. The court would then have to say, "You will have to change that compensation because you are taking more," wouldn't he? You would have to have another trial.

MR. DODGE: Another trial, yes.

MR. LEMANN: I wonder whether that will work in logically in this proposed language.

JUDGE DOBIE: I rather doubt it.

MR. LEMANN: Didn't you cover that in your amendment

National Press Bldg. Washington 540 No. Michigan Ave. Chicago The MASTER REPORTING COMPANY, Inc. Law Stenography • Conventions • General Reporting 51 Madison Ave. New York 1370 Ontario Street Cleveland

about taking more property? I wasn't sure that I followed all of your counter-suggestion.

JUDGE DOBIE: Monte, I rather doubt, from what they said here and a good deal that they said before us in our Judicial Conference in North Carolina and from that letter, that what they would normally do would be to take as much as they started out to take. They are pretty likely to say, "We want the whole thing," and then the War Department may say, "We don't want all of it."

MR. LEMANN: But the other thing might happen.

JUDGE DOBIE: Of course it might. I want to do anything we can to expedite these things, because we have a great many of them in our Circuit. Of course, in Virginia, around Norfolk, there have been fabulous numbers of them, up, I think, into the thousands, and I want to do anything I can to make this thing easy and expeditious. But I have the same feeling that I think most of us have, that we ought not to allow the Government to go ahead and seize a man's property, have the case tried, compensation determined, and have the use of it, and then before compensation is paid, to say, "We don't want this man's property" and have a right to amend as a matter of course. That is what I am afraid of.

MR. DODGE: That ties in with the provisions that we are coming to later.

JUDGE DOBIE: If these were formal amendments, I

National Press Bldg. Washington 540 No. Michigan Ave. Chicago The MASTER REPORTING COMPANY, Inc. Law Stenography • Conventions • General Reporting 51 Madison Ave. New York 1370 Ontario Street Cleveland

National Press Bldg. Washington 540 No. Michigan Ave. Chicago The MASTER REPORTING COMPANY, Inc. Law Stenography • Conventions • General Reporting 51 Madison Ave. New York 1370 Ontario Street Cleveland

wouldn't object; but if they are substance, I think it is really going quite far.

DEAN MORGAN: How about this suggestion of Mr. Littell's that they can make this amendment at any time before trial as to the amount of compensation?

MR. LEMANN: That would cover the case I put.

DEAN MORGAN: Then say, "provided that they shall not amend so as to dismiss."

SENATOR LOFTIN: Suppose they kept it for a year and came on for trial, and on the day of the trial they dismissed as to half of the property.

DEAN MORGAN: We say, adding Mr. Dodge's statement, too, that it should not operate to be a dismissal, you see; both those things: time of trial and then preventing the dismissal.

SENATOR LOFTIN: I am in favor of anything that will protect the property owner in situations of that kind.

MR. DODGE: He is the fellow we have to look after here.

SENATOR LOFTIN: Yes.

MR. DODGE: Nobody is representing him, except our subcommittee.

THE ACTING CHAIRMAN: That, of course, is true, but we don't want to be too theoretical, so that we make him worse off.

MR. DODGE: Oh, no.

THE ACTING CHAIRMAN: I mean the war is going forward, and we may get him just turned down. I should think this is all right, only I wonder about the trial.

DEAN MORGAN: He said trial of the question of compensation.

MR. HAMMOND: Here are his exact words: "I suggest that the time of trial on the issue of compensation be used."

THE ACTING CHAIRMAN: Still, I was going to say, trial is always a bit indefinite.

MR. HAMMOND: Yes, I think so.

THE ACTING CHAIRMAN: I don't see why there it shouldn't be the judgment fixing the compensation.

DEAN MORGAN: Oh, no.

THE ACTING CHAIRMAN: Why not?

PROFESSOR CHERRY: They will wait and see what the verdict is. Then if they don't like it, they will amend it all out of whack.

THE ACTING CHAIRMAN: That goes back a good deal to the other question of dismissal that they have made. If there is no appropriation, what are they going to do? And what are we going to do, too?

PROFESSOR CHERRY: You can't do anything, but, on the other hand, if there isn't appropriation, what would they be allowed to do then?

National Press Bldg. Washington · 540 No. Michigan Ave. Chicago · The MASTER REPORTING COMPANY, Inc. Law Stenography • Conventions • General Reporting · 51 Madison Ave. New York · 1370 Ontario Street Cleveland

MR. DODGE: Why should we give him more than he is willing to take? He is willing to take the beginning of the trial on the issue of compensation.

THE ACTING CHAIRMAN: Of course, I think it has to be that. It has to be what Mr. Dodge says. If you don't like the suggestion I just made, it has to be the opening of the trial or the beginning of the trial.

DEAN MORGAN: The beginning of trial is what you mean.

MR. DODGE: With the proviso that nothing should operate for discontinuance except as provided in the later rule.

DEAN MORGAN: Yes.

MR. DODGE: That ought to satisfy them.

MR. HAMMOND: You say the beginning of trial. Maybe something might come up in the testimony, and they might want to amend before--

PROFESSOR CHERRY (Interposing): You are right in court then.

DEAN MORGAN: You see, they are in trial in court, and there is no trouble about it at all.

MR. DODGE: Weren't his words "the beginning of the trial" or "before the trial"?

MR. HAMMOND: "In the event, however, that the Committee concludes that the determinative time should be put forward, I suggest that the time of trial on the issue of compensation be used."

National Press Bldg. Washington 540 No. Michigan Ave. Chicago The MASTER REPORTING COMPANY, Inc. Law Stenography • Conventions • General Reporting 51 Madison Ave. New York 1370 Ontario Street Cleveland

MR. DODGE: Before the trial. I move that we accept those words, with the proviso that no amendment should operate as a discontinuance which would not be permitted under the later rule.

DEAN MORGAN: Second the motion.

JUDGE DOBIE: That adopts the trial?

MR. DODGE: The trial.

PROFESSOR SUNDERLAND: The beginning of trial.

MR. DODGE: "Before the trial" would mean before the beginning of the trial, wouldn't it?

MR. HAMMOND: May I get the exact words on that?

THE ACTING CHAIRMAN: You had better come back to this. Mr. Dodge's motion was to accept Mr. Littell's words. You had better read his words again.

MR. HAMMOND: Yes, I know.

MR. DODGE: Before the time of the trial.

THE ACTING CHAIRMAN: That is a little modification of his words, isn't it?

MR. DODGE: Isn't that what he said? Before the time of the trial?

MR. HAMMOND: "In the event .... that the determinative time should be put forward, I suggest that the time of trial on the issue of compensation be used."

MR. DODGE: Time of trial.

MR. LEMANN: On the issue of compensation. There might

The MASTER REPORTING COMPANY, Inc. Law Stenography • Conventions • General Reporting
National Press Bldg. Washington 540 No. Michigan Ave. Chicago 51 Madison Ave. New York 1370 Ontario Street Cleveland

1370 Ontario Street Cleveland 51 Madison Ave. New York The MASTER REPORTING COMPANY, Inc. Law Stenography • Conventions • General Reporting 540 No. Michigan Ave. Chicago National Press Bldg. Washington

be some other.

THE ACTING CHAIRMAN: We say "before the time". Maybe they are the same thing. Let's be clear which we are going to say.

MR. DODGE: He is going to substitute for "final judgment and payment of the award" the "time of trial". "Before" is in there anyway; the word "before" or "until".

MR. LEMANN: Time of trial on the issue of compensation.

SENATOR LOFTIN: "Before" is already in there.

MR. LEMANN: You are going to add to that ....?

MR. DODGE: "Provided, however ...."

THE ACTING CHAIRMAN: I will state it. See if I have it right. Mr. Dodge moves in line 98 of the October draft, after the word "before", that there be inserted "the time of trial of the issue of compensation."

MR. DODGE: "provided, however ...."

THE ACTING CHAIRMAN: Don't we usually say "except"?

PROFESSOR CHERRY: Or "but".

THE ACTING CHAIRMAN: "except that no judgment of dismissal shall be made contrary to the provisions of subdivision (h)".

MR. DODGE: "except that no amendment should be made which will have the effect of dismissal contrary to the provisions of subdivision (h)".

THE ACTING CHAIRMAN: All right. Is there any further discussion?

MR. LEMANN: In discussing it, I wondered whether the language suggested for dismissal could be used. On the last page of Major Tolman's last memorandum, of February 25, 1944, he says: "The subcommittee chairman submits another draft which adopts Mr. Hammond's ideas with some modifications of phraseology. It reads as follows:

"'(1) On Motion of Plaintiff. If the plaintiff desires to dismiss a condemnation action as to all or any of the property, he shall serve on the defendants whose interest will be affected thereby, and not in default, a motion to dismiss. The plaintiff shall not be entitled to dismiss as to any property if possession has been taken, whether actual or by implication of law. ....'"

As I read that, I wondered if that could be used. You pulled it in--

MR. DODGE (Interposing): By reference.

MR. LEMANN: --by reference. I wondered if you couldn't take it bodily as the test for amendments also.

MR. DODGE: I think we had better refer to the rule as we are later going to adopt it.

MR. LEMANN: Only write in the same words.

MR. HAMMOND: That is what I suggested, using my draft, and not Major Tolman's. The way I had it was this.

The MASTER REPORTING COMPANY, Inc. Law Stenography • Conventions • General Reporting
1370 Ontario Street Cleveland
51 Madison Ave. New York
540 No. Michigan Ave. Chicago
National Press Bldg. Washington

MR. LEMANN: You are talking about amendments now?

MR. HAMMOND: Yes. I would add: "but the plaintiff may not amend the complaint so as to exclude from the action anything as to which there has been a taking under the condemnation statute used or as to which there has been an actual taking."

THE ACTING CHAIRMAN: Mr. Hammond, I was a little worried about that first alternative, "as to which there has been a taking under the condemnation statute used". Doesn't that mean formal entry of taking just a whole tract? Doesn't that defeat--

DEAN MORGAN (Interposing): It is a thing we have to discuss, I suppose, Charles, under dismissal, and that is why I think it is a perfectly good thing to refer to (h).

MR. DODGE: You have dismissal by consent in there, too.

MR. HAMMOND: Let's have Mr. Dodge's wording there again.

THE ACTING CHAIRMAN: Mr. Oglebay says he has it. Suppose you read it.

MR. OGLEBAY: I understand that the motion was to add after the word "before" in line 98, the following words: "time of trial of the issue of compensation, except that no amendment shall be made which has the effect of a dismissal under subdivision (h)."

National Press Bldg. Washington 540 No. Michigan Ave. Chicago The MASTER REPORTING COMPANY, Inc. Law Stenography • Conventions • General Reporting 51 Madison Ave. New York 1370 Ontario Street Cleveland

THE ACTING CHAIRMAN: As a matter of wording, "which has the effect of a dismissal contrary to subdivision (h)."

MR. DODGE: That is what I meant.

DEAN MORGAN: That is what you said.

MR. LEMANN: "which would result in a dismissal not permitted by subdivision (h)."

THE ACTING CHAIRMAN: That is better.

MR. HAMMOND: "except that no amendment shall be made which will result in a dismissal not permitted under subdivision (h)."

DEAN MORGAN: That is right; that is the thing.

JUDGE DOBIE: That sounds all right, I think.

MR. LEMANN: This applies to "The plaintiff may as a matter of course and without order of court amend the complaint at any time".

DEAN MORGAN: That is right.

MR. LEMANN: Is it quite plain that under the rules otherwise they can amend at other times with an order of the court?

DEAN MORGAN: By 15, yes.

MR. LEMANN: I think that is plain.

DEAN MORGAN: Rule 15 makes that.

THE ACTING CHAIRMAN: Do you think Rule 15 would cover? Suppose it is held that the original taking is a final judgment, would Rule 15 still apply?

National Press Bldg. Washington 540 No. Michigan Ave. Chicago The MASTER REPORTING COMPANY, Inc. Law Stenography • Conventions • General Reporting 51 Madison Ave. New York 1370 Ontario Street Cleveland

National Press Bldg. Washington · 540 No. Michigan Ave. Chicago · The MASTER REPORTING COMPANY, Inc. Law Stenography • Conventions • General Reporting · 51 Madison Ave. New York · 1370 Ontario Street Cleveland

DEAN MORGAN: It says: "Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires."

