P R O C E E D I N G S

ADVISORY COMMITTEE ON RULES

FOR CIVIL PROCEDURE

Vol. 6

Rule 71A, Condemnation of Property for Public Use

April 30 - May 2, 1945
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WEDNESDAY MORNING SESSION
[Continued]

May 2, 1945

THE CHAIRMAN: We will go ahead with 71A, then. You will remember that, after talking the matter over with the chairman of the subcommittee and others, we decided it would save time if we had Mr. Hammond take the minutes of our last meeting and, according to the Committee's instructions, make a recast of 71A. Due to an oversight on my part, I didn't understand that it was being held up, and it didn't get to Major Tolman and the other people as soon as it should have been received. So, I don't understand that we have anything before us from the subcommittee. We may have.

MR. HAMMOND: Yes. I have a letter from Mr. Tolman making suggestions as to the draft, and we will bring up all the points he made.

THE CHAIRMAN: Let's start in on this draft of 71A. Is there any suggestion about subdivision (a)?

MR. HAMMOND: No, sir.

THE CHAIRMAN: I mean from the Committee here.

MR. HAMMOND: Excuse me. I thought you were talking about suggestions from the bar.

THE CHAIRMAN: Subdivision (b) is that one or more separate pieces of property sought to be taken may be proceeded against in the same action. Is that the way we ordered it in

that meeting?

MR. HAMMOND: Yes, sir. The only thing about it, as you will see if you read that note, that I was also supposed to call attention to any suggestions that hadn't been considered at the last meeting.

THE CHAIRMAN: Do you think these are ones that we ought to go into?

MR. HAMMOND: The only point about it was that there were four objections to this subdivision, but they seem either to overlook our provisions for separate trials in the general rules or to think that the provisions in the general rules didn't cover.

THE CHAIRMAN: They were wrong about that, weren't they?

MR. HAMMOND: I think so. I think the general rules are sufficiently broad to cover this separation. The only thing is whether you want to put a note to the subdivision calling attention to it.

[At this point the following representatives of the Department of Justice appeared:]

J. Edward Williams, Acting Head, Lands Division

Frank Chambers, Head, Legislative Section, Lands Division

Ralph Luttrell, Lands Division

THE CHAIRMAN: There are two members of the Committee who have to leave, one of them at twelve-thirty. I understood that you had a special objection to the draft or comment, something to do with naming all the owners. Is that it?

MR. HAMMOND: That is what I understand.

THE CHAIRMAN: We should like you to present your thoughts about that, and then in whatever time you have left before they go, we will take up anything else that you have to present.

I think that is probably the provision in line 14 of our draft, at the top of page 3, where it says, "Except as hereinafter provided, the body of the complaint shall name as defendants all persons appearing of record or known to the plaintiff's attorney". Is that the clause?

MR. HAMMOND: Yes, sir.

MR. WILLIAMS: We have perhaps what you might call two fundamental objections to that language; rather, one fundamental objection perhaps with several parts, and then some technical objections, as you might call them.

You recall at the last meeting, at which you were kind enough to permit me to appear, we discussed the need for discretion in the pleader as far as the naming of parties was concerned. You will probably recall that I used the illustration of a defect in the granting clause, a question raised as to the insufficiency of a granting clause, which might, for

example in Pennsylvania, be construed to be meaningless, but in Virginia, say, might be construed to be fatal to the instrument. I was under the impression after that discussion that efforts would be made to adopt language in a rule which would permit some discretion in the pleader, so that you would not unnecessarily encumber the federal courts with defendants and encumber the marshal with the duties of serving them and of publication and encumber the attorneys for the plaintiff with the duty of locating parties who really had no substantial interest at all or, in fact, any interest in the compensation or in the proceedings as such.

Under the language that is submitted here, it is provided that "the body of the complaint shall name as defendants all persons appearing of record or known to the plaintiff's attorney to have interests in the property as owners, encumbrancers or otherwise."

Certainly throughout these chains of title we find many defects in conveyances. Those people represented by those defects are certainly people who have interests of record, but at the same time those objections and defects might be cured by various things, such as, for example, adverse possession. Still, those people would have interests of record, and we would be forced to implead them as defendants and serve them in accordance with these rules. I think that is an undue restriction. I think there should be some liberality allowed

in the naming of these defendants.

Also, of course, there is no distinction made as to the time of the search that would be required. The general regulations of the Department of Justice provide, for example, that on the Eastern Seaboard an 80-year search generally would be sufficient. In other states we go back to the original source of the title, particularly in some of the western states. How far back we go generally depends on the circumstances and the need for speed. We wouldn't be given any discretion along that line here.

If we use certificates of title issued by title companies, of course we would have in our contract to ask them to furnish us with the names of all persons appearing of record having an interest in the property. That language is practically identical now with the language that we use in giving these orders to the title companies. We find that, as a result of that, they will give us in their certificates of title objections to the title which constitute purely technical matters and which they freely admit they would not include in their certificates were they issuing an insurance policy. In other words, they say that under language of that kind, they cannot assume any risk; they can't take any chance, because they must certify that the parties that they give us are all of the parties who have any interest of record. They must certify finally, when the title is in the United States, that the United

States does have an indefeasible fee simple title of record. They also say, "Were we to take out insurance policies, those matters would be eliminated," and of course in a good many of these companies the insurance policy would be issued for an additional consideration.

If we have language of this type in a rule, it means that we will have to get the same type of information from the title companies, and I don't believe that they would like it. I know that they cannot furnish us with the addresses of these people, and for that reason I think that there should be a substantial amount of discretion given to the pleader, depending on the type of acquisition that is involved. For example, if we were acquiring an easement of some kind, paying very little value for it, we would not feel justified in making the expenditure of government funds that would be required for a complete abstract back to the source of the title. If we were acquiring a temporary interest in a piece of farm land for the purpose of constructing a temporary housing project, such as a trailer camp, and were paying, for example, five or ten dollars a year rental for that land, we would not feel justified in going back to the sources of title and spending far greater money for title evidence than we are paying for the interest in the land, in addition to going to the expense of serving all these persons for that minor interest. That would be required by this rule. If a person is leasing some property, for example,

a store or a farm for a temporary period, he doesn't necessarily examine the title back to its inception and implead all persons having any interest of record there, regardless of the technical defects.

So, those are, I believe, generally the reasons that we think there should be more relaxation in this rule.

Major Tolman will recall that last fall in Chicago we discussed this thing somewhat. There was objection made at that time to the language appearing in the draft submitted to the bench and the bar. That language read, of course, as you know, that:

"The complaint shall name as defendants all owners of and parties interested in the property sought to be taken, if known, and all others shall be made defendants under the designation of 'Unknown Owners.'"

There was great objection to that language, apparently on the theory that that would permit us to do things with vested property interests. Of course, that is not our intention. Major Tolman at that time asked us to submit some additional language, there being so much opposition to this. We did so at that time, and it was what we thought would permit us to exercise some discretion and at the same time would completely satisfy all of the requirements that anybody should desire in the matter of naming defendants.

You recall the language we gave you, Major, at that

time out there. We haven't heard any more of that, I assume.

THE CHAIRMAN: We have never seen it. Mr. Hammond waited on making his draft and says he has not seen it.

MR. WILLIAMS: Yes. I didn't submit it to Mr. Hammond.

THE CHAIRMAN: Did you submit it to the Committee?

MR. WILLIAMS: To Major Tolman in Chicago last September. You recall that.

THE CHAIRMAN: Have you a copy of it here now?

MR. WILLIAMS: Yes, sir, I have a copy of it here.

THE CHAIRMAN: Suppose you read it to us.

MR. TOLMAN: Of course, I don't have it word for word in my mind now, but I know, Mr. Chairman and Gentlemen, that we made every effort that we could make to get language that would meet that position taken by the Lands Division, if it was possible to get language of that sort which would also satisfy the bench and the bar. We said that if the criticism that they made of the looseness of our rule could be met, it would be a delightful thing and everybody would like to do it. We never were able to get language agreed upon, but I do think that the language we use now gives the flexibility that is desired in the cases where immediate possession is taken, and it leaves only the field where there is no immediate taking. That is as far as we were able to go.

THE CHAIRMAN: Could you read that proposed amendment?

It relates to this draft, does it?

MR. WILLIAMS: Yes, it relates to the same subject, and it was with the idea in mind that the plaintiff would exercise reasonable diligence in the making of this search along the line that we discussed previously, that he should be given some discretion. I think we are agreed on that, aren't we?

JUDGE DOBIE: Suppose you read the language.

THE CHAIRMAN: We would like you to read your proposal, and we will see how it differs from this.

MR. WILLIAMS: "The attorney for the plaintiff shall exercise reasonable diligence to ascertain the owners of and parties interested in the property sought to be taken, who shall be named as defendants. Those who are known shall be designated by name, and those who are unknown shall be designated as 'Unknown Owners.'"

THE CHAIRMAN: In the absence of any reference to the record owner, would all these title fellows object to that on the ground that it doesn't make it clear that you are not using reasonable diligence if you don't go to the abstract offices and get the records?

MR. WILLIAMS: I don't see how they could. Obviously, to exercise reasonable diligence to ascertain the owners of real estate, there is only one place that you can get it, and that is from the public records.

THE CHAIRMAN: I don't want to interrupt your

statement, but I would like to ask one question right here. The draft before me is the one that we had made up here. It says that "the body of the complaint shall name as defendants all persons appearing of record or known to the plaintiff's attorney to have interests in the property as owners, encumbrancers or otherwise."

That is a copy or a paraphrase of the provisions that appear in a great many state laws. They say, "the owners appearing of record".

Confronted with a clause like that, the lawyer examines the title and makes up his mind who the record shows has a real interest in the property and, if he thinks he has one, he names him; if he thinks he really hasn't, he doesn't name him. That is a hazard that the plaintiff takes, if he doesn't name everybody who appears of record to have some interest, who really has one.

I don't see the slightest difficulty about discretion. The Department of Justice under this clause looks at the record to make up its mind, to see who really did have any. If it wants to leave a man off because it thought his was a mere technical interest that might be barred by statute or adverse possession or whatnot, leave him off. It doesn't annul the proceeding, and if it turns out that you made the wrong guess and he is an owner, then you are just out of luck. You have to take that chance, but I don't see why this clause doesn't give

you perfect freedom about that.

MR. WILLIAMS: The only difficulty, Mr. Chairman, in the first place, is that our attorneys do not search the records. The U. S. Attorney does not go to the county land records in all these counties throughout his district and make a search of the records. He gets certificates of title. Those certificates of title in most instances probably are prepared by attorneys. Maybe they are not. Many of these title companies have their own title plants. We don't know whether they get their information from the public land records or not. We have no way of telling the court that these are all of the people appearing of record from a personal search by the attorneys. We have to rely upon a certificate of title, and some courts, such as Judge Chesnut, for example, require that the attorney actually making the search for the title company as the basis for their certificate of title appear and testify as an expert witness on the condition of that title.