JUDGE DOBIE: Any time by leave of court, as I understand it.

MR. DODGE: That is right.

THE ACTING CHAIRMAN: This question of judgment comes in. I think that is probably all right. Nothing is said about judgment in (a), but look at (b), which says that a certain type of amendment (in the second sentence) can be made "even after judgment".

DEAN MORGAN: Yes.

THE ACTING CHAIRMAN: There might be an implication that under (a) the amendment is not to be made even after judgment. I don't know. I just throw that out. I suppose that wouldn't affect Mr. Dodge's immediate motion, anyway.

DEAN MORGAN: I should think that would be an _a fortiori_ thing, Charlie. If you can amend as of course at any time, and the judgment of taking is before the amendment, of course, obviously, you can get an amendment with leave of court at the trial.

THE ACTING CHAIRMAN: I should think so. Are you ready for the question on Mr. Dodge's motion?

SENATOR LOFTIN: Question.

THE ACTING CHAIRMAN: All those in favor say "aye"; those opposed. So voted. (Carried)

MR. HAMMOND: The next amendment is 13, lines 98 to 100, and that is just a rephrasing of that.

DEAN MORGAN: It makes it clearer.

MR. HAMMOND: It is to make it clear and to take care of that business where under the original rule we didn't have any notice to a party who was in default. Mr. Mitchell suggested, suppose they make an amendment whereby they take some more of his property. He should have a notice. I think that clears it up. You see, both the ones that are in default and the ones that are not in default will get notice, in accordance with the rule.

DEAN MORGAN: I think that is all right; yes.

MR. HAMMOND: Department of Justice Amendment B, lines 102 to 104. That is to strike that sentence and to insert another sentence. That is a new suggestion. I think it is quite unobjectionable, but it is also unnecessary. The real change is to add "in the form and manner and with the same effect as provided in subdivision (d) of this rule."

MR. DODGE: Which would be implied anyway.

MR. HAMMOND: Yes.

MR. DODGE: That is harmless.

MR. HAMMOND: But it is perfectly all right.

DEAN MORGAN: I don't see any objection to that, if

National Press Bldg. Washington 540 No. Michigan Ave. Chicago The MASTER REPORTING COMPANY, Inc. Law Stenography • Conventions • General Reporting 51 Madison Ave. New York 1370 Ontario Street Cleveland

they want it.

MR. HAMMOND: I don't, either.

THE ACTING CHAIRMAN: All right, then; go ahead.

MR. HAMMOND: Amendment No. 14, lines 108 and 109. Strike the words "abate the action or".

DEAN MORGAN: Why?

MR. HAMMOND: Because the condemnation action doesn't abate.

DEAN MORGAN: Well, that is just assuming that it doesn't abate. Why wouldn't it abate? If they named a particular party, if they were trying to get his interest, and he died, if you apply the common law rule the action would abate as to him, and you wouldn't have a substitution of his heirs or anything of the sort. It seems to me that they are just inviting trouble by striking "abate the action".

MR. LEMANN: It is the idea that it is proceeding in rem against the property.

DEAN MORGAN: That may be the notion, but it isn't an admiralty proceeding. This isn't like an admiralty proceeding.

MR. LEMANN: No, but it is a proceeding to take property. It doesn't make any difference who owns the property.

MR. HAMMOND: That is the point, Mr. Lemann.

MR. LEMANN: The Government is going to take the property, and it doesn't care who owns it--dead people or crazy

National Press Bldg. Washington 540 No. Michigan Ave. Chicago The MASTER REPORTING COMPANY, Inc. Law Stenography • Conventions • General Reporting 51 Madison Ave. New York 1370 Ontario Street Cleveland

people. It isn't a proceeding _in personam_, where it naturally would abate if the fellow you are suing died. I think that is their point.

DEAN MORGAN: I think it is, but I think it is a debatable point.

MR. LEMANN: Is it proper for a distinguished scholastic committee of professors, eminent practitioners, and judges to use the word "abate" in a proceeding of this character?

MR. HAMMOND: That is what I thought. I am guilty of this suggestion.

MR. LEMANN: If the professors in pleading are willing to use the word "abate," who am I to object?

JUDGE DOBIE: I think Littell made that very clear, that it is the philosophy of these actions that they are really _in rem_, that they ought not to abate when a person dies, and that really comes into the picture when the question of compensation comes up.

MR. LEMANN: They are really _in rem_.

DEAN MORGAN: It depends on what you mean by _in rem_.

PROFESSOR CHERRY: Why shouldn't the words stay in? If they are unnecessary, they are unnecessary. It expresses what we think the law is or should be.

MR. HAMMOND: I don't think the Department would have any objection if they stayed in.

National Press Bldg. Washington — 540 No. Michigan Ave. Chicago — The MASTER REPORTING COMPANY, Inc. Law Stenography • Conventions • General Reporting — 51 Madison Ave. New York — 1370 Ontario Street Cleveland

DEAN MORGAN: I don't care whether you take it out, as a matter of fact, because you can't require any other person to be substituted as a party. That settles it.

THE ACTING CHAIRMAN: Mr. Hammond pleads guilty.

MR. HAMMOND: I am guilty.

DEAN MORGAN: If he wants an artistic job done, I haven't any objection.

THE ACTING CHAIRMAN: What is happening, anyway?

DEAN MORGAN: Let the amendment go as far as I am concerned. I just wanted to know why it was, that is all.

MR. HAMMOND: The next one is on (g)(1), Trial, By Jury. The first amendment is No. 15, lines 113 and 114. Strike the words: ", and may be withdrawn by any party by filing a notice of withdrawal". In lieu of that, turn to Amendment No. 18, line 118, and you insert there a new sentence reading: "A party may withdraw his demand as to any lot, parcel or tract by stipulation of the parties affected thereby who are not in default or by order of court."

MR. LEMANN: That makes it a little bother to provide for an order of court where people are in default. Is that the only effect of the change?

MR. HAMMOND: This matter arose at the last meeting by the suggestion that, under the rule as it read, the Government might demand a jury trial and then withdraw it, when the landowner, relying on the Government's demand, hadn't made a

National Press Bldg. Washington 540 No. Michigan Ave. Chicago The MASTER REPORTING COMPANY, Inc. Law Stenography • Conventions • General Reporting 51 Madison Ave. New York 1370 Ontario Street Cleveland

demand.

MR. LEMANN: I see.

MR. HAMMOND: In our general rules we had a provision to take care of that, which required in such a case the consent of all the parties, you see.

MR. LEMANN: This requires a stipulation instead of a notice.

MR. HAMMOND: This requires a stipulation or an order of court. This was worked out with Mr. Tolman. I rather felt that the order of court ought to be upon motion and notice and that we ought expressly to say so. I didn't see any reason that it shouldn't be given, but there is the danger, if you don't say "upon motion and notice," that it might be an ex parte order, for which no notice is required under our general rules.

Do you see what I mean, Mr. Lemann? Do I make that clear?

DEAN MORGAN: The idea is that the party who has claimed the jury can't withdraw it without the consent of the other party.

MR. DODGE: You mean, if the other party has claimed the jury, you continue to have the jury trial.

DEAN MORGAN: Yes, that is it.

MR. LEMANN: If the Government claimed the jury, you might not claim it because, you say, "The Government has

National Press Bldg. Washington 540 No. Michigan Ave. Chicago The MASTER REPORTING COMPANY, Inc. Law Stenography • Conventions • General Reporting 51 Madison Ave. New York 1370 Ontario Street Cleveland

claimed it, so I didn't have to claim it." Then the Government comes along and says, "We've changed our minds, and we don't want the jury," and you might lose it under the original draft because you didn't originally claim it. Under this amendment, it would take your consent or an order of court.

MR. DODGE: And I might have protected myself against difficulty by also claiming one. We have that all the time in Massachusetts.

DEAN MORGAN: They always double-claim?

MR. DODGE: Each party claims a jury, so the other fellow's waiver of jury trial won't affect him. It really isn't very important, because a fellow is already protected. If he really wants a jury trial, he claims it.

MR. HAMMOND: They said that adding the words "upon motion and notice" was not necessary, and I think Mr. Tolman rather agreed with them, because he said the court would always protect the other party if they went to get an order of court to withdraw it anyway.

MR. DODGE: To protect a party who hasn't taken the trouble to claim a jury trial but who now claims that he wants it, who has relied upon the fact that somebody else has claimed it. It isn't very important.

PROFESSOR CHERRY: We have protected the parties generally in our Rule 38. "A demand for trial by jury made as herein provided may not be withdrawn without the consent of the

1370 Ontario Street Cleveland
51 Madison Ave. New York
The MASTER REPORTING COMPANY, Inc. Law Stenography • Conventions • General Reporting
540 No. Michigan Ave. Chicago
National Press Bldg. Washington

parties."

MR. LEMANN: This puts that in.

MR. DODGE: Is that in our old rules?

PROFESSOR CHERRY: Yes; for that very reason.

MR. DODGE: Just to protect the parties.

MR. LEMANN: We have to protect the "poor oafs," that is all. Some of us are "poor oafs" ourselves now and then.

PROFESSOR CHERRY: I think in a good many states it is true that if one party makes the demand, that is that.

MR. LEMANN: This is all right, anyhow. I see no objection to this amendment, Mr. Hammond.

MR. HAMMOND: I have just that slight one as to whether we should add "upon motion and notice". Here is what I wrote on that.

MR. DODGE: What is the other rule?

PROFESSOR CHERRY: Rule 38(d).

MR. HAMMOND: I am reading what I said about "upon motion and notice".

"A party should be given notice of the withdrawal by his opponent of a demand for jury trial because he may have relied on that demand and not have demanded the jury trial himself. Rule 5(a), which provides for service of motions, excepts therefrom motions which may be heard <u>ex parte</u>; and Rule 6(d), which provides for service of motion and notice of hearing thereof not later than five days before the time

1370 Ontario Street Cleveland
51 Madison Ave. New York
The MASTER REPORTING COMPANY, Inc. Law Stenography • Conventions • General Reporting
540 No. Michigan Ave. Chicago
National Press Bldg. Washington

specified for the hearing, unless a different time is fixed by the rules or by order of the court, excepts therefrom motions which may be heard ex parte. In view of the fact that subdivision (g) gives any party the right to demand a jury trial, a possible and, it seems to me, reasonable interpretation of that provision would be that a party must himself demand it or else lose the right to it, and his opponent's demand for a jury trial gives him no right to one. Therefore, having lost the right to demand one himself, and having acquired no right to one by virtue of the fact that his opponent has demanded one, the opponent's motion to withdraw his demand is one that may be heard ex parte, and he is not entitled to have a copy of the motion served upon him under Rules 5(a) and 6(d) or to any notice of hearing on the motion under Rule 6(d)."

MR. LEMANN: Why not put in "upon motion and notice"? I don't see any objection to it.

MR. DODGE: We haven't that in our regular rule on the subject.

MR. LEMANN: We haven't any order of court in there.

DEAN MORGAN: No, but, you see, in the non-condemnation cases the party has the right to a trial by jury, and the court can't by order deprive him of it. In condemnation cases, he doesn't have any right to trial by jury.

MR. DODGE: He doesn't have a right unless he demands it.

National Press Bldg. Washington 540 No. Michigan Ave. Chicago The MASTER REPORTING COMPANY, Inc. Law Stenography • Conventions • General Reporting 51 Madison Ave. New York 1370 Ontario Street Cleveland

DEAN MORGAN: I know; but I mean he doesn't have any constitutional right to trial by jury, so the court could order this to be tried without a jury, even though he has demanded it.

MR. LEMANN: In cases that were not common law actions he wouldn't have a right to trial by jury, either.

DEAN MORGAN: But these are not common law actions.

MR. LEMANN: I mean general equity suits covered by the old rule.

DEAN MORGAN: You can't get a trial by jury in an equity case, anyway, under our rules.

MR. LEMANN: Not now. I mean previously he wouldn't have had any right to trial by jury.

DEAN MORGAN: Certainly not, and he wouldn't have had a right to trial by jury here. You are giving him a right to trial by jury in this case, and then you are providing that it might be taken away from him, Mr. Hammond says, under certain circumstances. Do you want it taken away from him without giving him a hearing? That is really the question.