That, as a practical matter, is what we are up against here. It isn't a case of our going over and searching the record and saying, "Well, we don't think that this person has an interest, so we won't implead him." We are given a certificate of title with a great many objections, and that is the evidence of title on which we base our pleading, on which we go to the court for distribution. The court requires that title evidence, and every one of those little objections has to be

represented by somebody in court, there has to be service upon him, and the court as a matter of law must adjudicate the interests of the parties as represented by those objections.

THE CHAIRMAN: Suppose you left a man out because you thought that the interests shown on the certificate were too little to amount to anything; you didn't name him, and you took your chance on his having a real interest. What would happen to you?

MR. WILLIAMS: Whatever his interests might be, of course, if he could establish in court that he had a compensable interest in the property.

THE CHAIRMAN: But you haven't served him; you haven't named him.

MR. WILLIAMS: We haven't served him, and he is protected by the Fifth Amendment to the Constitution that his property cannot be taken without just compensation being paid for it or without due process of law, and undoubtedly he has an action under the Tucker Act.

THE CHAIRMAN: All right. But you have the discretion to take the chance that he has a claim, haven't you?

MR. WILLIAMS: I don't think we would have under this language: "the body of the complaint shall name as defendants all persons appearing of record .... to have interests in the property".

THE CHAIRMAN: I construe that to mean that if the

lawyer did examine the title and concluded that a substantially good title was in Smith and Jones, he would be disregarding a lot of technical things that might be disclosed. Go ahead. I am taking your time. We want you to make your statement.

MR. WILLIAMS: In any event, the title companies will not so construe it, and they insist on these objections being cleared.

THE CHAIRMAN: Why should it be their business to insist?

MR. WILLIAMS: Because they are required under just about similar language that we give them in the contracts to furnish that information to us.

THE CHAIRMAN: Suppose you look at it and say that these are just technical defects, that the fellow hasn't really ownership, that you won't name him as defendant, that Smith is the real owner on the record, and you go ahead. What of it?

MR. WILLIAMS: Of course, we couldn't tell actually as to the validity of those objections because we don't have the actual instruments before us. We have never seen the records, and we don't know upon what they are based. We have to rely upon the discretion of the title companies as they put them in. In other words, those are objections against which they will not guarantee. They think they are that substantial.

THE CHAIRMAN: You want to fire ahead and leave out an objection that they think is a substantial one?

MR. WILLIAMS: Not necessarily fire ahead. Here are the types of objections that we would like to eliminate, for example, and I am taking a few here from the actual files of the Department of Justice, certificates of title issued by title companies. An objection was made to a break in the chain of title following the year 1853. Objection was made to the proof that J. D. Cravette was the same person as James D. Cravette. The question of initials or names. The title companies consider those things to be material.

THE CHAIRMAN: You wouldn't, would you? If that title certificate came before you, you would throw that man out and say, "I won't name him as defendant," wouldn't you?

MR. WILLIAMS: I don't know whether we could or not, operating under this rule, because we are required to show all persons appearing of record to have an interest in the land, and that man as a matter of record has not conveyed his interest out, so he still owns the title.

THE CHAIRMAN: Appearing of record to have an interest. On your statement, I don't think it appears of record that he has.

MR. WILLIAMS: If the conveyance is to one man by one name and the conveyance out is by another name, you can't say as a matter of record that the man who acquired the property has conveyed it out.

THE CHAIRMAN: You want us to leave out, then, all

reference in the rules to persons appearing as record owners, don't you?

MR. WILLIAMS: We don't care, if there is something magical about that expression, "of record," keeping in mind your point that these people have an interest that has to be paid for if we miss them. We would just as soon have the words "of record" put in there, as long as there is something put in there that gives us some discretion that will not force us, if we are taking a very inexpensive easement for a pipeline--for example, a temporary pipeline across some farmer's land--to make a complete search of his title. That is exactly what we would have to do under this rule, because there is no discretion given to anybody for any purpose. He has to name everybody appearing of record.

THE CHAIRMAN: What do you do in all the states under the conformity system where they have clauses like this?

MR. WILLIAMS: You referred to this language being similar to that of a great many states. Eleven states have language that is pretty comparable to this. In some of them we find nothing. In some of them we find very liberal requirements as to naming of parties. As a matter of fact, we don't attempt to comply with those state statutes. We look upon them more or less as matters of substance, and we do in most of them a great deal more than the statutes require.

THE CHAIRMAN: In Connecticut notice is given to all

persons appearing of record, persons holding any mortgage, lien, or other encumbrance, and so on. What do you do in a case like that? Don't you form a judgment on the record as to whether there is really an interest in Smith and Jones?

MR. WILLIAMS: Yes, as to whether there is really an interest, we would.

THE CHAIRMAN: Why don't you do that under this draft?

MR. WILLIAMS: Under the Conformity Act, of course, we are required to comply with those state statutes, assuming that they are statutes of procedure only, as near as may be, not as near as may be possible. So, we are not bound to a strict compliance with those statutes.

THE CHAIRMAN: In Minnesota: The names of all persons appearing of record, known to be owners.

MR. LEMANN: Have we had the alternative language proposed by the Department?

THE CHAIRMAN: He did just read it to us. Do you want it read again?

MR. LEMANN: Yes.

THE CHAIRMAN: Will you please read that proposal again?

MR. WILLIAMS: "The attorney for the plaintiff shall exercise reasonable diligence to ascertain the owners of and parties interested in the property sought to be taken, who shall be named as defendants. Those who are known shall be

designated by name, and those who are unknown shall be designated as 'Unknown Owners.'"

THE CHAIRMAN: Do you have any proof filed that he did exercise reasonable diligence? Anything of that kind?

MR. WILLIAMS: We furnish whatever proof the court might require. Certainly if the court raised the question or if a party raised the question and inquired as to what means were taken to ascertain these parties, he would furnish a certificate of title or he would furnish his abstract of title or he would tell the court what he did or what one of his agents did in the matter of making a pencil abstract or an actual search of the records, depending on the circumstances existent and depending on the necessity for speed in the first instance.

I think that such language as that would eliminate the complications that appear in the April 14 draft in the matter of going into detail and spelling out these things.

Incidentally, on the effort made here to eliminate some of the objections we made at the last hearing, there are one or two other points that should be included.

Many times, regardless of the desire for immediate possession, we want to file condemnation proceedings covering the entire area long before we have title evidence. We want to do that to stop the trafficking in titles. We want to fix those titles as of a certain date, and particularly we want to fix the values. Not only do we want to stop the trafficking in

real estate that might increase the values, but we don't want to take a piece here for construction purposes and a year later take a piece over here that has in the meantime greatly been enhanced in value by reason of the government project. We want to take in the whole area. We want to stop the trafficking in titles and fix the titles as of that time. That is a perfectly lawful and proper procedure to follow.

THE CHAIRMAN: Your point is that you ought to be allowed to start your proceeding before you know who are the owners.

MR. WILLIAMS: That is exactly the point.

THE CHAIRMAN: How do you handle that?

MR. WILLIAMS: We just file a blanket condemnation proceeding, treating it as an action in rem fundamentally in the first instance.

THE CHAIRMAN: You don't name any owners?

MR. WILLIAMS: Yes, we do. We name the owners that we find in posession. Generally, it is a simple thing to find out who is in possession or to make a quick search of the record. We can take a last owner search very quickly in an area and can find the last owners of record, but when it comes to getting an abstract of title or calling upon the title companies immediately to furnish us with 150 or 200 certificates of title by tomorrow morning, you simply can't do it.

THE CHAIRMAN: Have you a proposed amendment to name

all the persons you know of at the time you file the petition, or something like that?

MR. WILLIAMS: No. I feel that the naming of the parties under the language that I have suggested here, the exercise of reasonable diligence, would mean reasonable diligence under the circumstances existent.

THE CHAIRMAN: You mean you wouldn't have to name them at all if you had to hurry with your petition so fast that you didn't have time to make any search.

MR. WILLIAMS: At that time I don't think we would have to. Particularly, could there be an explanation made in the notes to the rules as to what we have in mind on this thing, perhaps to clarify it?

THE CHAIRMAN: Then what do you have to do afterwards? According to your theory, when you have your title record and you find that Smith, Jones, and whatnot are really the owners of record, how do you add them to the proceedings, not having named them originally?

MR. WILLIAMS: By amendment, and we have successive amendments, depending on the size. We amend as to certain tracts. It may be that as to a great many of these tracts we won't bother to amend because under the Second War Powers Act we are entitled to go in under those circumstances, whether we take possession or not, and acquire by direct purchase. As a matter of fact, a great deal of this land that is under

condemnation proceedings was acquired by direct purchase, avoiding the necessity for publication and for service by the marshal and all that expense. We take their deeds.

THE CHAIRMAN: If I may state your position about that, then, you don't want to have to name all the owners at the time you file your petition, when you haven't had time to look them up, but you want some provision made to allow you to go ahead without searching for all of them, and if some do appear after the proceedings start, after you get judgment, you are obliged to name them and bring in the parties interested.

JUDGE CLARK: I question that.

MR. WILLIAMS: I might also suggest that in this draft reference is made to the exception when immediate possession is to be taken upon the filing of the complaint or when declaration of taking is to be taken upon the filing of the complaint.

THE CHAIRMAN: Is that in this same section?

MR. WILLIAMS: Yes, sir.

THE CHAIRMAN: What line is that?

MR. WILLIAMS: Starting on line 18. "If the plaintiff intends to file a declaration of taking with the complaint pursuant to the authority", and so on, "or if immediate possession is to be taken upon the filing of the complaint ...., the body of the complaint need name as defendants only such owners as are known to the plaintiff's attorney at the time of the

filing of the complaint". Then it goes on with the exception, "but before any proceedings", and so forth.

We cannot, of course, limit the Declaration of Taking Act to the use of a declaration of taking at the inception of the proceedings, that is, upon the filing of the complaint. An act of Congress gives us the right to file the declaration of taking at any time before final judgment. The same is true of an order of possession under the Second War Powers Act or under any other act. To get your order of possession, you don't necessarily have to file your declaration immediately upon the filing of the complaint.

So, those conditions, of course, are not taken care of. These matters that I am discussing now might come under the head of technical objections to the complaint, but they are only some of them. I feel that we can avoid the complication of trying to list all of these things in a rule to guard against the possibility that the acts of Congress might be thwarted, by permitting us to exercise reasonable diligence under the circumstances existing as of the time the complaint is filed.

I should like in this connection to point to the record of the Department--

THE CHAIRMAN [Interposing]: Excuse me. I may be a little dumb about it, but I am not quite clear what you want done with this provision about declarations of taking. What is

your criticism of it?

MR. WILLIAMS: I mean the authority to permit the filing of a complaint without the naming of all the necessary parties only when the declaration of taking is to be filed at that time is not sufficient.

THE CHAIRMAN: Your broader protection covered that, didn't it?

MR. WILLIAMS: Yes.

THE CHAIRMAN: In other words, you want to name only those that you know about when you file the petition, whether it is a declaration or not.

MR. WILLIAMS: Exactly. We don't know and, of course, we have no control over whether a declaration of taking is or is not to be filed. That is a question for the acquiring agency.

MR. LEMANN: Didn't you say, "knew or could ascertain by reasonable diligence"?

MR. WILLIAMS: Yes, sir.

MR. LEMANN: Isn't that your proposal?

MR. WILLIAMS: Yes, sir.

MR. LEMANN: You are not restricting it to those you know.

MR. WILLIAMS: Oh, no.

MR. LEMANN: You are willing to include those that you could ascertain by reasonable diligence.

MR. WILLIAMS: Yes.

MR. LEMANN: Suppose somebody says that "reasonable diligence" means going to the records, that it is not reasonable not to go to the records. What would you say to that?

MR. WILLIAMS: We would say, of course, it is reasonable to take that position.

MR. LEMANN: Then, your "reasonable diligence" phrase brings you right back to the public records, where we have it now.

MR. WILLIAMS: Yes, it would, but it wouldn't be so restrictive as the language you now have.

MR. DODGE: You want the right to exercise reasonable caution, reasonable judgment, in dealing with the abstract of title.

MR. WILLIAMS: Yes, sir, and particularly on the temporary interests in some of these low-value easements and that sort of thing. It seems to me we just must have it.

MR. DODGE: You are not getting away from the necessity of having an abstract of title.

MR. WILLIAMS: Oh, no.

MR. DODGE: Merely to view it with a common-sense point of view.

MR. WILLIAMS: Yes, that is exactly it. There will be instances where we will have attorneys or agents for acquiring agencies who will personally make an abstract and personally

make a search of the records. In many instances our own attorneys have done that. We have sent them out to Memphis or Pittsburgh or other places particularly to check the records where we are worried about a big project. If we are paying $250,000 for a title for a new federal building in Detroit, Michigan, we take a real look at that title, or if we are going to put $5,000,000 worth of munitions plant on some farm land down in Mississippi, we really take a look at it, but if we are taking the temporary use of that land for one year, maybe with the right to renew it for another year, and are paying two or three dollars a year rental for it, we don't think you should make us spend many, many times the value of the interest we are taking for title evidence.

At the same time, if anybody is hurt by this matter, he is going to be taken care of one way or the other, I am sure.

That brings up the point of the record of the Department through war times here during the greatest frenzy for land acquisition that anybody has ever known. I don't know anybody, mortgagee or otherwise, who has been missed in this program and hasn't been paid for his property. I would like to ask you gentlemen if you do know of anybody whom we have mistreated in the handling of these proceedings.

That is why I suggested at the last conference that if the language in the rules that were submitted last fall at

Chicago to the bench and bar was so objectionable to the people (incidentally, it was not our language; it was exactly the language that appeared in the 1937 draft of these rules), and if they think there is room for short-cuts and if they completely mistrust the Department of Justice, then leave it out entirely and let us stand on the present basic law as it is now to avoid this complication. That is the reason I made the suggestion at the last conference that we are willing to conform with the state statutes as they now are, and I don't see how anybody could complain of that.

THE CHAIRMAN: Then, you are really not interested in getting a uniform rule at all.

MR. WILLIAMS: Yes.

THE CHAIRMAN: Not to the extent of being discommoded by it.

MR. WILLIAMS: Fundamentally, we are very much interested in getting uniform rules, but when you come down to determination of interests of record, you are bound to have to conform to the state laws. Titles to real estate, as you all know, are based upon the laws of the individual states, and you must make the determination by a complete regard for the laws of those states. So, actually, we are conforming to the laws of the states. You must in a thing of this kind.

SENATOR PEPPER: It occurs to me that part of the difficulty is that the liberality that you seek is expressed in

terms of diligence, whereas really it involves an element of discretion, an element of judgment. I suppose the difficulty in making a rule respecting a declaration or complaint is that you don't want to say that there should be named as defendants only those whom counsel for the plaintiff in the exercise of sound discretion thinks ought to be defendants. If you put it that way, you are up against an objection at once. Somebody says, "The question of who ought to be defendants in a title case depends on the people who have the interests and not on whom the plaintiff's attorney thinks should be joined."

MR. WILLIAMS: That is right.

SENATOR PEPPER: If you express it in terms of reasonable diligence, you really don't accomplish quite what you want, because "reasonable diligence" is just as vague a term as the other, and, as you have said yourself, it not being feasible for the officers of the United States to search the original records, you are met with the objection that the records haven't been searched, and then the answer to your contention is that you haven't used reasonable diligence.

It seems to me that you really have to take the position that you had better travel along as you are on the state statutes or else frankly say that the kind of business that you do requires that you should have the power to determine who ought to be joined as defendants and who ought not to be joined. That last thing is something that I should

think the Committee would shrink from recommending, wouldn't they?

MR. WILLIAMS: Of course, we are perfectly willing to go along with the present state statutes.

MR. LEMANN: Where did the suggestion originate that we should have uniformity?

THE CHAIRMAN: The Department of Justice. It came up in 1938, I think it was. We were reaching the end of our labors in getting out the original draft, and it came from the Department. We didn't want to undertake it. We felt that there were a great many difficulties in the way, conflicting systems, but we got a letter from Attorney General Cummings urgently requesting us to do it, so we took it up and made a draft. Immediately opposition arose from some of the government departments, because it upset their existing systems, and they were quite satisfied with them. At least, we got a letter from the Attorney General, stating that on account of the difficulties, he wouldn't press it, and we dropped it. We didn't take it up the second time on our own motion at all. It came (I have forgotten just how) from the Lands Division. Wasn't that it?

MR. HAMMOND: I think it did.

THE CHAIRMAN: They wanted a uniform system, and it is at their instance that we have done it. I have a feeling myself that maybe if we had gotten it seven years ago, before

all this big bunch of war expropriations occurred, it might have been really useful to the Department, but now they are getting back on a sort of peacetime basis and are not pressed with such a great volume of work on this thing, and they are rather inclined to say, "We can get along under the conformity system."

Is that about it?

MR. WILLIAMS: I think that is right.

JUDGE DONWORTH: One of the largest condemnations ever undertaken by the Government, I think, is a project in the state of Washington called by various names, usually called the Hanford project. Do you know about that?

MR. WILLIAMS: It seems to me I have heard about that, yes, sir.

JUDGE DONWORTH: The U. S. District Judge for the Eastern District of Washington, one of our very able judges, who has even been mentioned for the Supreme Court, Judge Schwellenbach, has been sitting on those cases and giving them very careful attention. I haven't heard, Mr. Williams, of any serious difficulties that you are meeting with there beyond those that are ordinarily unavoidable.

MR. WILLIAMS: There are quite serious difficulties there on the matter of compensation to be paid. That is our difficulty.

JUDGE DONWORTH: That is right.

MR. WILLIAMS: That is the principal difficulty there.

MR. LEMANN: Mr. Williams, if we reach the conclusion that the adoption of your language would not permit us to get the approval of the bar and Congress, or perhaps of the Court, you, as I understand it, would prefer to stick to the conformity system rather than to take the language in this draft that we have before us, the draft of April 14.

MR. WILLIAMS: Yes, sir, that is correct. We feel that it would be very advantageous to have a rule, but on the naming of the parties, we will be perfectly satisfied to follow the state requirements at that time.

MR. LEMANN: Do you mean, have a rule that would provide for the conformity provisions on this particular point, but introduce uniformity on other points? Is that it?

MR. WILLIAMS: Yes.

MR. LEMANN: That is still something else, isn't it?

MR. WILLIAMS: That is what I had in mind at the last meeting.

MR. LEMANN: I rather got the impression that you meant, if we had to bring in a rule that would require this to be done, you would say, "Well, just drop it; forget it. We will go along as we are now."

MR. WILLIAMS: There are certain very distinct advantages in other features of this rule that we would like to have, if we could get them.

MR. LEMANN: But you wouldn't think those advantages were sufficient to reconcile you to accept this provision if we had to insist on this provision, as we thought, to meet reasonable objections to your phraseology.

MR. WILLIAMS: I am afraid not, because it just seems to me to be too unreasonable when you consider the great variety of acquisitions that we handle by condemnations.

THE CHAIRMAN: I can see where you might not have to name them all at once if you didn't know them and wanted to start the proceedings going and added them later on. That is easy enough. The point I have in mind is that, when it says, "owners appearing of record", somebody has to decide whether the man is an owner of record.

MR. WILLIAMS: Yes.

THE CHAIRMAN: As a young man, I examined thousands of abstracts. I looked at the record, and I decided whether or not he appeared of record to have any interest. If I thought the defect was technical and not substantial and if it didn't really worry me about the ownership, I ignored it. The point I tried to make before was that, on the face of this rule as drawn, if I were a Department of Justice attorney, I would say, "I am going to decide whether he does appear of record. His name may be mentioned on the record, but I want to know whether he really appears of record to have an interest, and I exercise my judgment as a lawyer about that."

SENATOR PEPPER: It is not a question of diligence, but a question of judgment.

THE CHAIRMAN: Yes. When you exercise your judgment and say, "This fellow's name is on the record, but he doesn't appear to me from the record to have any real interest," and you drop him out of consideration, all is well and good. I pointed out that if you made a wrong guess as to whether he had a substantial interest, you just didn't get title to that particular piece. That is the chance you take.

But I myself think that you are setting up a straw man when you set up a certain interpretation of this rule for the purpose of showing how unreasonable and difficult it is.

MR. WILLIAMS: Yes, of course, because we have to work with it, Mr. Chairman. I would like to suggest that, if your interpretation of that rule and that language as you just announced it were to be followed by all the courts, we would have no difficulty.

THE CHAIRMAN: How would the courts do anything else?

MR. WILLIAMS: They would have to read the exact language as it stands there, "interests appearing of record".

THE CHAIRMAN: The court doesn't get to that point unless some fellow comes in and says, "I am interested in this property"; and if he is, they let him in. That is all.

MR. WILLIAMS: I know the attitude taken by the title companies. If you give them that language, that is what they

will give us, interests appearing of record. That is all the information we have, and the courts would require it.

THE CHAIRMAN: They tell you what the nature of it is in their certificate.

MR. WILLIAMS: Sometimes they do. They will refer to a judgment or to an objection made as to knowledge of the unknown heirs of somebody deceased way back along the line. We don't have their names.

THE CHAIRMAN: Can't you use that judgment as to whether that is a substantial defect or not?

MR. WILLIAMS: The title companies construe it to mean an interest of record, and we have not personally seen the record, so we don't know. On the construction of due diligence, reasonable diligence--

THE CHAIRMAN [Interposing]: Ask them what the nature of the interest is.

MR. LEMANN: If you had due diligence, you would still use the title company?

MR. WILLIAMS: Yes.

MR. LEMANN: If the title company came in and said that all these things exist, and so on, what would your "due diligence" lead you to do when you got that report from the title company? What would you do?

MR. WILLIAMS: I think that, under the language "reasonable diligence", we probably would be entitled to use

some discretion there.

On your point, Senator Pepper, about the construction of "reasonable diligence", we would leave it entirely to the court to determine, if the question were ever raised, whether or not we had exercised reasonable diligence.

MR. DODGE: What you want really is the right to read reasonably the title report.