MR. LEMANN: I say we don't, do we?

DEAN MORGAN: I don't think we do.

MR. LEMANN: That is why I say, why not put it in there. Major Tolman, I understand, reasoned, "Well, the judge is not going to do it ex parte."

MR. HAMMOND: Yes.

National Press Bldg. Washington · 540 No. Michigan Ave. Chicago · The MASTER REPORTING COMPANY, Inc. Law Stenography • Conventions • General Reporting · 51 Madison Ave. New York · 1370 Ontario Street Cleveland

MR. LEMANN: The only question is, Shall we put a restraint on the judge who might do it ex parte? I say, why not put in the restraint?

THE ACTING CHAIRMAN: Perhaps I misunderstood this. I don't suppose that that is what this meant. A party may withdraw his demand by stipulation or by order of court. Isn't that it?

MR. LEMANN: Yes, but the point is that the order of court should not be entered ex parte; that the Government, for example, shouldn't be able to go to the judge and say, "We changed our mind. We don't want a jury. We are asking an order withdrawing the demand for the jury," and the judge say, "O.K. Hand me a pen." The idea is that the judge should not sign the order without saying, "Let's hear what the other fellow says about it. He may want the jury."

THE ACTING CHAIRMAN: Why not? Still, if I understand it, the Government apparently is the other party, and the only other party as to this--

DEAN MORGAN (Interposing): No.

THE ACTING CHAIRMAN: Why not?

DEAN MORGAN: The Government isn't the other party, Charlie. The landowner is the other party. The Government, we will say, has demanded a jury trial, and the landowner, relying upon that, as in our general rule he has a right to, doesn't demand a jury trial. Then the Government afterwards says, "We

National Press Bldg. Washington — 540 No. Michigan Ave. Chicago — The MASTER REPORTING COMPANY, Inc. Law Stenography • Conventions • General Reporting — 51 Madison Ave. New York — 1370 Ontario Street Cleveland

withdraw our demand." They can't get a stipulation or don't want to get a stipulation. They get an order of the court, without letting the defendant have a chance to be heard on it.

THE ACTING CHAIRMAN: Wait a minute. In the first place, anybody can withdraw it when they are not in default, I take it.

DEAN MORGAN: No; only by stipulation.

THE ACTING CHAIRMAN: Yes.

DEAN MORGAN: That is all right; if you get the stipulation of the other party, that is O.K.

THE ACTING CHAIRMAN: Yes.

DEAN MORGAN: But can he get it by an ex parte order, without stipulation? That is the only question, Charles.

THE ACTING CHAIRMAN: I see what you mean. Of course that presupposes that the Government has demanded a trial by jury.

DEAN MORGAN: They say you can do it by endorsing it on the complaint and, as I understand it, the Government wanted trial by jury in these cases.

PROFESSOR CHERRY: In the TVA cases especially they wanted jury trial.

MR. LEMANN: I suppose you might conceive that the Government originally might not have claimed it, that the defendant claimed it, and then that the defendant changed his mind, and the Government might say, "Well, we don't want you to

National Press Bldg. Washington — 540 No. Michigan Ave. Chicago — The MASTER REPORTING COMPANY, Inc. Law Stenography • Conventions • General Reporting — 51 Madison Ave. New York — 1370 Ontario Street Cleveland

change your mind. We have a good reason that you shouldn't. We want to be heard before the judge orders it."

Where there is a refusal to execute a stipulation, I should think the judge ought to have a hearing, when he can get the parties.

MR. DODGE: Would you move to adopt Mr. Hammond's suggestion?

MR. LEMANN: Yes, I would say so. What about the people in default? Motion and notice?

DEAN MORGAN: People in default aren't entitled to jury anyhow, I should suppose.

MR. LEMANN: You say in the line before, "by stipulation of the parties affected thereby who are not in default".

DEAN MORGAN: Yes.

MR. DODGE: "or by order of court or upon motion and notice."

MR. LEMANN: You wouldn't want to say "upon motion and notice to parties not in default." Would that be necessary? You wouldn't want to give notice to parties in default.

DEAN MORGAN: No.

MR. LEMANN: I wondered, if you put in motion and notice, whether it might require notice. Is there a general provision that parties in default get no notices?

THE ACTING CHAIRMAN: This wouldn't mean to parties outside of the two parties who are faced off.

The MASTER REPORTING COMPANY, Inc. Law Stenography • Conventions • General Reporting
National Press Bldg. Washington
540 No. Michigan Ave. Chicago
51 Madison Ave. New York
1370 Ontario Street Cleveland

National Press Bldg. Washington · 540 No. Michigan Ave. Chicago · The MASTER REPORTING COMPANY, Inc. Law Stenography • Conventions • General Reporting · 51 Madison Ave. New York · 1370 Ontario Street Cleveland

MR. LEMANN: No.

THE ACTING CHAIRMAN: You don't want to make it so broad that they have to notify all the parties.

DEAN MORGAN: Oh Lord no. It ought not to be.

MR. DODGE: I move that we adopt Mr. Hammond's suggestion.

JUDGE DOBIE: I second the motion.

THE ACTING CHAIRMAN: You have heard the motion. Any further discussion? If not, all those in favor will say "aye"; those opposed. So voted. (Carried)

MR. HAMMOND: A question that comes up under this rule (there is no specific amendment in regard to it) is the question that was much discussed at the last meeting, as to whether we can abolish a court trial by rule of procedure. Mr. Mitchell, as you recall, very strongly felt that we could not do that by a rule of court, especially where there is an express provision in statute for a court trial. There are other members of the Committee who feel (I know Major Tolman does) that it is a matter of procedure and that we can do it. I believe that Judge Donworth feels the same way, and we have the other member of the subcommittee here. I don't know that you (to Judge Clark) have expressed your view on it.

Before I give you my own thought in regard to it, I should call your attention to the fact that the Lands Division has an office memorandum, which was distributed, discussing

this question, a very full and good memorandum on the subject, and their conclusion is that you can abolish the court trial by court rule.

DEAN MORGAN: Put it the other way: Grant a trial by jury, not abolish the court trial.

MR. HAMMOND: I think I should probably go back to Mr. Mitchell's idea that the Government had a right to a court trial.

DEAN MORGAN: But if the Government doesn't claim it, the Government doesn't want it.

MR. HAMMOND: But the thought that I had about it was that the Committee might save itself a lot of trouble in deciding this question if they would consider this question first: Suppose we assume that we have the power. Should we exercise it? Would it be good policy to promulgate a rule abrogating a statute which gives a trial by court of the issue of compensation? It seems to me, even if we decide we have the power, that we ought not to do it, because I think that Congress would not like it, and we would run into difficulties with these agencies (and there are just a few of them, really) that have that provision--the TVA particularly.

MR. LEMANN: How many are there?

MR. HAMMOND: The TVA and the District of Columbia.

MR. LEMANN: What is the provision? Who fixes the compensation? The judge, or the three commissioners, or

National Press Bldg. Washington — 540 No. Michigan Ave. Chicago — The MASTER REPORTING COMPANY, Inc. Law Stenography • Conventions • General Reporting — 51 Madison Ave. New York — 1370 Ontario Street Cleveland

National Press Bldg. Washington 540 No. Michigan Ave. Chicago The MASTER REPORTING COMPANY, Inc. Law Stenography • Conventions • General Reporting 51 Madison Ave. New York 1370 Ontario Street Cleveland

something like that?

MR. HAMMOND: They have commissioners in the TVA, and they are very well satisfied with them. In the District of Columbia they have two sets, one for Federal condemnations and the other for District of Columbia condemnations. I don't recall the details of it, but I think they have a small jury there to try those.

MR. DODGE: I think they have a jury of five.

Your suggestion is that at the beginning of line 111 we insert the words "Except where another method of trial is prescribed by statute"?

MR. HAMMOND: Yes.

MR. DODGE: "a party may demand a trial by jury".

MR. HAMMOND: Yes; except where a statute of the United States expressly provides for a different method of trial.

JUDGE DOBIE: The TVA have three commissioners. Then you have an appeal to a three-judge court, all three of whom may be district judges. Then you have an appeal to the circuit court of appeals, and in reviewing that, the circuit court of appeals is not bound by that finding at all. It goes into the whole thing de novo. We had one of those cases. It has been pending, I think, about four years now, and has been to the Supreme Court three times.

DEAN MORGAN: Why does the Lands Division want a

National Press Bldg. Washington 540 No. Michigan Ave. Chicago The MASTER REPORTING COMPANY, Inc. Law Stenography • Conventions • General Reporting 51 Madison Ave. New York 1370 Ontario Street Cleveland

jury trial?

MR. HAMMOND: Why do they want a jury trial?

DEAN MORGAN: Yes. I understood them, when they appeared here, to say they wanted a jury trial.

THE ACTING CHAIRMAN: It is the speed, as I recall it; the expedition.

MR. HAMMOND: That is one thing, and they have found that juries treat them--

DEAN MORGAN (Interposing): Better than commissioners.

MR. HAMMOND: --better than commissioners, on the whole, I think.

MR. LEMANN: It is the Government you are speaking of now?

MR. HAMMOND: Yes. They find that, on the whole, it is more satisfactory to have a trial by jury.

MR. DODGE: Does the Department of Justice want this change made which you now suggest?

MR. HAMMOND: They have no objection to it whatever.

MR. DODGE: Do they affirmatively ask for it?

MR. LEMANN: They don't ask for it.

MR. HAMMOND: No, they don't ask for it, but they have no objection to it. They don't care if we except the TVA and the District of Columbia.

MR. DODGE: What did Mr. Mitchell say about it? Did he think we should make that exception?

MR. HAMMOND: The one that I made?

MR. DODGE: Yes.

MR. HAMMOND: That has never been submitted to Mr. Mitchell. May I ask where you got that language that you first quoted?

MR. DODGE: I invented it.

MR. HAMMOND: It is practically the same that I had written out.

MR. LEMANN: Great minds!

THE ACTING CHAIRMAN: Mr. Hammond, there is a bill for a statute.

MR. HAMMOND: Yes. I should call attention to that. There is a bill pending in Congress now.

MR. LEMANN: There is a bill pending in Congress to do that?

MR. HAMMOND: Senate 919. It has passed the Senate and has been called up in the House, but it has been asked to be postponed. The Lands Division doesn't know for what reason. Have you seen that bill, Mr. Lemann? Everybody else is more or less familiar with it.

MR. LEMANN: No.

MR. HAMMOND: It makes certain exceptions and provides for a demand for jury trial of the issue of compensation in the cases not excepted.

MR. LEMANN: There are quite a few exceptions, aren't

National Press Bldg. Washington 540 No. Michigan Ave. Chicago The MASTER REPORTING COMPANY, Inc. Law Stenography • Conventions • General Reporting 51 Madison Ave. New York 1370 Ontario Street Cleveland

there?

THE ACTING CHAIRMAN: Is that going to cover the TVA case? Will that amend the TVA Act or supersede it?

MR. HAMMOND: No, the TVA is excepted.

THE ACTING CHAIRMAN: Oh, yes, I see.

MR. LEMANN: Line 11 is what I was looking at.

MR. DODGE: TVA is the only exception.

MR. HAMMOND: TVA and the District of Columbia are excepted.

THE ACTING CHAIRMAN: A statement here in the last memorandum of Major Tolman's is that the passage of that bill might make the question academic. In one sense it does make it academic, but in one sense it makes it more necessary. It makes it more necessary as to these things that they except.

MR. HAMMOND: Not only that, but this Act expires on December 31, although I understand there is a proposed amendment to change the last section to make it last as long as the war lasts.

MR. LEMANN: But it still would be temporary.

MR. HAMMOND: It is still temporary, yes.

MR. LEMANN: Then, we have two difficulties. One is that it is temporary, and two is that it does except the District of Columbia and the TVA, whereas if we pass our rule in the proposed form, we won't be excepting the District of Columbia and the TVA, will we?

National Press Bldg. Washington 540 No. Michigan Ave. Chicago The MASTER REPORTING COMPANY, Inc. Law Stenography • Conventions • General Reporting 51 Madison Ave. New York 1370 Ontario Street Cleveland

MR. HAMMOND: Yes, under Mr. Dodge's form.

MR. LEMANN: The way we have it here, before you and Mr. Dodge got busy, the way it is here, we would be overriding S. 919.

MR. HAMMOND: Yes.

MR. LEMANN: I hardly see how we could do that. Even though S. 919 is temporary, it shows that even temporarily whoever wrote this doesn't want to force a jury trial upon the District of Columbia or the TVA. Is S. 919 a Department of Justice project?

MR. HAMMOND: Yes, that was prepared by them.

MR. LEMANN: They evidently felt that the TVA and the District of Columbia would object to any provision which forced a jury trial.

MR. HAMMOND: Exactly so.

MR. LEMANN: So, although they had a war measure, they preserved their immunity from jury trial, and we would be coming along in peacetimes and forcing a jury trial upon those.

MR. DODGE: Treating it as a matter of practice.

THE ACTING CHAIRMAN: Yes. I should think that is all the more reason for having something in.

MR. LEMANN: If we are going to force it, it raises a very serious question of policy with me, of whether this group should undertake to force a jury trial in two cases where the Congress, even in wartime, wasn't prepared to force a jury

The MASTER REPORTING COMPANY, Inc. Law Stenography • Conventions • General Reporting
National Press Bldg. Washington
540 No. Michigan Ave. Chicago
51 Madison Ave. New York
1370 Ontario Street Cleveland

trial on them. Who are we to say, "Well, they can be forced to submit to a jury trial"?

MR. DODGE: Why not put in the words of exception at the beginning and let it go at that.

JUDGE DOBIE: I move that it be done. I agree with Mr. Lemann. I believe Congress would resent it very much if we stepped in here and tried to overrule a thing like the TVA.

MR. LEMANN: "Except as provided by a statute of the United States"?

THE ACTING CHAIRMAN: Mr. Hammond, can you suggest the language you had before?

MR. HAMMOND: Yes.

THE ACTING CHAIRMAN: Would you listen to this, please, so we will get it exact?

MR. HAMMOND: In line 111, after the heading "By Jury," insert at the beginning of the sentence: "Except where a statute of the United States expressly provides for a different method of trial,".

MR. DODGE: I move it.

JUDGE DOBIE: I second it.

PROFESSOR SUNDERLAND: It would be better to say "requires" rather than "provides for". It might provide for several.

MR. DODGE: "Provides for"? I think I would rather leave it "requires". If the Act of Congress permits the jury

National Press Bldg. Washington 540 No. Michigan Ave. Chicago The MASTER REPORTING COMPANY, Inc. Law Stenography • Conventions • General Reporting 51 Madison Ave. New York 1370 Ontario Street Cleveland

trial, we want to permit it.

DEAN MORGAN: That is right.

THE ACTING CHAIRMAN: "Except where a statute of the United States expressly requires a different method of trial"? Is that the way it is to stand?

MR. DODGE: We didn't have the word "expressly" in it.

MR. HAMMOND: Yes. I did.

JUDGE DOBIE: You didn't have "expressly".

MR. LEMANN: I think you had better take out "expressly".

MR. DODGE: Yes.

DEAN MORGAN: Just say "requires".

MR. LEMANN: It is just an adjective of emphasis.

MR. HAMMOND: It is more than that, Mr. Lemann.

MR. DODGE: You had the word "requires". We could say "either expressly or by implication requires", if we want to accept it.

MR. HAMMOND: I was thinking, you know, that they have these conformity acts, and the conformity act governs a lot of this, most of these condemnations, and we want to abolish that.

MR. DODGE: I see.

MR. HAMMOND: The word "expressly" is very important.

MR. LEMANN: Then you ought to put a note in, I think, referring to that, so people will not think that we use an

National Press Bldg. Washington 540 No. Michigan Ave. Chicago The MASTER REPORTING COMPANY, Inc. Law Stenography • Conventions • General Reporting 51 Madison Ave. New York 1370 Ontario Street Cleveland

adjective of emphasis without reason.

DEAN MORGAN: Did you say "expressly requires" or "expressly provides"?

MR. HAMMOND: I said "expressly provides for".

THE ACTING CHAIRMAN: All right, what is the motion going to be now?

DEAN MORGAN: "Requires" or "provides for"?

MR. LEMANN: Mr. Dodge made the point (I thought it was good) that it ought to be "requires", because if the statute permits several methods, there is no reason that we shouldn't permit a jury trial.

DEAN MORGAN: That is right. I think so.

JUDGE DOBIE: How about "expressly requires"?

MR. LEMANN: Yes; "expressly requires".

THE ACTING CHAIRMAN: All right, is that acceptable now? All those in favor say "aye"; opposed. So ordered. (Carried)

MR. HAMMOND: That brings us down to Dismissal of Action, and on that we have on page 3 of the amendments a draft which is labeled "Amendment No. 19." That is a draft prepared by Mr. Tolman in an effort to carry out the instructions of the Committee at the last meeting, taken from a reading of the transcript by him, and endeavoring to use the various phraseology that was used by the different members, and selecting the one that he thought represented the consensus of

The MASTER REPORTING COMPANY, Inc. Law Stenography • Conventions • General Reporting
National Press Bldg. Washington
540 No. Michigan Ave. Chicago
51 Madison Ave. New York
1370 Ontario Street Cleveland

of opinion. I rather think that Mr. Tolman has more or less abandoned that particular draft, because in the report of the subcommittee you will notice that he has a sort of redraft of my suggested amendment, which you will find on page 4, labeled "Hammond Amendment" to distinguish it.

MR. LEMANN: We have three drafts now, have we? Maybe four. On page 3 there is the committee draft, and on page 4 there is the Hammond Amendment. At the bottom of the page is the Department of Justice Amendment. Then in this latest communication, of February, we have the committee's final suggestion.

MR. HAMMOND: Just Mr. Tolman's. I don't think that has been approved by the other members of the subcommittee.

MR. LEMANN: It has their names, "Respectfully submitted."

MR. HAMMOND: But you will notice that they have never agreed on it.

THE ACTING CHAIRMAN: He says, "The subcommittee chairman submits another draft which adopts Mr. Hammond's ideas with some modifications of phraseology."

MR. LEMANN: I see. And then he puts the names of all the committee down. I get it.

THE ACTING CHAIRMAN: We thought this was all desirable information which should be brought to the attention of the Committee.

National Press Bldg. Washington 540 No. Michigan Ave. Chicago The MASTER REPORTING COMPANY, Inc. Law Stenography • Conventions • General Reporting 51 Madison Ave. New York 1370 Ontario Street Cleveland

MR. HAMMOND: And, unfortunately, there is another. I had to redraft my own.

MR. LEMANN: Still another?

MR. HAMMOND: I don't know whether you have it or not. If you haven't, I will give it to you. It is called a redraft of the amendment. It was sent to the members of the Advisory Committee in the letter dated January 27, 1944.

MR. LEMANN: I have that.

MR. HAMMOND: It is really just to correct a word in there. I don't know how you want to take this up. I don't know how much you have studied these drafts.

MR. LEMANN: What is the final point of difference between your draft and that of the Department of Justice?

MR. HAMMOND: Their draft doesn't take care of the very thing that the Committee thinks should be taken care of.

DEAN MORGAN: The Department of Justice want just what they said in the first place, practically.

MR. HAMMOND: Suppose I read you my criticism of the Department of Justice draft. In their letter of explanation of it, Mr. Littell says he thinks he has made quite a concession by the provision in there that they can't dismiss, provided possession has not been taken.

MR. LEMANN: His views are in Exhibit C, pages 1, 2, and 4, are they?

MR. HAMMOND: Yes. Do you want to read those over

National Press Bldg. Washington 540 No. Michigan Ave. Chicago The MASTER REPORTING COMPANY, Inc. Law Stenography • Conventions • General Reporting 51 Madison Ave. New York 1370 Ontario Street Cleveland

first?

MR. DODGE: Everybody agrees that this rule applies only where title has not passed. That is, we start with the assumption that the title has not passed. You say in your draft, "If the court finds that there has been no taking under the condemnation statute used and no actual taking ...." Just how are those to be correlated to the idea that we are talking about, a case where title hasn't passed. What kind of taking would there be except the taking of possession?

MR. LEMANN: He doesn't use the words "vesting of the title" in the redraft. That is in the Department of Justice's. He doesn't use it, as I understand it. You see, here is the Department of Justice's, and here is his (indicating).

MR. DODGE: Oh, yes. You didn't make that preliminary statement.

MR. LEMANN: He has no "as of right". You see, they have a provision "as of right", and he doesn't use that.

MR. DODGE: You say, "If there has been no taking under the condemnation statute used" (that would mean a taking of title) "and no actual taking", which would mean going into possession.

MR. HAMMOND: Yes. I was following the language in the Danforth case more or less. That was a Mississippi flood control proceeding, and they held in that case that there was

National Press Bldg. Washington 540 No. Michigan Ave. Chicago The MASTER REPORTING COMPANY, Inc. Law Stenography • Conventions • General Reporting 51 Madison Ave. New York 1370 Ontario Street Cleveland

no actual taking and therefore no interest could be allowed on the award, or something like that. There was some kind of question involved, and Mr. Justice Reed clearly indicated in that case that if there had been an actual taking--

MR. DODGE (Interposing): Of possession.

MR. HAMMOND: --compensation would have had to be paid. It seems that what they did there was to go into the property in connection with this flood control business, but the Court concluded that what they had done left the landowner in no worse position than he was before, that they had done things in there but that his property was just as well off as before, if not better than it was before they went in there.

I will read you the two excerpts from that opinion that I was following. He says:

"Unless the taking has occurred previously in actuality or by the statutory provision which fixes the time of taking by an event such as the filing of an action, we are of the view that the taking in a condemnation suit under this statute takes place upon the payment of the money award by the condemnor. No interest is due upon the award until taking. The condemnor may discontinue or abandon his effort."

Then, later on in the opinion he says:

"The Government could become liable for a taking in whole or in part, even without direct appropriation, by such construction as would put upon this land a burden actually

National Press Bldg. Washington 540 No. Michigan Ave. Chicago The MASTER REPORTING COMPANY, Inc. Law Stenography • Conventions • General Reporting 51 Madison Ave. New York 1370 Ontario Street Cleveland

experienced of caring for floods greater than it bore prior to the construction."

MR. DODGE: Your words are: "Where there has been no taking under the condemnation statute used and no actual taking." Do those go beyond words like this: "Where there has been no taking of title or possession"?

MR. LEMANN: They said "At any time prior to the vesting of the title" and also "provided possession has not been taken." That is in the Department of Justice's. It seems to me that they cover both points. You have possession; you don't say anything about title. You say possession has been taken, whether actual or by implication of law. If anything, they have more limitation, because they have all the possession taken. You could write in at the end of their language: "provided possession has not been taken, either actually or by implication of law", and if you added that to their words, you would have everything that is in your rule plus some language about the vesting of title.

MR. DODGE: Except that they haven't provided for determining compensation in the case.

MR. LEMANN: I was going to raise that question. The committee chairman says he submits Mr. Hammond's language with some modification, including the statement: "As to property so taken, just compensation shall be awarded in the condemnation action." The Department of Justice say they

National Press Bldg. Washington 540 No. Michigan Ave. Chicago The MASTER REPORTING COMPANY, Inc. Law Stenography • Conventions • General Reporting 51 Madison Ave. New York 1370 Ontario Street Cleveland

don't know just what you mean by "just compensation" in that connection.

MR. DODGE: They have to take a chance on that.

MR. LEMANN: That is right, but what I am wondering is whether that is the introduction of a point of substantive law, and what is the necessity for it?

MR. DODGE: It would prevent the necessity of bringing a new suit, that is all. We discussed that point a good deal at the last meeting.

PROFESSOR CHERRY: Yes.

MR. LEMANN: But they can't do it if they have taken possession under the limitation here; and if they haven't taken possession and if title hasn't vested, how would any compensation be due, Mr. Dodge? They can't dismiss if either of those things has happened. If none of them has happened, how can just compensation be due? They already have the limitations in as to when they can dismiss.

MR. DODGE: We are not talking about a dismissal if possession has been taken.