MR. WILLIAMS: Yes, sir, that is exactly what we want.

MR. DODGE: To disregard unsubstantial technical interests which do appear of record.

MR. WILLIAMS: Yes, sir; and we also want a little liberality in the expenditure of money for title evidence on these interests that we acquire that do not constitute fee simple titles and where the value is small and where we are taking only a temporary interest. I think it is perfectly reasonable to expect that we could acquire those interests without the expenditure of several times the value of the interest we are taking.

JUDGE CLARK: Mr. Williams, if you once go to a title company, aren't you pretty much in their hands?

MR. WILLIAMS: Yes, sir.

JUDGE CLARK: The question of whether or not you need to go is a separate one, but once you go to them as title people, I have always recognized as a practical matter that they held the whip hand, because if you don't do what they say,

they won't certify or guarantee the title, and there you are.

MR. WILLIAMS: Exactly.

JUDGE CLARK: Isn't the Government, once you get in their hands, in practically the same situation?

MR. WILLIAMS: Yes, sir. There isn't any question about it.

JUDGE DOBIE: But, as I understand it, if you could give them language a little more liberal than this, then they would hand you in a rather different certificate of title; is that right?

MR. WILLIAMS: Then they would give us a different certificate of title, and they would give us the names of the interests in effect that they would want represented on deeds, and they would guarantee against everything; but they say that under this type of language they have no discretion, and they must show, for example, the placer mining claims filed years back on the Mojave Desert.

JUDGE DOBIE: I say that they are wrong and that what you ought to ask for is a certificate, just as you stated, of the names of the persons who, according to their judgment as title examiners, have a substantial interest in the property. You are the master of what you ask for, aren't you?

MR. WILLIAMS: But asking them for material in that kind of language would not be compliance with this rule.

THE CHAIRMAN: The rule doesn't tell you what you

shall ask the title company for.

MR. WILLIAMS: I know, but we must use it. For the court and in our allegation as to parties, we would have to use this language by saying, "The following persons are named as defendants and are all the persons appearing of record or known to the plaintiff's attorney," and so forth, with a colon, and then list them.

THE CHAIRMAN: You have examined the title or you have had the title company do it, and you know the nature of the alleged defects and have formed your judgment as an attorney, as any examiner has to do, that so-and-so doesn't have an interest of record. His name appears there, and there is some point or technicality there, but you have resolved the point in favor of the conclusion that he doesn't own the property. Every examiner of title does that. You are misconstruing the language of this when you say you have to do anything else. You don't have to use the words of this rule when you ask the title company. You ask for a statement as to who in their opinion are the owners of the property, omitting what they consider to be unsubstantial defects. You are asking for their opinion and not for a policy, aren't you? You don't want a certificate on which you can hold them liable. You are just asking for their opinion, aren't you?

MR. WILLIAMS: We expect to hold them liable also if they have missed some parties with substantial interests. At

the same time, I don't think we could ask the title company for information along the line you have mentioned and then represent to the court by the certificate of the attorney for the United States that these people represent all persons appearing of record, when we have told the title company, "You disregard a lot of these people appearing of record."

THE CHAIRMAN: It doesn't say, "appearing of record". It says, "appearing of record to have an interest".

MR. WILLIAMS: Yes.

THE CHAIRMAN: I contend that under these rules you have power, as an experienced title man, to say whether or not a man has an interest of record. I have examined thousands of titles, and I may have mentioned defects, but I would say, "This doesn't show that he has any substantial interest of record or anything that affects the marketability of the title." That is what you do under this.

Now let me ask you a question about the jury business. There is a statement in this rule that the parties have a right to trial by jury. I am asking if you know anything about the attitude of the TVA or any other government service that now, under existing law, has a different system, whether they would welcome this or oppose it.

MR. WILLIAMS: Yes, sir, I do know something about the attitude. I know something about the attitude of TVA.

THE CHAIRMAN: How do they stand about this jury

business, abolishing their present system for having de novo hearing in the court of appeals, and all that sort of thing?

MR. WILLIAMS: They are opposed to any modification of their present procedure.

THE CHAIRMAN: I see.

MR. WILLIAMS: They are opposed to the provision of S. 802 in the present Congress, which provides for the abolition of the commissioner system. It is just like the old S. 919 in the last Congress. That is now pending in this Congress, and they are opposed to it. As a matter of fact, I talked with Mr. McCarthy, the Assistant General Counsel of TVA, who was in my office this morning (I left him to come up to this meeting), and he was discussing S. 802. I told him what was going on generally, that I thought, regardless of the exception that was contained in the draft of the rules that was submitted in May 1944, that this Committee was seriously considering making no exception as to TVA on the jury.

THE CHAIRMAN: Yes.

MR. WILLIAMS: I told him also that of course we couldn't make an exception in S. 802 because we had to be consistent with the position taken before this Committee on the advisability of jury trials. I do know that they feel that they should be permitted to retain their present procedure.

JUDGE DOBIE: They like it.

MR. WILLIAMS: They tell me they like it, yes.

JUDGE DOBIE: Speaking for the circuit court of appeals, we don't.

MR. WILLIAMS: I suggested that to him, sir, and he countered with the suggestion that the district court judges like it. That was his suggestion. I didn't know about that, but I recalled very definitely your attitude expressed here at our last hearing on this thing.

MR. LEMANN: We can size it up this way: TVA doesn't like this if we don't except them.

THE CHAIRMAN: I want to ask one more question. How about the District of Columbia? How does the Department of Justice feel about abolishing this present system in the District of Columbia? I understand there are two, one relating to the U. S. condemnations, the other to District condemnations.

MR. WILLIAMS: We have no objection.

THE CHAIRMAN: Neither of them provides for jury trial, but they have a special six-man provision. How do you feel about that?

MR. WILLIAMS: We have no objection to the abolition of the present District of Columbia procedure for condemnations by the United States. For condemnations by the District of Columbia as such, I believe it would be perfectly proper to except them, because it is analogous to condemnation by a state or municipality throughout the United States. It is for their street widening and that sort of thing. But for condemnations

by the United States for federal buildings or other purposes, we have no objection to it.

THE CHAIRMAN: Are they uniform now? Do they have the same system for the United States as for the District?

MR. WILLIAMS: I think there is a little difference.

THE CHAIRMAN: Does anybody from the Committee who is going have questions to ask before he leaves?

JUDGE DOBIE: Is that the most serious objection you have to the rule as it is now drawn?

MR. WILLIAMS: Yes, that is the most serious objection. Of course, going back to the construction of this language, I don't quite know how you would construe the alternative there, "or known to the plaintiff's attorney". Does that mean that the body of the complaint shall name as defendants (a) all persons appearing of record or (b) all persons known to the plaintiff's attorney? I am not clear about the alternative there.

JUDGE DONWORTH: It means it shall contain both, all those appearing of record and also those known.

MR. WILLIAMS: Of course, it says "or" here in the draft. Do you see what I mean?

JUDGE DOBIE: Yes. I agree with Judge Donworth. I would say that if X and Y on the record have interests, and if B and C are not on the record but he knows that they have interests, he would have to name both under that.

MR. WILLIAMS: I wondered if the "or" should be changed to "and".

JUDGE DONWORTH: No. You see, it is a classification. There are two classes that must be included under the words "all persons". The first class, those appearing of record; the second class, those known to the plaintiff's attorney. That is the intent, isn't it?

PROFESSOR SUNDERLAND: You want them both, so it ought to be done.

JUDGE DONWORTH: I should like to answer the question just asked by the Chairman, subject to correction, about the District of Columbia. As is well known, there are a number of statutes of the United States applicable to all federal condemnations, and they override the Conformity Act in the states where there are such specific federal statutes, like filing the declaration of taking and all that. My understanding is that wherever there is a federal statute relating to federal condemnations, it would prevail in the District of Columbia so far as the federal statute is specific on the subject. Am I right?

MR. WILLIAMS: I think that is correct, yes.

JUDGE DONWORTH: For instance, although the District of Columbia might not be able to take possession of property in advance of the ascertainment of the amount of compensation, the United States can positively do that because the law says

so in the case of the United States.

MR. WILLIAMS: Yes. But I believe there are some variations in the procedures between a condemnation made by the District of Columbia and one made by the United States in the District.

JUDGE CLARK: Mr. Williams, in this draft there is a subdivision (j) on Assessment for Benefits, which you probably have seen, which deals particularly with the District of Columbia. How far is that needed? If we except the District of Columbia, it wouldn't be needed at all, would it?

MR. WILLIAMS: It would not be needed.

JUDGE CLARK: As it is written, in line 204 it speaks of "a special assessment or special tax". I don't know whether there is any difference between assessment and tax, but it would not be needed if the District of Columbia is excepted.

MR. WILLIAMS: That is correct.

THE CHAIRMAN: Under the draft here, it is excepted. The last page of the draft says it is excepted.

JUDGE CLARK: But the note brings up the point. I just wanted to see if it wasn't needed.

MR. WILLIAMS: I might add that those sections dealing with assessment for benefits and compliance with state procedure do not concern us at all. As I understand it, they pertain to condemnations under the state statutes in the federal

courts. So, we have not given any consideration at all to those sections.

MR. LEMANN: How do you like this provision in the District of Columbia Code? "Petition shall contain the names of all owners and their residences as far as the same may be ascertained."

MR. WILLIAMS: That doesn't sound bad.

THE CHAIRMAN: How does that read?

MR. LEMANN: "Petition shall contain the names of all owners and their residences as far as the same may be ascertained." I asked him how he liked it. He said it didn't sound so bad.

JUDGE DOBIE: I guess he would like it if you said, "ascertained by reasonable diligence".

MR. WILLIAMS: I would like it the way it is. Reasonable diligence is implicit.

MR. LEMANN: He would take it, but I myself would be inclined to think that he wasn't really any better off than the way we propose it. He might like this and not the other way, and I should think the title companies might accept this.

THE CHAIRMAN: The title companies went haywire because they took it for granted that, when we said known owners, we didn't intend that an owner of record was a known owner. Of course, the thing was vague, but nobody who had anything to do with the drafting ever supposed that a man who had an

owner-of-record interest would be construed to be a known owner. Having misconstrued the word where there was room for construction, then they sat up a straw man on the wrong construction and began to yell about nobody having to look for an abstract any more. In view of the fact that that once has been made a talking or yelling point, if we put up a draft to the title interests again that didn't expressly mention the record, we would have the same roar. They would say, "You are just trying to slip it around again." They would yell their heads off and go to Congress, and then we would have the same old row all over again. So, as a tactical matter, we are put to it to say something about the record ownership, I think, don't you?

MR. LEMANN: You never can tell. I would have thought the Department of Justice would prefer our language, perhaps, to this language in the District of Columbia, but I am wrong. He says this language is all right, and that the language in our rule is not. So, I am not quite sure what position groups may take. Personally, if I were in the Department of Justice, I would rather have our draft rule than that of the District of Columbia.

THE CHAIRMAN: If I were in the court, I wouldn't ever consider requiring the appearing of record interests, requiring the naming of a person whose name was mentioned in the record but who in my judgment as a title examiner did not hold the title, if I concluded that the title was in somebody else

and that he didn't have a real interest. I think our draft presupposes that the government lawyer would use the same judgment that he could under that District of Columbia draft.

MR. LEMANN: I would say so. I should think this might require him to do more, because certainly it says "as far as the same may be ascertained." That certainly means looking at the records. Yet, these gentlemen from the Department of Justice think this is better than our draft. If you ask me, therefore, what I think the title companies might say, they might surprise me also by saying, "We will take that."

MR. WILLIAMS: I think they would.

THE CHAIRMAN: Of course, if the Government wants a policy of title insurance, it is not going to get it unless it names everybody in the judgment proceedings that the title company thinks ought to be named. If they have a clause like that of the District of Columbia, with reasonable diligence, and they don't construe that to exercise judgment as to who is the owner, and if the title company is dissatisfied with it, it won't insure that any more than it will under the other system. I don't think that, as far as getting insurance is concerned, we are interested in it at all. It is a matter of judgment of the Department lawyer as to whether he thinks there is a substantial interest that ought to be named to clear the title, and I think the rule as drawn now says that.

JUDGE CLARK: May I throw out a suggestion? I wonder

if there would be anything in this, that in the appropriate place here in the rule as to the complaint, we could make the formula that whoever by the applicable substantive law has an interest should be named by the time you get to the hearing.

THE CHAIRMAN: You mean, those persons shall be named who are required to be named by the state law.

JUDGE CLARK: Yes, along that line.

MR. LEMANN: A conformity provision on this point.

JUDGE CLARK: Yes, that is it.

MR. LEMANN: That is what I understood Mr. Williams to suggest as a possibility. Take the conformity position on this point and then have uniformity on other points. Mr. Cherry says that is hybrid.

THE CHAIRMAN: It would have no application to TVA, no application to the District of Columbia, and you would have as many systems around the country--

JUDGE DONWORTH [Interposing]: I think Judge Clark's language would be no different in meaning from what our draft says, those appearing to have interests in the property. That means substantial.

JUDGE CLARK: I think that probably is true. Of course, this is to get over to the title companies so that they won't require too much. I am inclined to think there is a real difficulty. If you ask the title company to do something, and then they make their own construction of the rule, there you are.

They are pretty nearly king, I have always found, when they start doing it.

Quite so, Judge Donworth. I am just trying to get a little different formula to state the same thing. Mr. Williams was saying that they had to observe the state substantive laws. I suppose they have. Therefore, we will be only stating in a little different formula and perhaps a little more directly, I am not sure, what they actually have to do.

THE CHAIRMAN: What do the title companies do in those states--and there is quite a number of them--where it is expressly stated that the parties named as defendants shall include all those appearing of record to be owners? What do they do there? Do they do anything different than you think they do under our rule? Have they caused you trouble?

MR. WILLIAMS: No, I don't suppose they would.

THE CHAIRMAN: Those statutes are just the same as ours. I have counted them. You say there are eleven or twelve of them. I notice my own state in the list.

MR. WILLIAMS: Minnesota, yes.

THE CHAIRMAN: You have had lots of condemnations up there.

MR. WILLIAMS: Yes.

THE CHAIRMAN: Do you rely on title companies for insurance or only for abstracts?

MR. WILLIAMS: We use both up there. It depends on

the circumstances. Of course, in the past we haven't been attempting to conform to those state statutes, and if we were attempting to conform with them, we would conform only as near as may be under the Conformity Act. We don't feel now that we have to comply with state statutes except on matters of procedure under the condemnation statutes of the United States.

THE CHAIRMAN: You think, when you are condemning under the statute of a state, under the practice of the conformity system, that in drawing your complaint, for instance, you don't have to comply with the state statute that requires you to name all persons appearing of record to have an interest?

MR. WILLIAMS: We have never considered it such.

THE CHAIRMAN: What does the conformity system mean, then?

MR. WILLIAMS: It means matter of procedure and practice.

THE CHAIRMAN: You don't think the question of who shall be made parties and named is a matter of procedure?

MR. WILLIAMS: That has been one of the fundamental objections we have had to going into this detail, that is, the ascertainment and the naming of indispensable parties and where you shall go to look for those parties. All that sort of thing is something that I doubt very much is a fit subject for a rule of court. I think that the naming of defendants is pretty much a matter of substance. Then, those defendants, once named, will

be served in accordance with the rules, on the theory that you name your defendants and you take your risk. There is no place else in these rules where you try to define where you shall go to find out who shall be named defendant or party to any kind of proceeding. That is the fundamental question raised here. That is why I say that this language submitted in the May draft is not satisfactory to these people, because they think it will permit a short-cut in some way or other. We are willing to stay exactly in the position we now are in in the handling of these proceedings. Nobody can point to anybody who has been injured by it, as far as getting compensation is concerned.

SENATOR PEPPER: May I ask how the matter would stand if the rule read: "The complaint shall name as defendants all persons having interests in the property as owners, encumbrancers or otherwise." Instead of attempting to spell out the way in which you ascertain who the owners are, you state the general principle that it is the duty of the complainant to join as defendants all persons having interest. Having done that, as the Chairman has pointed out and as you yourself recognize, just as in a private litigation, if you fail to join somebody who has an interest, you have to take the consequences.

MR. WILLIAMS: That is right.

SENATOR PEPPER: But somebody would have to be able to come forward and show that he had an interest, in order to defeat the complaint as drawn.

I was just wondering how it would be from the point of view of the title company. Suppose that you asked the title company to report to you under a rule providing that you must join as defendants all persons having interest as owners, encumbrancers, and so forth, and just put it to them on that ground, what would their report be to you?

MR. WILLIAMS: I think that would be very helpful, and I think that that would give the title companies some discretion.

SENATOR PEPPER: It certainly would, would it not, because a title company would not be apt to report that a person was an owner or an encumbrancer if in their experience all that could be said in favor of his position as such was something purely technical or chimerical, although it was a matter of record.

MR. WILLIAMS: I think that would be helpful.

THE CHAIRMAN: It flabbergasted me, because they have to decide in that case by reference to the record, and that is all they have to go on as to whether a man has an interest or not. They look at the record and say, "Has that fellow an interest or not?"

SENATOR PEPPER: And then they decide that he hasn't.

THE CHAIRMAN: Yes. Under this rule as drafted, appearing of record. They look at the record and decide whether or not he has an interest.

SENATOR PEPPER: But the point is that all those whom the title company unearths as having their names on the record have got to be joined under this rule as defendants.

THE CHAIRMAN: That isn't the rule. It says, all persons appearing to have an interest.

SENATOR PEPPER: What I mean is that the rule as written, as I understand Mr. Williams, is interpreted by the title companies to mean the latter thing. We think they are wrong. You have pointed out, Mr. Chairman, that they have the whip hand, and what I was doing was searching for some formula which would be sound as a matter of procedure and which would meet the difficulty of the title company. It does seem to me that ordinarily in stating what a complaint should contain, you wouldn't bind the plaintiff to any particular method of determining who in his judgment ought to be joined as defendants. You would state a broad category, that all persons must be joined as defendants who have interests in the property as owners or encumbrancers. Suppose you stopped there. The question that I had was whether that would be construed by the title companies as enabling them to exercise the element of discretion which Mr. Williams thinks would relieve the Department. I understand him to think that it would.

MR. WILLIAMS: Yes, sir, I do very definitely think that it would.

PROFESSOR SUNDERLAND: Would that take care of the

question of unknown owners?

MR. LEMANN: Isn't Senator Pepper's suggestion equivalent to taking the language sent out to the bar and which made all the title companies, the American Bar Association, Mr. Walter Armstrong, and everybody at Chicago foam at the mouth and stand on their heads? It is the same language, leaving out the words, "if known". We had it--and this is what aroused all the argument:

"The complaint shall name as defendants all owners of and parties interested in the property sought to be taken, if known, and all others shall be made defendants under the designation of 'Unknown Owners.'"

If we took out the words, "if known", it would then read as follows: "The complaint shall name as defendants all owners of and parties interested in the property sought to be taken". That, as I understand, is practically your suggestion.

SENATOR PEPPER: I wasn't covering the case of the unknown owners.

MR. LEMANN: I mean before you get to unknown owners.

THE CHAIRMAN: Of course, Senator, if in one breath you require everybody who has an interest to be named, and then if you put in another clause that persons who are unknown owners shall be served by posting or publication, haven't you really whipped yourself back to the point where your original statement means nothing?

SENATOR PEPPER: I suppose maybe you have.

THE CHAIRMAN: It is exactly what the language of the rule was before. You were going to leave, Senator. Would you take up any other thing that is in your mind about this?

SENATOR PEPPER: No.

THE CHAIRMAN: You are through with him?

SENATOR PEPPER: This was the thing that interested me, and the thing that worries me about the rule as we have drafted it is that we are prescribing a formula by which a plaintiff is bound, exercising what in every other type of litigation is a form of discretion, as to whom to join as defendants. Usually, the plaintiff's attorney has to take his risk that he will join all the people that he ought to join and take the consequences if he fails to join somebody whom he ought to have joined or be met with the objection that there is an indispensable or necessary party who hasn't been joined. Here you say that, to guard against all that, you have got to put in all the names in the city directory. That is a real hardship when you consider the size of the city directory.

JUDGE DONWORTH: I would like to comment on that along this line. There is a very important question of public policy involved here. We should see that both parties are protected, and the condemnor should not be allowed through negligence or design to leave out of a condemnation affecting valuable property one of the owners is perhaps litigious or demands a

higher figure. Every owner is entitled to be notified when the property that he is interested in is being condemned by the Government, and it is not fair to any property owner to leave him out. For that reason, I think it is a little different from the ordinary case of defective parties.

MR. WILLIAMS: I would like to say that Senator Pepper has stated our position exactly as I wish I were able to state it. I agree entirely with what he said on the way these things should be handled.

SENATOR PEPPER: Your objection is to the inclusion in the rule of a formula for determining who have to be joined as defendants, if that formula is so broad in its application that it requires presence on the record through service and whatnot of a whole lot of people who, in the exercise of ordinary common sense, could have been determined to be superfluous defendants.

MR. WILLIAMS: Yes, sir.

SENATOR PEPPER: I can see the difficulty, but the problem is to find the remedy.

MR. WILLIAMS: If you all assume that we omit necessary parties, parties with compensable interests, at our peril, then why do we need to concern ourselves with this thing? Why not omit it entirely? That was my suggestion.

THE CHAIRMAN: Of course, if you make the rule as broad as the Senator suggests and say that everybody who has an

interest has to be named as defendant, then if there is some fellow who isn't known, who hasn't any interest of record, if he isn't named, the proceedings are defective again. That is another hazard you are getting into. Our rule helps you out to the extent of saying that the only people you have to name to make the proceedings good are those that you know about or those who have record interests. Now this new suggestion says, "No, that isn't enough. You have to name everybody who has an interest, whether you know it, the record shows it, or whatnot, at your peril. It is your business to find out absolutely in some way other than an examination of the records who are in fact the real owners." I think that rule is worse on you than this one. This certainly confines the sources of your information and says, "If you know him, all right. If you don't know him, you are good if you go to the records and look at them and determine as a title examiner who or what has an interest in the property."