MR. LEMANN: No, we are not. They have excluded that. So I don't see, with these limitations, how you could get to the point of compensation. If you wanted to paint the lily, where it says "provided possession has not been taken", you could add "either actually or by implication of law", and it seems to me you would have every safeguard in their draft.

National Press Bldg. Washington · 540 No. Michigan Ave. Chicago · The MASTER REPORTING COMPANY, Inc. Law Stenography • Conventions • General Reporting · 51 Madison Ave. New York · 1370 Ontario Street Cleveland

Then they couldn't dismiss as of right if there had been either vesting of title or possession actually or by implication of law.

MR. HAMMOND: We want to go further than that, too. We don't want to allow the court to dismiss it without awarding just compensation.

MR. LEMANN: You mean the court could do it on its own motion? I don't get that.

DEAN MORGAN: The court couldn't, on motion, dismiss without awarding compensation.

MR. LEMANN: Under this, there would be no right to dismiss if title had vested or if possession had been taken.

DEAN MORGAN: No right to dismiss, but what about the discretion of the judge?

MR. DODGE: The court couldn't step in and dismiss an action.

DEAN MORGAN: But here he moves to dismiss, and the court says, "You may dismiss."

MR. DODGE: There is no provision about motion to dismiss.

MR. HAMMOND: Their argument is that our general rule, Rule 41(a)(2) will then come into play.

MR. LEMANN: "shall not be dismissed at the plaintiff's instance".

MR. HAMMOND: "except upon such terms".

National Press Bldg. Washington · 540 No. Michigan Ave. Chicago · The MASTER REPORTING COMPANY, Inc. Law Stenography • Conventions • General Reporting · 51 Madison Ave. New York · 1370 Ontario Street Cleveland

MR. LEMANN: "save upon order of the court and upon such terms and conditions as the court deems proper." We have to tell the court, "You must not dismiss without compensation"? The court says, "Yes, it is proper to dismiss it without compensation"? Is it thinkable that in a case where compensation ought to be given, the court would think it proper to dismiss without it? With all the doubts about the judges, I shouldn't assume that he would do anything like that. If he did, you could appeal.

MR. HAMMOND: They want an express statement in the rule that they can't--

MR. LEMANN (Interposing): Who is "they"?

MR. HAMMOND: --have a dismissal if there has been anything taken.

MR. LEMANN: You have it here, except, you say, you are afraid the judge will do it. You have a limitation in this language submitted that it can't be dismissed as of right if there has been possession taken.

MR. HAMMOND: That is as of right.

MR. LEMANN: How else would it be done? By permission of the court?

MR. HAMMOND: Yes.

MR. LEMANN: Then you are afraid that the court would give them permission, when possession had been taken, to dismiss it without compensation, that the court would think it

National Press Bldg. Washington 540 No. Michigan Ave. Chicago The MASTER REPORTING COMPANY, Inc. Law Stenography • Conventions • General Reporting 51 Madison Ave. New York 1370 Ontario Street Cleveland

proper to do that?

MR. HAMMOND: Yes; they do all the time.

PROFESSOR CHERRY: Their whole contention to us, Mr. Lemann, was that they couldn't retain it and--

MR. LEMANN (Interposing): You speak of "they."

PROFESSOR CHERRY: Mr. Littell and his associates.

MR. LEMANN: But he didn't want this just compensation provision in.

DEAN MORGAN: Of course he doesn't.

PROFESSOR CHERRY: For that very reason, that they are not entitled to it. If he has to go to the court and get permission, he still doesn't want any compensation.

MR. LEMANN: He can't dismiss under this draft if possession has been taken.

DEAN MORGAN: What draft?

PROFESSOR CHERRY: Without going to the court.

MR. LEMANN: They all do it.

DEAN MORGAN: That is as of right.

MR. LEMANN: What other situation is there in which they are going to do it? They are going to go to the court for permission, and you are afraid of the court; is that it? You have to tie some limitations on the judge.

MR. HAMMOND: That is it.

MR. LEMANN: That is the committee's fear.

MR. HAMMOND: Yes.

National Press Bldg. Washington 540 No. Michigan Ave. Chicago The MASTER REPORTING COMPANY, Inc. Law Stenography • Conventions • General Reporting 51 Madison Ave. New York 1370 Ontario Street Cleveland

MR. LEMANN: You are afraid that he will say, "No, I couldn't do it, but I will go to this judge and say, 'Judge, the rules wouldn't permit me to dismiss as of right because I have taken possession. Now, Judge, I want you to let me dismiss it after I have taken possession, so this fellow will get nothing.'" I can't imagine that a judge would do it. I can't imagine that he wouldn't be reversed. I can't imagine that constitutionally a fellow wouldn't be entitled to just compensation.

DEAN MORGAN: But he would be required to do it in another action. That is the whole point.

MR. DODGE: Mr. Hammond, you say judges are constantly doing it. After the Government has actually entered into possession and caused a lot of damage, are the judges dismissing the action without giving them anything?

MR. HAMMOND: Yes. They cite a case there, the most recent case where they very clearly did just exactly that thing. The court said, "You have to go to the Court of Claims. I admit you have suffered damage, but your remedy is in the Court of Claims." That is the thing that the Committee wanted to prevent.

MR. DODGE: That is where the remedy lies? If the Government, without any formal taking, has come on my land and done a lot of damage with a view to some prospective public improvement, I then have to go to the Court of Claims,

National Press Bldg. Washington 540 No. Michigan Ave. Chicago The MASTER REPORTING COMPANY, Inc. Law Stenography • Conventions • General Reporting 51 Madison Ave. New York 1370 Ontario Street Cleveland

ordinarily speaking?

DEAN MORGAN: Yes.

MR. HAMMOND: That is their position.

DEAN MORGAN: Surely. It is just as if the Government could come into any action.

MR. LEMANN: You have a remedy in the Court of Claims. The fear is that the judge is going to permit that, and you ought not to be sent to the Court of Claims.

MR. DODGE: Of course the thing ought to be disposed of by the pending action before any dismissal by order of the court is permitted.

PROFESSOR CHERRY: That is the point.

MR. LEMANN: Would they take possession without going to the court at all?

DEAN MORGAN: Yes.

MR. HAMMOND: Yes, they have, under the Second War Powers Act, and the First War Powers Act in the last war had a provision.

MR. LEMANN: Then you have to go to the Court of Claims, haven't you, and there is no pending action? That is what I asked you.

MR. HAMMOND: No pending action. Pardon me. Yes.

MR. LEMANN: They can go take your property.

PROFESSOR CHERRY: Then they have to start the action.

THE ACTING CHAIRMAN: I suppose that may happen. We

National Press Bldg. Washington 540 No. Michigan Ave. Chicago The MASTER REPORTING COMPANY, Inc. Law Stenography • Conventions • General Reporting 51 Madison Ave. New York 1370 Ontario Street Cleveland

had a case somewhat of that kind.

MR. LEMANN: I don't know.

THE ACTING CHAIRMAN: We had a case where the original taking excepted easements of telephone wires, and so on, and then actually they took down the telephone wires. The telephone company appealed in an eminent domain proceeding, and the district court held, and we affirmed, that there was no taking of it; that it was just a trespass, and they had to go to the Court of Claims.

MR. LEMANN: All the time I have clients whose ships they have taken. They are not going to bring a suit in wartime. They take the ships. They say, "We want the ship." I have clients in the ice business. They say, "We want your ice. We will take it, and we will tell you what we will pay you for it. If you don't like what we pay you for the ice and the ships, you sue us." That is happening all the time.

MR. HAMMOND: Surely.

MR. LEMANN: Constantly. It happened in the last war, when I was here in the Shipping Board. We took ships. We told the people what we would take and what we would give them for it, and if they didn't like it they could go to the Court of Claims. I didn't think it was terrible. I was on the Government's side then, and I am on the individual's side now. I don't see anything terrible about going to the Court of Claims when the Government comes in and takes property. That is what

National Press Bldg. Washington · 540 No. Michigan Ave. Chicago · The MASTER REPORTING COMPANY, Inc. Law Stenography • Conventions • General Reporting · 51 Madison Ave. New York · 1370 Ontario Street Cleveland

the Court of Claims is for.

DEAN MORGAN: Have you been before them often?

MR. LEMANN: Once.

DEAN MORGAN: A swell court to get anything out of!

MR. LEMANN: I don't think you can use that case logically to say that you have a bum court.

DEAN MORGAN: Charlie is telling us we ought to be practical here, and I agree on that point.

MR. DODGE: Here is a case where the Government has brought a suit, hasn't it, and one of the issues is the determination of compensation for what they have done. They seek to abandon it after they have taken possession and inflicted a lot of damage. They seek to abandon it by motion to the court. Why shouldn't we provide that the damages should be assessed then and there in the suit already pending, instead of forcing the landowner to go down to Washington to the Court of Claims?

DEAN MORGAN: You see, Major Tolman's draft on page 3, says: "the plaintiff may dismiss the action in whole or in part by filing a notice with the court setting forth", and so forth, "but if the plaintiff has taken title or possession of the property sought to be acquired or of any part thereof or interest therein the plaintiff may not dismiss until just compensation has been awarded."

Why isn't that just what we insisted on last time?

MR. DODGE: Yes, it is. That is what we voted for

National Press Bldg. Washington 540 No. Michigan Ave. Chicago The MASTER REPORTING COMPANY, Inc. Law Stenography • Conventions • General Reporting 51 Madison Ave. New York 1370 Ontario Street Cleveland

National Press Bldg. Washington 540 No. Michigan Ave. Chicago The MASTER REPORTING COMPANY, Inc. Law Stenography • Conventions • General Reporting 51 Madison Ave. New York 1370 Ontario Street Cleveland

last time.

DEAN MORGAN: And why doesn't that say, just as clearly as you can say it, that when you take title or possession, as Monte said--my difficulty has always been to know what "title" means.

MR. HAMMOND: Yes, I think that is the trouble.

MR. LEMANN: You have "possession" in there, too.

DEAN MORGAN: "or of any part thereof or interest therein".

MR. DODGE: We are talking only about cases where the Government has moved the court.

DEAN MORGAN: That is right. They have already gone in.

MR. DODGE: It hasn't the right to discontinue of its own volition. It files a motion for leave to discontinue. We propose to condition that as Major Tolman suggests and as you suggest.

MR. LEMANN: You have two methods of handling this mechanically. One is to put in a dismissal as of right, with no provision for a motion, which is the Department of Justice draft, and I think it is the original draft that I have before me. Then it is changed around to have nothing under "As of Right", but only by motion of the plaintiff. You have to make up your minds which of the two methods of handling it you will adopt, or whether you are going to combine them, because they

are two different methods.

MR. DODGE: Insert paragraph (3) on motions in this Department of Justice amendment.

MR. LEMANN: You would have to do that.

MR. DODGE: "The court may dismiss the action on motion, but only upon determination of just compensation." Something like that.

THE ACTING CHAIRMAN: Always it seems to me that this is a case where there is a certain lack of directness in the language used on both sides. You might easily say that we weren't saying what we were doing or that the courts wouldn't realize what we were trying to do unless they had the benefit of our discussion.

I take it what we are trying to do is to say that damages shall be awarded in the same action. Why don't we say that in so many words? What we do is to say it in terms of "just compensation", but I don't think that the court or the people will think of it as what we are driving at.

For example, "If the court finds that there has been a taking under the condemnation statute used or an actual taking, the court shall not dismiss without awarding damages for the period of occupation."

MR. HAMMOND: I think that the Lands Division justifiably would object very much to the use of the word "damages," because one of the things that they claim they are afraid of

National Press Bldg. Washington 540 No. Michigan Ave. Chicago The MASTER REPORTING COMPANY, Inc. Law Stenography • Conventions • General Reporting 51 Madison Ave. New York 1370 Ontario Street Cleveland

is that the court will award for things which are not really compensable under the just compensation amendment to the Constitution.

THE ACTING CHAIRMAN: I know they do, and of course I think there is something in their fear. Then, in the face of that, we make it a lot wider than that. We say that there should be a just compensation, which may be for the fee, which may mean that you have to take the land willingly even though nobody is going to use it any more. So, in a sense, we make it worse than their worst fears.

MR. HAMMOND: I rather thought that, if we followed the Constitution a little, that would be better for them.

THE ACTING CHAIRMAN: Mr. Hammond, under your draft may a court do this, which is what I suppose we contemplated? They have been in possession for a year. They now want to withdraw. May the court say, "Your title is only for a year. It ceases now, and the amount of compensation you pay for the year is as follows"? Is that the substance of what you are doing?

MR. HAMMOND: Yes.

THE ACTING CHAIRMAN: I suppose that is what was intended.

MR. HAMMOND: For whatever taking there is. I based it on the word "taking".

THE ACTING CHAIRMAN: Yes. I thought that was what

National Press Bldg. Washington 540 No. Michigan Ave. Chicago The MASTER REPORTING COMPANY, Inc. Law Stenography • Conventions • General Reporting 51 Madison Ave. New York 1370 Ontario Street Cleveland

was intended, and I think that is what we have all been driving at. Nevertheless, isn't your language likely to mean this? In the case that I put, where the Government wants it only a year, and we are discussing its having to pay for the year, your language means now that they can't give it back, that they have to take it in fee simple and pay the full amount.

PROFESSOR CHERRY: No, I don't think so.

THE ACTING CHAIRMAN: Why not?

PROFESSOR CHERRY: They are permitted to dismiss by the court's order, so they are not going to get the fee simple.

THE ACTING CHAIRMAN: But they can't dismiss here.

PROFESSOR CHERRY: No, no. This is a condition.

THE ACTING CHAIRMAN: There has been a taking, and the motion shall not be granted except as to what has not been taken. Of course, I suppose you are going to say that what has not been taken is the remainder of the fee beyond a year.

PROFESSOR CHERRY: Not necessarily that. We have had up these cases where the taking, although it has meant possession for only a year, has damaged the land for ten years ahead, because they gave back what was a farm as a set of gullies that he can't farm. That is one of the cases that we were discussing with Mr. Littell. We can't undertake in any rule here to say what the court should hold as being the measure of recovery there.

I would agree with Mr. Hammond's draft, that "just

National Press Bldg. Washington 540 No. Michigan Ave. Chicago The MASTER REPORTING COMPANY, Inc. Law Stenography • Conventions • General Reporting 51 Madison Ave. New York 1370 Ontario Street Cleveland

compensation" is constitutional language and as far as we can go. So far as the court holds there has been a taking, that is what they will give compensation for, and that is going to differ from case to case.

THE ACTING CHAIRMAN: I suggest a game with you. I suggest we put it up to six district judges and ask them what they conclude that means and if any of them think that what has been taken means the year of taking and not the rest. I think that the normal thing you think of is so much land and that what you have taken has been Blackacre and perhaps not Whiteacre, and therefore as to Blackacre you can't go back on what you have taken.

DEAN MORGAN: Don't you think the difficulty here is that you have tried to do too much in one section? That is, you want to give these people a right to dismiss unless the plaintiff, to use Mr. Tolman's words, "has taken title or possession of the property sought to be acquired or of any part thereof or interest therein". They can dismiss as of right unless they have done that. Second, on motion of the court. If they have taken possession, it may be dismissed, on motion, upon payment of just compensation for whatever interest has been taken.

MR. DODGE: Yes.

THE ACTING CHAIRMAN: Yes, I think that is true.

DEAN MORGAN: It seems to me that is what you ought

National Press Bldg. Washington · 540 No. Michigan Ave. Chicago · The MASTER REPORTING COMPANY, Inc. Law Stenography • Conventions • General Reporting · 51 Madison Ave. New York · 1370 Ontario Street Cleveland

to do. You ought to have "As of Right" and "On Motion" in two separate subdivisions.

MR. DODGE: That is the idea, exactly.

THE ACTING CHAIRMAN: Shouldn't you expand your idea a little to make it clear that it is for whatever interest taken or for the length of time taken? You see, originally the idea is that they have taken it for the full period, and unless you get in the time element, I don't believe it is going to be a natural deduction.

DEAN MORGAN: I think you will probably have to draw the language pretty carefully there, but certainly it seems to me you ought not to allow him to dismiss as of right "if the plaintiff has taken title or possession of the property sought to be acquired or of any part thereof or interest therein".

MR. DODGE: The Government agrees to that.

DEAN MORGAN: They don't agree to that extent. They just want it in case you have taken possession, whatever that may mean.

MR. DODGE: In whole or in part.

DEAN MORGAN: Yes. Then the next thing is "As of Right," and I agree with Charlie that you have to draw that language as to compensation for whatever interest has been taken so that it will mean that if you have taken less than the amount that is stated in the complaint or in the action, only as to that amount shall you get compensation; that it be

The MASTER REPORTING COMPANY, Inc. Law Stenography • Conventions • General Reporting
National Press Bldg. Washington 540 No. Michigan Ave. Chicago 51 Madison Ave. New York 1370 Ontario Street Cleveland

the actual interest taken. I don't know just how you would draft it.

MR. HAMMOND: That is the trouble.

DEAN MORGAN: That is my difficulty there, but I do think you have to split it. You have to give them the right to dismiss up to that time.

MR. LEMANN: Mr. Dodge's suggestion (see if this is it, Mr. Dodge) is that you have to make two motions. First, that you adopt the Department of Justice's draft of (h)(1).

MR. DODGE: "As of Right."

MR. LEMANN: At the bottom of page 4. Adding at the end the words: "either actually or by implication of law."

DEAN MORGAN: I don't agree with that. I don't like that "by implication of law." Why don't you use Tolman's, and instead of saying "provided possession has not been taken", say "unless the plaintiff has taken title or possession of the property"?

MR. LEMANN: He has title in the first line. You would have to rewrite the whole thing if you were going to do that. I thought he had it all right.

DEAN MORGAN: Where?

MR. LEMANN: Department of Justice, page 4, "As of Right." "At any time prior to the vesting of the title sought to be acquired in the action". That takes care of title. "the plaintiff may dismiss the action in whole or in part, without

540 No. Michigan Ave. Chicago · The MASTER REPORTING COMPANY, Inc. Law Stenography • Conventions • General Reporting · 51 Madison Ave. New York · 1370 Ontario Street Cleveland · National Press Bldg. Washington

court order, by filing a notice with the court setting forth briefly and concisely the property as to which the action is dismissed, provided possession has not been taken."

Then I switch over to Major Tolman's, and I see he uses the language: "If possession has been taken, whether actual or by implication of law."

So I was adopting his language, but if you don't like the words "whether actual or by implication of law"--

DEAN MORGAN (Interposing): I am talking about his original draft.

MR. LEMANN: I am looking at the first one, though, Eddie. Assuming that there was some idea that you would bargain with words about using "whether actual or by implication of law", personally I shouldn't think you would have to use it.

MR. DODGE: I shouldn't think so.

DEAN MORGAN: I wouldn't think so, if you are going to agree, Monte, that title and possession are the only two things.

MR. LEMANN: That is right. As of right, and that is what we--

DEAN MORGAN (Interposing): What I am talking about is what you mean by "title."

MR. LEMANN: I don't see how you help anything by eliminating a reference to title. The point is: "or of any part thereof or interest therein". If you take less than the

National Press Bldg. Washington 540 No. Michigan Ave. Chicago The MASTER REPORTING COMPANY, Inc. Law Stenography • Conventions • General Reporting 51 Madison Ave. New York 1370 Ontario Street Cleveland

fee, have you taken title?

MR. DODGE: You have taken title to the interest you have acquired.

MR. LEMANN: That is what I would say.

DEAN MORGAN: Suppose you go after the fee, and you have taken an interest less than the fee. Have you taken title?

MR. LEMANN: To that interest.

DEAN MORGAN: All you have taken is title. Title to what?

MR. LEMANN: You think it means fee simple property?

DEAN MORGAN: I don't know what it means. I don't think anybody knows what "title" means.

MR. DODGE: This is the title sought to be acquired in the action.

DEAN MORGAN: Suppose you go after the fee simple. They have taken something less. They haven't taken title, and they haven't taken possession.

JUDGE DOBIE: In a lot of cases they take a right, you know.

MR. LEMANN: That is all they seek to acquire.

JUDGE DOBIE: That is all they seek and pay for.

MR. DODGE: The title sought to be acquired in the action.

MR. LEMANN: Let's have a substitute for this

National Press Bldg. Washington · 540 No. Michigan Ave. Chicago · The MASTER REPORTING COMPANY, Inc. Law Stenography • Conventions • General Reporting · 51 Madison Ave. New York · 1370 Ontario Street Cleveland

"As of Right" language. Personally, I would be willing to vote it the way they propose it, except "As of Right."

THE ACTING CHAIRMAN: What is going to be the rest of yours?

MR. LEMANN: Then I understood there would be added a paragraph (3) under (h) which would follow the paragraph (2) now appearing, "By Stipulation", and paragraph (3) would be on the motion of plaintiff.

DEAN MORGAN: That is right.

THE ACTING CHAIRMAN: Go ahead.

MR. LEMANN: That would provide that it could be done on motion, provided that if possession had been taken, whether actually or by implication of law, the action should not be dismissed without the fixing of just compensation.

THE ACTING CHAIRMAN: For the interest?

MR. LEMANN: I would stop there, as far as that is concerned. I don't think it could mean anything but compensation for the property possession of which had been taken. You could add that, if you wish.

DEAN MORGAN: "For the interest taken" is what you mean.

MR. LEMANN: "Just compensation for the property of which possession has been taken."

THE ACTING CHAIRMAN: I think you had better say "for the interest which has actually been taken."

National Press Bldg. Washington 540 No. Michigan Ave. Chicago The MASTER REPORTING COMPANY, Inc. Law Stenography • Conventions • General Reporting 51 Madison Ave. New York 1370 Ontario Street Cleveland

DEAN MORGAN: That is it. That is what you want.

MR. LEMANN: You already have the words "by implication," so you have to decide whether you are going to keep them or take them out. They weren't my original suggestion. I thought somebody thought they were helpful. I would be willing to take them out.

THE ACTING CHAIRMAN: I will throw in my little all, because I think in general that this is a good idea that Monte is putting forward. I should say for my part that I really think that "title to the interest sought to be acquired in the action" is all right, because that goes back to what they have asked for. Of course, in a sense, title is always indefinite, but nevertheless this is whatever their prayer is, and it goes back. This is the alternative, and I don't believe you need "whether actually or by implication." I am a little afraid of the word "implication." It is what the court finds is possession.

So I should say that No. 1 of Monte's is good, and I should think that the other paragraph he suggests adding should be by order of court. Don't you mean that?

MR. LEMANN: That is right.

THE ACTING CHAIRMAN: By right, by stipulation, and then by order of court.

MR. LEMANN: That is right.

THE ACTING CHAIRMAN: Then I think your language would

National Press Bldg. Washington 540 No. Michigan Ave. Chicago The MASTER REPORTING COMPANY, Inc. Law Stenography • Conventions • General Reporting 51 Madison Ave. New York 1370 Ontario Street Cleveland

be all right, only I would substitute for the time thing, "just compensation for the interest which has actually been taken."

MR. DODGE: Yes.

DEAN MORGAN: I agree to the latter part, all right, but I don't agree to the first part, "As of Right." I think that if any interest has been taken, just compensation should be granted for it. I think that at any time prior to the vesting of the title sought to be acquired in the action, the plaintiff may dismiss by filing a notice, unless the plaintiff has taken title or possession to any part of or interest in the property sought to be acquired."

MR. DODGE: How can he have taken title to something less than the title sought to be acquired in the action?

DEAN MORGAN: Oh, many ways. He can seek a fee simple and take an easement ultimately, for example.

MR. DODGE: It must be described in the instrument of taking.

DEAN MORGAN: No.

MR. DODGE: Or described in the petition.

DEAN MORGAN: It wouldn't be described in the petition. They go in to take all of Blackacre, the fee simple title, as Charlie suggested and as they suggest in that memorandum, and ultimately they take possession for a year, as we supposed before, or they go in and remove a building, or something of

National Press Bldg. Washington 540 No. Michigan Ave. Chicago The MASTER REPORTING COMPANY, Inc. Law Stenography • Conventions • General Reporting 51 Madison Ave. New York 1370 Ontario Street Cleveland

that sort.

MR. DODGE: Without any filing of a suit describing what they are taking?