MR. WILLIAMS: May I ask just one question? Suppose this rule does define exactly what we must do and where we shall go to find these defendants; suppose that we do all those things and that through some error on the part of the recorder or otherwise, a man has a substantial interest in property which does not appear of record and he is completely omitted from the proceedings. We have done everything that the rule requires us to do. Isn't the United States under those

circumstances completely absolved from further liability?

THE CHAIRMAN: I should say so, under the terms of this statute. It is an in rem proceeding, and the judgment is good against the real owner if you have complied with the rules and they constitute due process of law against an unknown owner. There is no doubt about that.

MR. WILLIAMS: Yes. So, there is a danger to the property owner by trying to define what we shall do. If there is anything wrong with the records, that land owner is going to be hurt.

THE CHAIRMAN: Are there any more questions that anybody wants to ask?

MR. LEMANN: You mean on this section? There may be objections to other portions of this draft.

THE CHAIRMAN: Have you covered in general your objections to the draft?

MR. WILLIAMS: No. I should like to mention one or two more.

THE CHAIRMAN: All right.

MR. WILLIAMS: I have a suggestion to the Committee on the provision on the form of notice appearing on page 7 of the draft of April 14, 1945, line 60. It is provided that the form of notice shall advise the person to whom it is directed that in case of failure to serve their answers, their defaults will be entered. I suggest for your consideration that the

land owner be given just a little bit more notice as to what will happen. I don't want him to think that his property is going to be taken from him without receiving just compensation. I should like to have some means by which we would have a reasonable opportunity to contact these owners and to negotiate with them and to settle with them before requiring them to rush into a lawyer's office and file an answer immediately.

THE CHAIRMAN: You mean you want to warn them that, if they don't appear, you simply go ahead and value their property, something like that.

MR. WILLIAMS: Something on that order to indicate that he will not be deprived of compensation.

THE CHAIRMAN: How would you word that?

MR. WILLIAMS: I hadn't thought about the exact language, because I didn't know whether or not that might be taken care of, whether you gentlemen might think it was taken care of in the note that Mr. Hammond has suggested to be included under the default provision, to refer to setting aside defaults and liberality in setting aside defaults. Of course, I think that there should be something there, but I do feel that the land owner should not be hit quite so hard here and be forced in effect to file an answer and get into a contested status. I don't like to force them into that position.

THE CHAIRMAN: Mr. Hammond suggests in lieu of that something like this: If they don't answer, they will be deemed

to have consented to such taking of their property and fixing of such compensation as the court may finally award. He suggests something like that, instead of default, telling them what is going to happen to them.

MR. WILLIAMS: Something along that line would soften it up a great deal, I think. Of course, we intend immediately upon the filing of these proceedings and particularly upon the filing of declaration of taking, as we always have, to address letters to these owners and tell them the amount of money on deposit and that they will be contacted soon by a representative or that they can contact the U. S. Attorney to discuss the settlement of the case. We would like to have that opportunity before requiring them to file an answer. In other words, an answer must be filed by an attorney. It may be that we can avoid expense.

THE CHAIRMAN: You think, if you don't tell them you are going to default them but are just going on without their presence and fix compensation, that they may not go to a lawyer so fast. Is that the idea?

MR. WILLIAMS: They may not. Of course, we have a fine regard for the welfare of the bar and don't want to do anything that is going to prejudice that---

THE CHAIRMAN: That is all right.

MR. WILLIAMS: ---but at the same time we do feel that there should be something like that, particularly if we get

into these inconsequential objections to title and sue these people as defendants by reason of them, keeping in mind always that this land is generally many, many miles removed from the federal district court, and the landowner getting such a notice is going to go down and see his friend the lawyer and ask, "What is this?" The lawyer will say, "I don't know, but I had better go down to St. Paul and find out."

THE CHAIRMAN: Won't he do it if you notify him that if he doesn't appear, you are going to fix the compensation without his presence?

MR. WILLIAMS: He may, of course, and that is one of the reasons that we don't like to implead as defendants all these people who really don't have any interest. That is a thing we don't want to be forced to do, and I don't think we should be forced to do it. I think we should be given discretion, depending on the type of acquisition that is involved, and that for the temporary use or the easement of small value we should not be forced to get complete title evidence.

JUDGE DOBIE: Some fellow may not have the slightest idea he had an interest in it, but if the Government thinks he has, he will say, "Santa Claus!"

MR. WILLIAMS: Yes.

THE CHAIRMAN: Have you any further objections, Mr. Williams?

MR. WILLIAMS: I have an objection as to the

publication of notice, page 10, lines 105 and 106. That requires an affidavit by the attorney for the plaintiff that, notwithstanding diligent inquiry by him, certain addresses cannot be found. We cannot publish until that affidavit has been filed by the attorney, and of course he would not file the affidavit unless he had complied with it. We had contemplated originally in considering these rules that we would follow the District of Columbia practice and publish at the inception of the proceeding and then serve all people within the jurisdiction of the court that could be found. It is going to delay the consummation of our proceeding if, after serving everybody personally, getting the "not found" returns and mailing of notices, then, as to those persons who live outside the jurisdiction of the court, in order to publish against them, diligent inquiry as to their addresses must be made and that showing made in the form of an affidavit. I think it might be some little time before we could get to our publication.

So, I question the advisability of making that requirement that the affidavit must be made that notwithstanding diligent inquiry they cannot be found, because diligent inquiry by the Department of Justice, of course, means a very careful search.

THE CHAIRMAN: The record would be this: You have a person whose name is known, whose identify is known, who is in interest, but you don't know his residence. The rules require

that a person be personally served. You don't know his residence, but you don't file any proof of it. You simply go ahead and publish it. As far as the final record in the condemnation suit is concerned, you have a record of him, his name is known, there is no personal service on him, and no showing of any kind in the record that his address is unknown. I suppose that one of the objects of having an affidavit filed, and sometimes an order of publication, is to have a judicial basis in the record that prima facie made your service good; but if you don't put that in, if you have no proof of not knowing his address, and no order of court permitting you to serve on a showing of that kind by publication, then you have got the validity of the decree, as a matter of fact, outside the record. If it is attacked ten years afterward, a question of fact then arises as to whether you knew his address or whether you did not.

The whole purpose of this sort of thing in an in rem suit is to get an initial record right then and there that forms the basis for your publications and excuses personal service. You wipe that all out. I think the Government would like to have some kind of record made in a condemnation suit that justified the published service.

MR. WILLIAMS: We have great difficulty in complying with that type of statute in those states where they are in effect; such as California, for example.

THE CHAIRMAN: It delays you, you mean?

MR. WILLIAMS: Yes, sir. We have to make an individual showing there under their statute before we can publish of the exact things that we have done in an attempt to locate an individual defendant against whom we want to publish. We have to show the names of all the persons to whom inquiry is made, the telephone books we searched, the city directories, the tax collector's office, the post office, and everything else. It is a very distinct hardship.

It seems to me that if the Committee wants some such condition to the publication, a certificate by the plaintiff's attorney that they are unknown---

THE CHAIRMAN: That their names are known.

MR. WILLIAMS: ---or that their addresses are unknown--

THE CHAIRMAN [Interposing]: If somebody hasn't a mailing address, then you are excused.

MR. WILLIAMS: It isn't so much mailing in. We have people residing without the jurisdiction of the court, if we know their names and know their addresses or their last known addresses.

THE CHAIRMAN: This person is in the jurisdiction; he has a record owner interest; he is an owner, and, as far as you know, he is a resident of the state. The acquisition could be made on that provision, and your suggestion was that the government lawyer in a case of that kind, although the man's

identity was known, could publish without any showing that his address was unknown or that any effort had been made to discover it. I don't believe you could ever get a provision like that approved.

MR. WILLIAMS: Of course, we can't take care of everything in a rule of court and, after all, a man whose property is being taken certainly knows it is being taken.

THE CHAIRMAN: He ought to come in to court without being summoned, then. Is that the idea?

MR. WILLIAMS: Exactly, if he knows his property is being taken. There is nothing secret about the condemnation cases and the entry of the Government on to the land.

THE CHAIRMAN: You couldn't get by with that.

MR. WILLIAMS: Oh, no.

THE CHAIRMAN: Congress wants everybody who is a record owner and whose name is known to be served. The only excuse for not serving him that way is sticking a notice in the newspaper, which he never sees, on a showing that you don't know how to reach him.

MR. WILLIAMS: Of course, we want to get service, and we want to get notice to all parties who have an interest. We have no objection to that, but I just wondered about the use of the diligent inquiry and the affidavit by the plaintiff's attorney. A great many of our attorneys would hesitate to file those affidavits unless they personally had made the inquiry,

and in these large offices I don't know whether they would be able to or not. I should think that that requirement might be relaxed a little bit.

THE CHAIRMAN: Was there some other objection that you wanted to make?

MR. WILLIAMS: I would like very much to be able under these rules to publish first and then serve.

THE CHAIRMAN: I can see that is another point. I was just wondering about the mechanics of it. Suppose you publish right away without waiting to find out whether you know his address or not, then, after you have had time to find out, you find that you do know his address, and you go on and serve him personally.

MR. WILLIAMS: Yes.

THE CHAIRMAN: But if it turns out that you don't know his address or can't find it, then your publication made last month has started the time for answering to run, and there has been no delay. That is your theory, isn't it?

MR. WILLIAMS: Yes.

THE CHAIRMAN: What kind of concrete suggestion have you made as to how the rule would be worded which would permit publication offhand without any reference to your knowing their addresses and then having it that the addresses are checked afterwards and providing that that publication shall not be good where you do find his address unless you serve him some

other way. What is your machinery for providing for that sort of novel suggestion?

MR. WILLIAMS: We would follow substantially the language in the present District of Columbia Act, and we would file the certificate as to inability to serve personally or to locate at the time we reached that point, after personal service failed. We would of course mail the notice to the last known address and do all the other requirements of posting, and so forth.

THE CHAIRMAN: You publish right away---

MR. WILLIAMS: Yes.

THE CHAIRMAN: ---and then to show that your publication is good, under the District practice all you have to do is to file an affidavit later that you haven't been able to locate his address or make service on him. Is that it?

MR. WILLIAMS: Yes.

THE CHAIRMAN: That retroactively makes your publication good. Is that the machinery they use?

MR. WILLIAMS: That would be substantially the way it would work.

THE CHAIRMAN: I don't know whether we have a copy of the District of Columbia provision.

MR. HAMMOND: Yes.

THE CHAIRMAN: If we have, all right. Is there anything else, Mr. Williams?

MR. WILLIAMS: I think not, thank you, sir. Do you have anything, Ralph? I appreciate your kind consideration of this matter.

THE CHAIRMAN: You don't owe us anything. It is our business to listen to you and hear what you have to say. We were glad to have you here.

[The meeting adjourned at 1:05 p.m.]