DEAN MORGAN: It is said that they are going to take all of Blackacre.

MR. DODGE: They have said in the petition that they are going to take all of Blackacre.

DEAN MORGAN: Now they go in and just take a part of Blackacre and a building on it. They destroy the building. At the end of a year, they walk off. That is before they have trial. They haven't the title.

MR. DODGE: They can amend the petition so as to show they are taking only a limited interest.

DEAN MORGAN: Yes, that is what they are going to do now. But they are going to dismiss now, quite altogether, and say they aren't taking anything now. If they dismiss and quit, then the defendant has a claim against them in the Court of Claims.

MR. LEMANN: But they can't dismiss it as of right, Eddie, in your case, because possession would have been taken.

DEAN MORGAN: Not of all of it.

MR. LEMANN: It doesn't say that possession has been taken of all. That isn't the language.

MR. DODGE: "in whole or in part".

DEAN MORGAN: Where does it say that? It doesn't say

National Press Bldg. Washington 540 No. Michigan Ave. Chicago The MASTER REPORTING COMPANY, Inc. Law Stenography • Conventions • General Reporting 51 Madison Ave. New York 1370 Ontario Street Cleveland

anything about "in whole or in part".

MR. LEMANN: Down here it is provided that possession has not been taken. I should think that would mean that if any possession has been taken of anything, they couldn't dismiss as of right. That is what I should think that language clearly meant.

THE ACTING CHAIRMAN: I don't see why you shouldn't add that, if you want to; but, Eddie, I don't see why title comes in down there. You have suggested: "provided possession or title has been taken in whole or in part." How can they take title when they haven't any judgment for it?

MR. LEMANN: Title is taken care of by the first two lines.

THE ACTING CHAIRMAN: I agree with you on that.

DEAN MORGAN: When I said that, I thought you had omitted that. Or you could say: "provided that possession or any interest in the property has not been taken". You see, I am bothered by title, because I don't know what title means, and I don't believe you know what it means.

THE ACTING CHAIRMAN: Not too well.

DEAN MORGAN: I don't believe anybody knows what it means.

THE ACTING CHAIRMAN: But I have made some decisions.

DEAN MORGAN: If you mean all the beneficial interest, you mean what we call title in fee simple; and Monte is going

1370 Ontario Street Cleveland 51 Madison Ave. New York The MASTER REPORTING COMPANY, Inc. Law Stenography • Conventions • General Reporting 540 No. Michigan Ave. Chicago National Press Bldg. Washington

on the theory that when you say "title and possession," you have said everything you can say.

MR. DODGE: It may be title to a leasehold interest or an interest for one year, or anything.

DEAN MORGAN: All right.

MR. DODGE: That is the title sought to be acquired.

DEAN MORGAN: But the title sought to be acquired may be the fee simple, and they may have taken title to a leasehold interest.

MR. DODGE: Can't we take care of this by adopting in substance the Government's agreement as to paragraph (1), which is at the bottom of page 4, agreeing in exact <u>totidem verbis</u> to (3), which becomes (4), and inserting a new paragraph (3) covering the substance of Mr. Hammond's "By Motion of Plaintiff" paragraph so as to take care of--

MR. LEMANN (Interposing): By order of court, that is.

MR. DODGE: --by order of court, yes. He has it "By Motion of Plaintiff." It is "By Order of Court."

DEAN MORGAN: "By Order of Court."

MR. DODGE: If title or possession has been taken, plaintiff may move to discontinue, and so forth, that the damages shall be assessed in that action. Leaving the working out of the language to the Reporter and Mr. Hammond.

DEAN MORGAN: That is all right with me.

MR. DODGE: Who will send us a draft within two days!

1370 Ontario Street Cleveland
51 Madison Ave. New York
The MASTER REPORTING COMPANY, Inc.
Law Stenography • Conventions • General Reporting
540 No. Michigan Ave. Chicago
National Press Bldg. Washington

MR. HAMMOND: It is an awfully difficult thing.

MR. LEMANN: And it must be returned within two further days.

PROFESSOR CHERRY: Why the delay?

MR. DODGE: Isn't that the way to dispose of this according to our vote at the other meeting and according to the consensus of opinion today?

DEAN MORGAN: I so move.

MR. DODGE: I seconded the motion.

THE ACTING CHAIRMAN: I was wondering if we couldn't have some language along this line by early afternoon. Can't you write out just what we have been talking about?

PROFESSOR MOORE: Not on the basis of the discussion, no.

THE ACTING CHAIRMAN: Sure, you can. My staff has gone back on me.

MR. LEMANN: Why not have Mr. Morgan bring in a draft, because he is the one who is worried about this language now. If it would get by Dodge and by the "Lemon" here, I think it would get by the "Cherry", wouldn't it?

THE ACTING CHAIRMAN: I think it would be better to get some language that looks like something we want, and not try to correspond. That is too bad. I really think we have gotten close enough now. Eddie, couldn't you get something?

DEAN MORGAN: I will try my hand at it, but I think

National Press Bldg. Washington · 540 No. Michigan Ave. Chicago · The MASTER REPORTING COMPANY, Inc. Law Stenography • Conventions • General Reporting · 51 Madison Ave. New York · 1370 Ontario Street Cleveland

Hammond could probably do better.

THE ACTING CHAIRMAN: You do that by this afternoon and let us look at it. If it doesn't work, it doesn't, but I think it would be better to try it here; don't you think so?

MR. HAMMOND: Much better. This is an awfully difficult rule to draw.

THE ACTING CHAIRMAN: Let's temporarily leave it that way, that Mr. Morgan will try his hand at a draft along the lines that have been suggested, which involves: a dismissal as of right, which cannot apply when any interest has been actually taken by the Government; a dismissal by stipulation, upon which we are agreed; and a dismissal by order of court, which shall provide for just compensation for the interest actually taken.

Can you go ahead with those instructions, Eddie?

DEAN MORGAN: I think Hammond had better do it, too.

MR. DODGE: Hammond and you together.

THE ACTING CHAIRMAN: All right.

MR. LEMANN: I guess this is a very difficult rule because we have (1) the Department of Justice, (2) the TVA and the District of Columbia, all the public bodies that have their own legal staffs, and (3) the Congress. I should think that this rule would be more provocative of objection and opposition than any of our regular rules. Wouldn't you think so, Mr. Hammond?

The MASTER REPORTING COMPANY, Inc.
Law Stenography • Conventions • General Reporting
1370 Ontario Street Cleveland
51 Madison Ave. New York
540 No. Michigan Ave. Chicago
National Press Bldg. Washington

Hammond could probably do better.

THE ACTING CHAIRMAN: You do that by this afternoon and let us look at it. If it doesn't work, it doesn't, but I think it would be better to try it here; don't you think so?

MR. HAMMOND: Much better. This is an awfully difficult rule to draw.

THE ACTING CHAIRMAN: Let's temporarily leave it that way, that Mr. Morgan will try his hand at a draft along the lines that have been suggested, which involves: a dismissal as of right, which cannot apply when any interest has been actually taken by the Government; a dismissal by stipulation, upon which we are agreed; and a dismissal by order of court, which shall provide for just compensation for the interest actually taken.

Can you go ahead with those instructions, Eddie?

DEAN MORGAN: I think Hammond had better do it, too.

MR. DODGE: Hammond and you together.

THE ACTING CHAIRMAN: All right.

MR. LEMANN: I guess this is a very difficult rule because we have (1) the Department of Justice, (2) the TVA and the District of Columbia, all the public bodies that have their own legal staffs, and (3) the Congress. I should think that this rule would be more provocative of objection and opposition than any of our regular rules. Wouldn't you think so, Mr. Hammond?

The MASTER REPORTING COMPANY, Inc. Law Stenography • Conventions • General Reporting
National Press Bldg. Washington
540 No. Michigan Ave. Chicago
51 Madison Ave. New York
1370 Ontario Street Cleveland

MR. HAMMOND: I don't think we will have any objection from Congress, probably, or from the landowners, certainly. The real objection is from the Department of Justice, and they don't want the rule unless they can get it the way--

MR. LEMANN (Interposing): The way they think it will work.

MR. HAMMOND: Yes.

MR. LEMANN: And the TVA people and people like that are also affected.

MR. HAMMOND: They haven't been consulted about it so far, but we figured that when the draft goes out to the bar with the rest of it, we would hear from them on it.

MR. LEMANN: Tell me, are most of these condemnation proceedings under state statutes under conformity practice?

MR. HAMMOND: Yes. We may get some objection from Congress on that. As to the provision we were talking about before, about the trial by jury, Congress may not want to abolish that. It is unlikely that that conformity will be abolished.

MR. LEMANN: I haven't tried that. My firm has. But my impression is that in my state we have a jury of freeholders, property owners, not an ordinary jury. I guess that is so in many states. If this provision were adopted, you would have a regular, ordinary jury, wouldn't you?

JUDGE DOBIE: You mean no man can sit on that jury

National Press Bldg. Washington 540 No. Michigan Ave. Chicago The MASTER REPORTING COMPANY, Inc. Law Stenography • Conventions • General Reporting 51 Madison Ave. New York 1370 Ontario Street Cleveland

unless he is an owner of property?

MR. LEMANN: Yes. We feel that in expropriation cases a property owner is especially qualified to make a guess of what the property is worth.

THE ACTING CHAIRMAN: Gentlemen, wouldn't it be a good idea if we got up and stretched our legs for about five minutes? Of course, Mr. Morgan might be through by then.

MR. DODGE: First, let me ask Mr. Hammond if I understood him correctly that most of these takings for war purposes by the Government are made under state authorization.

MR. HAMMOND: That is what I understand.

MR. LEMANN: What is your procedure, Mr. Dodge?

MR. DODGE: I never knew them to proceed in Massachusetts in accordance with our state practice, which is to file an instrument of taking vesting title and then to go to a jury on the landowner's petition for compensation. I think they are always started by a Government suit in a Federal forum.

MR. HAMMOND: Yes, but they follow the state procedure in the Federal court.

MR. DODGE: It is quite different from the state procedure. It is a suit by the Government instead of by the landowner, and they don't get title ordinarily until the judgment.

MR. HAMMOND: Of course, they have the special Declaration of Taking Act.

The MASTER REPORTING COMPANY, Inc.
Law Stenography • Conventions • General Reporting
National Press Bldg. Washington
540 No. Michigan Ave. Chicago
51 Madison Ave. New York
1370 Ontario Street Cleveland

... Brief recess ...

THE ACTING CHAIRMAN: You have covered everything, have you?

MR. DODGE: He has it.

THE ACTING CHAIRMAN: Fine. I knew he would. All right, we will resume. I understand that we have it all settled.

DEAN MORGAN: We will throw this to the lions again.

THE ACTING CHAIRMAN: Shall we vote to accept it, or would you like to have it read?

DEAN MORGAN: I think you had probably better have it read, just as a matter of precaution or form, shall I say.

THE ACTING CHAIRMAN: Very well. I think it is risky, but nevertheless, go ahead.

DEAN MORGAN: Taking the form at the bottom of page 4 of the memorandum, which is the Department of Justice Amendment C, strike out the words "provided possession has not been taken" and insert "unless the plaintiff has taken possession of or some interest in the property as to which the plaintiff seeks to dismiss."

MR. LEMANN: Possession?

MR. DODGE: "or some interest in the property".

DEAN MORGAN: "possession of or some interest in the property".

MR. LEMANN: What does "taking some interest" mean?

The MASTER REPORTING COMPANY, Inc. Law Stenography • Conventions • General Reporting
National Press Bldg. Washington 540 No. Michigan Ave. Chicago 51 Madison Ave. New York 1370 Ontario Street Cleveland

Of course it doesn't mean interest in the populace. It means a property interest.

DEAN MORGAN: It means a property interest, of course. "Interest" is a very good American Law Institute expression.

JUDGE DOBIE: It is about the broadest thing you have.

MR. DODGE: If he has built a telegraph line across it or something like that, without taking possession.

DEAN MORGAN: That has been done.

JUDGE DOBIE: Will you read that again?

PROFESSOR SUNDERLAND: Will you read the rest of that again, Eddie?

DEAN MORGAN: "unless the plaintiff has taken possession of or some interest in the property as to which the plaintiff seeks to dismiss."