WEDNESDAY AFTERNOON SESSION
[Continued]

May 2, 1945

THE CHAIRMAN: Shall we go to Rule 71A? I think the discussion we had this morning about this rule raises a very serious problem as to whether there is anything more we can do about it. We have a situation here now where the whole demand for this rule comes solely from the Department of Justice in the first place. No one in the country has ever asked for it except them. They withdrew their request once, and now we are confronted with a situation today where they don't like our rule.

They don't want to draw it so that there is going to be any reference to record owners. They don't like our provision for putting in some proof that you don't know a man's address before you can serve him by mail. There are all sorts of things in the rule that they want out, which was bitterly attacked by the American Bar Association and others. On top of that, they say that, rather than have any of this sort of thing in, they would rather not have any rule at all. They have practically said that now they are quite content to go on the conformity system, as if we were trying to force this rule on them and they didn't want any rule.

We have had notice served on us that the TVA is against us. They object seriously to having their system, which

they like so much, interfered with. We have quite a number of district judges making bitter opposition to the jury clause in this rule because they say if all these cases in these big condemnations go to jury trials, they are just buried; they will never get anywhere. On top of all that, we have the District of Columbia system, with which they are quite well satisfied, and if we want to smooth them over, we have to make another exception to the application of these rules.

Finally, we had a fight in Congress over this subject, and, while the congressmen were considerably confused about the issue (it is true that they got one bill mixed up with the other), I have read their arguments and their debates, and the fact is that there was a very overwhelming sentiment expressed that this condemnation law ought to be run in each state according to state law, that they wanted their own state law. Those whose state law said jury trial wanted jury trial, and those whose state law said no jury trial didn't want it.

If you put this rule through without excepting the TVA, without excepting the District, and with the jury trial in it, you will never get it past the Congress. That is my opinion about it. You will have the Department of Justice against you, the TVA against you, and the sentiment in Congress against you.

I feel personally as if I want to wash my hands of the whole business. I don't see any justification for our proposing a rule on the theory that what is wanted is uniformity

when we are starting out admitting on the face of it that a very much better system exists in the TVA statute, that that is so good and so much better than ours that we are not going to have uniformity. The same thing as to the District. If the Department of Justice were pushing this rule and were praying for help and wanted it, in any way that would be acceptable to me at least, I would feel duty bound to go on, but I really personally have lost all interest in it. I don't care what you do about it.

It is a pity that we have spent all this time and effort to come just to where we were before. We tried it once and did our best. Then the government agencies disagreed, the Department didn't like it, and they withdrew their request. Now we have done exactly the same thing again, except that they haven't formally withdrawn their request. They have notified us informally that they are quite well satisfied with things as is. So, why should we try to formulate and deal with a lot of complicated objections? Are we willing to put out a rule that exempts the TVA and the District of Columbia? If we don't, don't we know before we start that we will never get anywhere with the Congress?

MR. LEMANN: We could make an argument, I think, reasonably to exempt the District of Columbia, but when it comes to TVA, I don't know how we could do it without, as you say, implying that the system that we are proposing isn't as

good for them and, therefore, conceivably for others as theirs is.

THE CHAIRMAN: All the TVA has to do is to go up to Congress, if they are not excepted, and say, "Look here, you have passed a statute yourselves defining how we shall run our business, and you thought it was a good scheme and worked fine. Why should this court come along with a rule and knock out all you have done?" You can't beat it. You can't get anything like this through Congress unless there is a pretty general uniform approval of it.

If you do what Mr. Williams wants us to do, this question of service by publication and naming defendants and all that, you are going to have the American Bar Association, which is already on record (they have their recommendations in), and all the title fellows and everybody on your necks, fighting tooth and nail.

MR. LEMANN: And run the risk of impairing the prestige--such prestige as the Committee has.

THE CHAIRMAN: Bear in mind, too, if you get the Court to sign it and send it up there, if it gets rapped, then the Court will get mad. There are two of them up there who don't like the system of court-made rules anyhow. They say we are just gumming the record. If we get up a rule and get smashed in Congress, if the poor Court has been dragged into this thing by us and we send up a rule and get licked on it,

there are going to be more than two votes against us.

MR. LEMANN: When you get to this question of condemnation of property, I guess you are running into a lot of local prejudices, the general feeling that you don't want too much centralization and butting in of the national government to supersede the local requirements.

THE CHAIRMAN: Exactly. Did you read the debates in Congress about this bill about jury trial?

MR. LEMANN: No.

THE CHAIRMAN: If you read those, you would feel the way I do. I read them all. Mr. Williams said at our last meeting that they were confused about the bill, and I agree with that, but all the people everywhere, whether they were jury trial fellows or non-jury trial fellows, said, "Let's have this thing run the way we want it in our own states." They combined on that.

MR. TOLMAN: Mr. Chairman, I think I can say what is in my mind in a very few words.

I want to start out by reminding you of what Mr. Justice Roberts said about the necessity of the condemnation rule on the ground of uniformity. He said at the judicial conference (I have forgotten what circuit or whether it was the general conference) that the Supreme Court, having condemnation cases come to them from every state, found it very difficult to follow the practice in every one of these states, and that it

was a great saving to their time and to their ability to do justice in these matters to have a uniform and a greatly simplified rule for procedure in condemnations. He said, "I don't know whether this rule is the right rule or not, for there has been some fault found with it, but we certainly should have a rule in the federal courts so that all the practice in the federal courts, wherever it may be, will be the same." The same thing occurs as to the necessity for uniformity in the circuit courts of appeal.

That is the kind of question that lies behind this whole matter of rules of court for federal procedure based on uniformity and abandoning the rule of conformity. Conformity with state practice was an experiment. It was not the original system. I must not talk too much about that because it will take too much time, but it proved to be an utter failure.

This movement for uniformity came from the leaders of the bar. It took a long time for it to win, but it finally did win, and it had the support of the American Bar Association and of the great men in that Association.

I think there are instances in which conformity in certain respects with the law of the states or the District of Columbia or with special provisions of federal statutes may be permissible. I don't say absolute uniformity everywhere, because there may be very good reason to conform to some statutes in some special and particular cases. That is not a

question which it is beyond our wits to work out. It can be worked out, and I myself believe that we ought to try to do it.

I know the attitude of the American Bar Association pretty well. I really think, Mr. Chairman, if you had heard all that I have heard and read all that I have read, that you would change your opinion as to the attitude of the American Bar Association. I want to say here that the American Bar Association is in favor of a uniform condemnation rule and of uniformity in the federal courts. True, Mr. Walter Armstrong criticized this rule at a meeting of the Insurance Section. He criticized it not because of uniformity, but because it was not uniform. That was the objection that he had to it, and he made himself very plain on that point.

The demonstration at Chicago is not to be charged to the American Bar Association. That demonstration is charged to certain interests in the Insurance Section of the Association. They objected because they said there wouldn't be sufficient notice, that everybody ought to be made a party, and so forth. Most of their objections were based on misunderstanding, and our rule as it stands now meets every one of the legitimate objections which was made by the Insurance Section.

I don't know, I may be out of reason in regard to this thing, but I have a feeling that when we have taken a job, we ought to go ahead with it and finish it. As far as I am concerned, I am willing to go on with it to the end. I don't

say, however, that any other man ought to feel as I do, but I want you to know how I feel about it.

JUDGE DONWORTH: Mr. Chairman, I desire to add to what Major Tolman has said. Major Tolman has devoted a great deal of time to this subject. He has done it with lawyer-like and intelligent application and deserves the thanks of this Committee and of the American bar and of the public generally for his splendid work. Sooner or later, his work is going to be fruitful. In saying that I share the opinion of the Chairman about the inadvisability of putting in a rule on this subject at this time, I agree with the Chairman, but I do so with the utmost regret in view of the very high appreciation I have for the splendid work that Major Tolman has done.

THE CHAIRMAN: I have one further thought about the matter. Instead of dropping the thing now with what I suggested, I haven't any objection to your publishing this redraft and seeing what the people think about that and how loud a yell you get from the TVA, then deciding finally, in the light of the second submission to the bar, whether you want to go on with it or not.

It is true that many of the virulent attacks on the old rule resulted from a misapprehension as to what the Committee was trying to do. They jumped to the conclusion that nobody had to pay any attention to the interests of record, and things like that. I think those objections, if they

construed the rule right, were well founded; but suppose that now we have drawn a revision and removed all those grounds for attack, it is more or less a speculation, I suppose, as to how much opposition you are going to get to it. I notice that this draft now leaves the TVA subject to the rule and removes the indefensible attitude taken by the first draft that in the interest of uniformity we were drawing the rule, then making nonuniform a great mass of cases in the federal courts.

It may be that the right thing to do is not to get fainthearted now, but to put the rule in the draft with a note stating that many of the objections heretofore made to it were based on a misapprehension or misinterpretation of what the Committee wanted and intended to do, whether we said it right or not, and see what reaction we get to the revision. Then make up your mind next fall whether you will throw it to the Court or Congress. I haven't any objection to that, in view of the amount of time that Major Tolman has spent on it.

JUDGE DONWORTH: I am not in favor of that. In the greatest war that the world has ever known, we in the United States of America have carried on condemnations exceeding in number and in value of property involved probably all and many times over all that has gone before. To change the rule at this stage, when all that matter is behind us, it seems to me would be a mistake, and I don't believe in putting it up to the bar at this time. The decisions that are being made under the

present state of the law, based partly on the federal statutes which have been amended to fit the occasion, and otherwise governed by the local decisions, have pointed the way so that for the prosecution of such cases as are now pending--and they are numerous--and for the remainder of the war, the legislation is ample, and I don't favor complicating the record by putting in a new statute or attempting to put one in at this time.

MR. LEMANN: You have this likelihood to consider also: If you put this out, the bar may say it is all right, and the Department of Justice doesn't want it this way.

THE CHAIRMAN: Yes.

MR. LEMANN: Then we have no kick from the bar, but the Department of Justice says, "We will go down and fight," if they stick to what they say now, and they are the only people who asked for it. I think that might be an objection to your suggested procedure.

THE CHAIRMAN: I just wanted to make it understood that I am not bitter against doing it.

MR. LEMANN: What do you think of that?

THE CHAIRMAN: My best judgment is that if we go through with this thing and draw the kind of rule that we think ought to be drawn, we are going to start a fearful row, and the chances are two to one that, if it isn't smashed along the line, it will be smashed in Congress. We will be in wrong with the Court, and we will be running the great risk of getting some

more votes on the Court who think this dummy directorship isn't just the right thing. I am afraid of it. When nobody is yelling for it, when the only people who did yell for it now say that they are getting along all right and don't care anything about the change, I don't know why we should go at it. That is the way I honestly feel about it.

MR. LEMANN: I would like to see it removed entirely from our activities on other rules. If we were going to tackle it, I would rather see it tackled specially and separately and not be involved at the time when the other amendments to the rules are brought up, so that it will be on its own bottom. I can conceive that a small committee might have a meeting with the Department of Justice and the title people, bringing them together by a process of negotiation and persuasion and getting them to agree on language, but it would take some time to do that. I think that at least that should be done before you brought it in to Congress.