JUDGE DOBIE: That sounds all right to me.

DEAN MORGAN: Then, a section "By Order of the Court." "At any time before compensation has been determined and paid, the action may be dismissed by the court after motion and hearing, except that the action shall not be dismissed as to any part of the property of which plaintiff has taken possession or in which plaintiff has taken any interest until just compensation has been awarded for the possession or interest so taken."

JUDGE DOBIE: I think that is very good.

MR. DODGE: "until just compensation has been awarded

National Press Bldg. Washington · 540 No. Michigan Ave. Chicago · The MASTER REPORTING COMPANY, Inc. Law Stenography • Conventions • General Reporting · 51 Madison Ave. New York · 1370 Ontario Street Cleveland

in the action."

DEAN MORGAN: "or other interest", really.

MR. LEMANN: "other interest" would help it, I think.

DEAN MORGAN: I think you ought to have there "possession or other interest."

MR. LEMANN: That would help it a lot, I think.

THE ACTING CHAIRMAN: (2) stays in, doesn't it? That is by stipulation.

DEAN MORGAN: Yes.

THE ACTING CHAIRMAN: And (3) is by order of the court, as you have given. Does "Effect" stay in as (4)?

MR. HAMMOND: Yes. That has to be considered.

DEAN MORGAN: Yes, I should suppose so. That wouldn't mean they couldn't start again, would it?

THE ACTING CHAIRMAN: Then don't you want to put in "Except as otherwise provided in the notice or stipulation of dismissal <u>or order of dismissal</u> ...."?

MR. LEMANN: Notice, stipulation, or order of dismissal.

MR. DODGE: How could you prejudice the Government in its right of eminent domain?

DEAN MORGAN: You never could. There wouldn't be an action if they didn't have a right to take it anyhow.

MR. DODGE: Whether it is with prejudice or without prejudice, you can't affect the Government's right.

National Press Bldg. Washington · 540 No. Michigan Ave. Chicago · The MASTER REPORTING COMPANY, Inc. Law Stenography • Conventions • General Reporting · 51 Madison Ave. New York · 1370 Ontario Street Cleveland

MR. LEMANN: This is just stating the obvious.

DEAN MORGAN: That is stating the obvious.

MR. HAMMOND: You can stop the Government.

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

MR. DODGE: You couldn't make it with prejudice even by stipulation.

MR. LEMANN: You could really omit that, don't you think, Mr. Hammond?

MR. DODGE: Does that amount to anything, Mr. Hammond?

MR. HAMMOND: I don't know. It has always been in there.

DEAN MORGAN: Suppose they gave notice of dismissal with prejudice. Lord bless me, that wouldn't stop them for a minute. How could it?

MR. LEMANN: Let's see. Suppose they had an issue as to whether there was any need for it.

DEAN MORGAN: They might not need it today, and might need it tomorrow.

MR. LEMANN: Suppose they start tomorrow.

DEAN MORGAN: Exactly. I would like to see anybody try to put a limitation on the Government's power of eminent domain, by rule of court or otherwise.

PROFESSOR CHERRY: Or by the Government by stipulation.

MR. HAMMOND: Do you want to leave in the words

National Press Bldg. Washington · 540 No. Michigan Ave. Chicago · The MASTER REPORTING COMPANY, Inc. Law Stenography • Conventions • General Reporting · 51 Madison Ave. New York · 1370 Ontario Street Cleveland

"Except as otherwise provided"? That seems to give the court power to dismiss it with prejudice.

MR. DODGE: The court couldn't dismiss it with prejudice to the Government's right of eminent domain.

MR. HAMMOND: Why have those words "Except as otherwise provided" in there, then?

MR. DODGE: I think the whole paragraph should go out.

MR. LEMANN: You either take it all out or leave it all in. Do you move to leave it out, Mr. Dodge?

MR. DODGE: I can't conceive of any dismissal being with prejudice.

MR. LEMANN: Move it out.

JUDGE DOBIE: Suppose the court had tried a public necessity or something of that kind.

MR. LEMANN: That is the point I raise, but then they said you might have a new necessity; that you don't have one today, but you might have one tomorrow.

JUDGE DOBIE: Make the basis clearly res judicata if the Government came back.

MR. LEMANN: You could at least say that they had to show some new necessity, that they couldn't relitigate it without showing a new need.

MR. DODGE: That isn't often a judicial question. Is it ever?

MR. LEMANN: Oh, yes, we have it, where there is a

National Press Bldg. Washington 540 No. Michigan Ave. Chicago The MASTER REPORTING COMPANY, Inc. Law Stenography • Conventions • General Reporting 51 Madison Ave. New York 1370 Ontario Street Cleveland

National Press Bldg. Washington 540 No. Michigan Ave. Chicago The MASTER REPORTING COMPANY, Inc. Law Stenography • Conventions • General Reporting 51 Madison Ave. New York 1370 Ontario Street Cleveland

need for it.

DEAN MORGAN: Where it is for a public purpose.

JUDGE DOBIE: That Gettysburg Battlefield was one of those cases.

MR. LEMANN: Sometimes it is the extent of the taking that is required. They want to take more than they need. I think you can litigate that. They want 100 acres. You say, "You don't need 100. You need just 50." You can litigate that.

MR. DODGE: You can certainly litigate the question of public use, public purpose.

DEAN MORGAN: There is one thing on which it could be done.

MR. LEMANN: That is the point I raised, and then you said there might not be a public purpose today but there might be one tomorrow.

DEAN MORGAN: You were talking about necessity. Yes, there might be a different public purpose.

MR. LEMANN: That is right.

MR. DODGE: That isn't so likely. The public purpose, you think, might be with prejudice.

JUDGE DOBIE: All this says, really, is "Except as otherwise provided". The court's dismissal doesn't have to be <u>prima facie</u> without prejudice. I don't think that can do any harm.

MR. LEMANN: It can't do any harm.

MR. DODGE: I thought at first that it was foolish, but I see there is a chance for it. Suppose there is a condemnation petition, and an answer is filed setting out that the taking is invalid as it is not for a public purpose, and there is a dismissal by the Government with prejudice. That would preclude the Government if it was not a public purpose at that time, wouldn't it?

DEAN MORGAN: I should think so.

JUDGE DOBIE: As I say, I don't think any judge is going to do it, but I don't think it does any harm. I think the Government Department likes it. It says that the dismissal normally is one without prejudice.

THE ACTING CHAIRMAN: Are you ready for the question?

PROFESSOR CHERRY: It makes it conform to our other dismissal statutes.

THE ACTING CHAIRMAN: Yes, it does.

JUDGE DOBIE: I don't think it is highly important, but I believe it probably serves a useful purpose. I move it be kept in.

DEAN MORGAN: Let it be.

THE ACTING CHAIRMAN: Unless there is objection, that will be kept in. Now do you want to move the adoption of the whole proposal?

JUDGE DOBIE: Yes, I make that motion, in the Morgan manner.

National Press Bldg. Washington   540 No. Michigan Ave. Chicago   The MASTER REPORTING COMPANY, Inc. Law Stenography • Conventions • General Reporting   51 Madison Ave. New York   1370 Ontario Street Cleveland

THE ACTING CHAIRMAN: Is there any discussion of that? That will be on Mr. Morgan's proposal, with the final section being section (4), "Effect," as is except that it contains a reference also to the order of dismissal.

JUDGE DOBIE: That is right.

THE ACTING CHAIRMAN: Are you ready for the question? All in favor say "aye"; those opposed. So voted. (Carried) That finishes up that.

JUDGE DOBIE: We ought to give a vote of thanks to Morgan.

MR. DODGE: It didn't take the entire forty-eight hours that were allowed.

THE ACTING CHAIRMAN: Does that cover the entire condemnation rule?

MR. HAMMOND: There was one thing that I didn't mention under Amendment No. 19. That is, there are some differences between the statute and our rule. These are just minor differences, but I think that we ought to follow the statute on them.

DEAN MORGAN: Which statute is that?

MR. HAMMOND: That is S. 919 about the demand.

JUDGE DOBIE: Where is that in here?

MR. HAMMOND: Do you have a copy of the statute, the wording about demand? It is just slightly different.

DEAN MORGAN: Demand for jury trial, you mean?

National Press Bldg. Washington 540 No. Michigan Ave. Chicago The MASTER REPORTING COMPANY, Inc. Law Stenography • Conventions • General Reporting 51 Madison Ave. New York 1370 Ontario Street Cleveland

MR. HAMMOND: Yes. I think we ought to adopt the provision in the statute in our rule. That is agreeable to the Department of Justice.

DEAN MORGAN: You want trial by jury demanded in this way?

MR. HAMMOND: Have you the language definitely? I think we had better have it.

DEAN MORGAN: Yes.

MR. HAMMOND: All right, I have it. You have the rule. The statute says that "Any party may demand a trial by jury of the issue of compensation by filing with the clerk of the court a demand therefor in writing at any time after the commencement of the condemnation proceedings, and not later than ten days before trial."

THE ACTING CHAIRMAN: What are you going to do? Are you going to leave in what we have as to withdrawal?

MR. HAMMOND: Oh, yes; and the amendment we made at the beginning of that section. It is just to make the rule conform to the statute as to that time.

DEAN MORGAN: The way you get it, Charles, that is all.

THE ACTING CHAIRMAN: Is that agreeable?

DEAN MORGAN: Yes, it is all right, since we are going to be bound by it anyhow, I should suppose.

MR. HAMMOND: Yes, it goes along with it.

THE ACTING CHAIRMAN: All right, then, we will consider

National Press Bldg. Washington 540 No. Michigan Ave. Chicago The MASTER REPORTING COMPANY, Inc. Law Stenography • Conventions • General Reporting 51 Madison Ave. New York 1370 Ontario Street Cleveland

that adopted.

JUDGE DOBIE: That finishes up condemnation proceedings. Good.

THE ACTING CHAIRMAN: I want to ask one thing more. I don't know whether we should do anything about it, but, Mr. Hammond, is there any view as to the procedure? Is this to go out to the bench and bar?

MR. HAMMOND: Yes, the Committee decided that it would. Of course, I think that the Department of Justice would be just as glad to have it go in, because they are anxious to get it before them. The Committee decided last time that they wanted it submitted to the bench and bar, like the rest of the rules.

THE ACTING CHAIRMAN: I should think it would be just as well to keep the two proposals separate when they go to the Court, and so on, but I suppose that is a question of detail that we can take up as we go along. I had forgotten that we did so decide, but I guess you are right, all right.

PROFESSOR SUNDERLAND: We decided we weren't going to give them special treatment.

MR. HAMMOND: I think that the Committee felt it would be a good idea to submit them at the same time to the bar, because then the lawyers would probably give some attention to the condemnation rule, whereas if they just sent out the condemnation rule--

National Press Bldg. Washington — 540 No. Michigan Ave. Chicago — The MASTER REPORTING COMPANY, Inc. Law Stenography • Conventions • General Reporting — 51 Madison Ave. New York — 1370 Ontario Street Cleveland

DEAN MORGAN (Interposing): A lot of them wouldn't pay any attention to it.

THE ACTING CHAIRMAN: I think that is right, but I was wondering if they should be tied up all the way through, particularly as they go to Congress.

MR. HAMMOND: On that, I just don't know, but I think that the Lands Division may want to submit it to Congress immediately.

DEAN MORGAN: By joint resolution, he said, didn't he?

MR. HAMMOND: Amend by special joint resolution or something to get it in there quickly and get it disposed of quickly.

Of course, there is another minor thing in connection with that that I didn't think we had to take up at this time. We will have to have an effective date rule for this. That would be different.

DEAN MORGAN: It will have to lie there for a year.

MR. HAMMOND: Yes. We will have to have a special effective date rule for the condemnation rule, and we will have to have another one for the amendments.

DEAN MORGAN: Yes.

THE ACTING CHAIRMAN: We will consider the condemnation rule, as amended herein, approved.

End Vol. III

The MASTER REPORTING COMPANY, Inc. Law Stenography • Conventions • General Reporting
National Press Bldg. Washington — 540 No. Michigan Ave. Chicago — 51 Madison Ave. New York — 1370 Ontario Street Cleveland

YALE LAW LIBRARY MAY 6 - 1960