THE CHAIRMAN: You just raised another point. We are always at the risk of having a flare-up in Congress. We got by on the original rules very nicely, and if we can send up a set of amendments to the regular rules this time, with the bench and the bar pretty well behind us, we are going to get by smoothly again; but if we stick controversial matter like this condemnation rule up to Congress, where I know there is already strong sentiment against the uniformity system, we are going

to start the ball rolling to condemn what the Court has promulgated, and once they get going on that, nobody knows where they are going to stop.

Your suggestion would be that we leave it out of our submission to the bar and put in a little note saying that so far, the Committee hasn't been able to prepare a draft that is satisfactory to so-and-so, and it is deferring action on the thing. Then, if you want to have a subcommittee that goes on and deals with it as a separate matter and tries to get an agreement between now and next year, if the title people like it, if the Department likes it, and if the TVA likes it, and we see a good chance of getting it through without controversy, we can put it up as a separate proposition later on and not mix up our regular body of rules on it. I think that is a good suggestion. Instead of dropping it entirely, just defer it for that kind of comment.

MR. LEMANN: Also I have wondered (maybe it has been tried) whether Congress itself, if it wants this, couldn't pass a statute on the subject that would provide for a uniform method of condemning property.

THE CHAIRMAN: You don't like to ask them to start making practice rules by statute.

MR. LEMANN: This condemnation is in a special category, and maybe that would be the way for the Department of Justice to bring it about. Have they ever tried that or

considered it?

THE CHAIRMAN: Yes, they have tried all sorts of things and have been licked every time they took the bill up there. One of the bills they were licked on was very harmless, proper enough, a bill to provide for jury trials. That is the one where the roar came about uniformity and conformity. The mass of opposition that was stirred up to beat that bill was based on the fact that the states ought to be allowed to run their own condemnation systems and that there ought not to be a centralized one. So, they haven't a Chinaman's chance to get a bill through Congress.

PROFESSOR SUNDERLAND: If they can't get a bill through Congress, how can we get a rule through Congress?

MR. LEMANN: We might have better standing than the Department of Justice, if we could overcome all private objections.

THE CHAIRMAN: Maybe if we could get the Department to object to the rule when we take it up there, we might get it through!

JUDGE CLARK: Do you want to do this? Maybe this is just as bad, but I will suggest it. Would you want to put this in an appendix and say: "We haven't been able to get full agreement. Here is the present form, and you can comment on it or not."

THE CHAIRMAN: I would rather see Monte's suggestion

adopted. Simply say that we haven't been able to agree on a satisfactory draft within the time that we have had to work on it, and we are deferring it with the idea that it may be taken up later as a separate proposition.

JUDGE DONWORTH: The district judges in my locality strongly favor retaining the present system, which is a combination of conformity and uniformity, and they say they hesitate to try to learn a new code.

JUDGE DOBIE: Do you think that has a lot to do with it, Judge Donworth? They know the present system, having worked with it a whole lot, and, whether it is cumbersome or not, they have mastered it, and the District Attorney knows it, and they are getting along pretty well under it and would rather keep it and go ahead with it than to learn something new, even though the new thing might prove to be very much better.

THE CHAIRMAN: Judge, the judges down your way have been working under the TVA statute and protest against this. They want the TVA system kept. They don't want juries, for instance.

JUDGE DOBIE: I think the thanks of this Committee certainly ought to be tendered to Major Tolman and, I think, also to Judge Donworth and Mr. Hammond, for the splendid work they have done on that, and we ought to take proper cognizance of that. Any step that we take, instead of being in criticism of their work, is in very strong praise of it.

THE CHAIRMAN: That is absolutely so. The trouble we are up against is the conflict of view among others as to what ought to be done. It isn't our argument.

What do you think about the idea of deferring action on it and so reporting in our report, and then appointing or continuing the subcommittee with a view to seeing if this draft which Mr. Hammond has carefully worked out secures some kind of support.

MR. LEMANN: It seems to me that, if we put a note in, the note ought to recite that we did not think the original draft presented was fairly open to some of the objections made, but the objections were vociferous. We have been working on a redraft, and it appears that the redraft is not satisfactory from some standpoints to the Department of Justice. It is obvious that this is a matter on which opinions differ very strongly. The war emergency is drawing to a close. The Committee has felt that this is in a special situation, quite apart from the other rules, and that it would not be good judgment or advisable to bring them to the bar and to the Congress at the same time as the other rules which relate to the general run of cases. The Committee thinks that this is a subject which the Department of Justice feels is important and should receive separate consideration apart from the rules that deal with lawsuits generally.

It seems to me that we ought to bring in all of that.

THE CHAIRMAN: Instead of hooking them together, when it looks to us as if they might kill each other. We are anxious to get our other amendments in together, and it is perfectly obvious that a great deal more time is going to have to be taken with this condemnation rule. We don't want to delay our other report on that account and, therefore, we are postponing action on that and going right ahead with the other.

MR. LEMANN: We might expand that thought, too, to say that it is apparent from a study of the congressional debates on these other bills and from the position of the TVA that a rule of this sort is going to receive a good deal of debate in Congress and that it might retard action by Congress on these other amendments that we have. In other words, not only retard us in submitting the amendments, but retard the approval of our amendments.

JUDGE CLARK: Who actually had better prepare this essay---

MR. LEMANN: The Chairman.

JUDGE CLARK: ---which is going to pour oil and at the same time--

THE CHAIRMAN [Interposing]: I think I wouldn't say that we were going to have a row in Congress over it. I would like to put it on the ground that we are anxious to get our other report going and, on account of the differences of opinion about this other thing, it probably will take considerably more

time to get out any draft that would be generally acceptable. So, we are going ahead with the other thing, leaving this rule to trail behind, and we will see what further can be done about it.

JUDGE DOBIE: I venture the motion, if it is proper, that the drafting of this memorandum be turned over to the Chairman, with the aid, if he wishes it, of our reporter's notes on what has been said here, and that if he wishes to, he may send it around to the Committee for any suggestions, and, if not, that he be empowered--

MR. LEMANN [Interposing]: Cut out "if he wishes to send it around," because that is invidious, and there won't be time.

THE CHAIRMAN: The trouble is that I wouldn't get any response in time to get it up.

JUDGE DOBIE: I make a motion, then, that the Chairman be requested to prepare a suitable memorandum explaining our position on this situation.

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

There is another thing. If we are going on with this thing and are going to have somebody keep on the trail of it, we ought to decide on it now. We ought not to have to wait until October to decide whether our Committee is going to do anything more about it. We ought to decide now whether we want

our subcommittee to continue consideration of this thing in connection with the Department and others interested.

JUDGE DONWORTH: Shouldn't we leave that for determination at the autumn session?

THE CHAIRMAN: Whether you want to go on with it or not?

JUDGE DONWORTH: In your memorandum say that we still have the subject under consideration, and so forth, and you might refer to the fact that the present emergency seems to be passing, something of that kind.

THE CHAIRMAN: I don't suppose, without any action of the Committee, that we would have any objection to the subcommittee's pursuing the effort if they want to, but I am afraid they won't do anything unless we encourage them in some way. Do you think it is better just to let that rest until fall?

JUDGE DONWORTH: That is merely a thought. I will go along with anything.

MR. TOLMAN: I would rather go on with the work now and then get it ready when we can get it ready, because I think we are so close together that it isn't a very big job now.

THE CHAIRMAN: None of you has any objection, without any formal action, to having the Major, as chairman of the subcommittee, do whatever he feels able to do during the summer to try to knock people's heads together on an agreement. You

wouldn't object to that?

MR. TOLMAN: No; I don't. I think it is all right.

THE CHAIRMAN: I mean, the Committee wouldn't object to your doing that.

JUDGE DOBIE: No.

THE CHAIRMAN: They are not clamping down on the subcommittee and saying, "Stop."

JUDGE DOBIE: Not at all.

THE CHAIRMAN: I guess that carries out your idea, doesn't it?

MR. LEMANN: It had better go separately to the Congress, and it had better go separately to the Court.

MR. HAMMOND: The only thing in connection with this subcommittee's going on is that, as far as going on with the Department of Justice, I don't know that we can get any further than what we have done. I have been working with them on this matter of the naming of defendants in the complaint, and you have heard them this morning. That is the one point that they are hanging out on. As far as the rest of it, I think we can come to an agreements on it.

MR. LEMANN: If I were in the Department of Justice and wanted this, I would myself go forward in conferences with the title company people and try to agree and work out a formula that would be satisfactory to both sides. If I wanted it, I would go forward with efforts to that end, if I were in

the Department of Justice.

MR. HAMMOND: They are doing that, Mr. Lemann. They are in touch with the title people now, as I understand it.

MR. LEMANN: Then I think they ought to come back to us in October and say, "Now we have gotten together with all the critics, and here is something we have agreed to, and we would like you gentlemen to carry the ball." Then we could decide whether we were going to do it separately. I don't believe we ought to mix it in with our general rules.

THE CHAIRMAN: I wasn't suggesting that. I was asking the Committee whether the action they are taking now is an order to the subcommittee not to have anything further to do with it. I don't suppose any of us would object if the subcommittee wanted to keep stirring the Department and the title companies up to an agreement. That is all I meant by that. Of course, one thing that discourages me is this: For example, this morning they made one point against the bill that sounded good to me. They say that, as worded, it requires them at the time they file the original complaint to start the proceeding, to find out who all the known record owners are and to name them in the original complaint.

They say: "We get orders to go ahead quickly, and we want to start the proceeding and publish a notice that will be good as against all those people ultimately who can't be found. We want to do it right away. We haven't had time to examine

the records. We can't name all the persons of record. We want leave to file a bill to name anybody that we can, with some appropriate provision in the rules that when they are ascertained, their names will be added."

That is reasonable, isn't it? Yet, the draftsmanship job involved in that would take us from now until six o'clock. They don't present any concrete thing. They don't sit down and draft it. They leave us in the position where we have to do half a day's work to try to carry out their idea. I am too lazy. I don't like it. I think we ought to have some concrete amendment that covers that particular situation.

So, I think that things like that might be worked up during the summer. If they don't do it, and if our subcommittee want to do it, all right. That would iron out one thing that the Department has in mind.

Then, if it is the sense of the meeting that the Committee as a whole will not act further on this rule at the present time, we will put in our published second preliminary draft a note to that effect, stating the reasons and that our subcommittee is at liberty, as far as we are concerned, to make any effort it feels able to make to try to work out with the Department, the title companies, and anybody else who is interested, a rule that will meet some of the objections. Then, in the fall we will decide, in the light of what has occurred, whether we are going to go on with it. Is that the

sum and substance of it?

MR. LEMANN: Which would mean going on with it separate from the other.

THE CHAIRMAN: Yes, going on separately. Oh, yes, because we will never send a rule of this kind to the Court without going back to the bar with it. We are going back to the bar right away on our other stuff. Next fall, that is going through to the Court without further submission to the bar, and that fact alone makes it impossible to put them together any longer.

[There were further proceedings concerning the rules in general. See Volume 5 of proceedings.]
