P R O C E E D I N G S

ADVISORY COMMITTEE ON RULES FOR CIVIL PROCEDURE

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

April 6, 1950
Supreme Court of the United States Building
Washington, D. C.

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THURSDAY MORNING SESSION

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April 6, 1950

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

The following members of the Committee were present:

William D. Mitchell, Chairman
Charles E. Clark, Reporter

Armistead M. Dobie
Sam M. Driver
Monte M. Lemann
Edmund M. Morgan
John Carlisle Pryor
Edson R. Sunderland

Also Present:

James Wm. Moore
Leland L. Tolman

CHAIRMAN MITCHELL: Gentlemen, we are here today on the Condemnation Rule. We have a very limited agenda on that. The Reporter and his staff have submitted a memorandum with suggestions as to whether the Committee, after handling the Condemnation Rule, ought to consider taking up a general review of the discovery rule and some other rules with the idea of meeting various complaints that have been made about their operation. That is a separate and distinct matter. If you are willing, before we dig

into that, I think we ought to take care of the condemnation matter and get it by us. Then we can take up the other and discuss it. We have to bear in mind that there is nothing we can do about that at the start more than tell the Court that we think it ought to be done and see whether the Court will authorize us to undertake it and also whether the Court will ask for an appropriation to enable us to do it, which we don't have. We have an appropriation which is limited to this condemnation business.

Suppose we take up the Condemnation Rule. I have had some experiences with it since we met last, and although I tried to report that to you by mail from time to time, I think I had better tell the story over again here in a few minutes and bring you up to date as to just what happened.

The principal point that we are concerned with has to do with the tribunal to fix the compensation. I have a memorandum here in the form of a letter to me from Professor Moore, dated April 3, which is a very useful document and reviews the very points about the Condemnation Rule about which the Department of Justice has raised some questions. I had that letter mimeographed in my office, and you have it before you. He reports about this question of the tribunal to fix compensation, and then there are two or three other points that the Department didn't follow.

The section that we are mainly interested in, in the Condemnation Rule, is subdivision (h). If you happen to have our report of May 1948, you will remember by reading that that we

carefully reviewed the situation respecting the TVA, where Congress has enacted a statute which provides that the TVA awards shall be made by a commission. We went into that as thoroughly as we ever went into any matter. We had the counsel and other people of the TVA write us memoranda and to tell their story. We circularized every United States judge who had ever tried a condemnation case for the TVA, circuit or district, and got letters from practically all of them on this question of how that system worked as far as the commission is concerned. You have mimeographed copies of all those letters. I haven't counted noses on them recently, but my recollection is that of the large group of judges who responded, only one or two said they liked the jury trial, and the rest of them all agreed that in situations like the TVA the commission system was preferable. Not only that, a lot of them went further and said, TVA or not, they liked the commission in every case.

We decided on good ground not to tamper with the TVA commission system, so our subdivision (h) provided that where any tribunal is specially constituted by an Act of Congress to award compensation, that tribunal should be used.

JUDGE DOBIE: If I might interrupt you, we have had a good deal of experience with that in the Fourth Circuit for the reason that the TVA did a tremendous amount of condemnation in North Carolina, which is in our circuit. Our experience certainly bears out what you said, that at least as far as the TVA is

concerned, the commission has worked beautifully. Nearly all the parties were satisfied with the commission's recommendations. I think only one of them ever reached us.

CHAIRMAN MITCHELL: That is true. I think we had uncontroverted proof before us that in situations like the TVA, where vast tracts of similar land were involved, embracing areas a long way from the court, you get a more uniform result, instead of a spotty result, by using the commission instead of a jury. The judges also made it very clear that it was a great hardship on the land owners to force them to a jury trial. If the land owner lived maybe 50 or 100 miles from the seat of the court that was going to try the case, who had a little piece of bottom land that was going to be taken, the commission could go to him, look over his land, and hear what he had to say about it informally and in many cases save him the trouble of traveling a long way to court and sitting down and waiting for a jury, and all that. From the standpoint of the land owners, the judges, and the TVA lawyers, it made a definite case. We agreed to that, but then when it came to situations where Congress had not provided for the tribunal, we agreed that it should be done by jury. We had some difference of opinion about that. This Committee was rather sharply divided about it.

Then we put in our report to the Court, and not long afterwards I got a telephone call from the Chief Justice, Justice Vinson. He said, "We are going to have a conference of the

Court on the Condemnation Rule, and I wish you would come down here and face the conference. I am going to tell you in advance what we are interested in." Then he referred to these letters from the judges and particularly to one from Judge Paul. He mentioned that one particularly and said, "Come prepared to talk about what Paul said about it."

Paul had written a very powerful letter, which you all have and which we considered when we reached the conclusion we did, and the Court had seen it and were impressed with it. Paul protested vigorously against the use of the jury in a case like TVA. He said it is all right to preserve the TVA system, but there are other projects of that type coming along. He opposed the jury very vigorously and gave his reasons for it. I won't repeat those because I think you are all familiar with them. It is the same kind of argument that we had adopted in the TVA consideration.

I managed to get hold of Judge Driver, who came East to attend that conference. I also picked up Senator Pepper on the way down. It was a rush job. I couldn't consult the Committee about it. I saw right away what the Court was driving at. It was an unusual thing for them to hold a conference about a rule and point to a letter and say, "What have you got to say about that?"

My own conviction was that there was an inconsistency in our previous attitude. If we were right in keeping

commissions in projects like the TVA, we seemed to be wrong if some other similar project came up and we fixed a jury. There seemed to be an inconsistency about that. I had the feeling from what the Chief Justice said that they liked Paul's view and they didn't like this rule that provided a jury in every case like the TVA, except TVA.

Judge Driver will remember that I tried to prepare for that conference without your authority and without having time to consult you. I thought we would go down and see what they had to say, and if the Court was against this rule which provides for jury trial of the issue of compensation in cases like TVA, I wanted to be prepared to make a suggestion to stall off trouble. So, on the way down there I hurriedly got together a substitute for subdivision (h) which would preserve the TVA system and then provided, instead of an absolute rule for a jury, that the district court in any case might try the case by jury or in his discretion in a certain case order a commission.

My provision was brought up at this meeting of the Supreme Court judges. I have to confess that I wasn't forced to, but I came out with the statement that I had no support from my Committee because I hadn't had time to consult them, and I felt diffident about making a proposal that the Committee had not approved. There were only three of us there. Senator Pepper and Judge Driver thought that, as a compromise, if we had to do it, the suggestion I was making might work.

I had suggested to the Chief Justice over the telephone that he get somebody from the Attorney General's office, too. I thought they would consult them anyway, and we had better have them there to see what they had to say. Attorney General Clark and Mr. Vanech, the Assistant Attorney General in charge of the Lands Division were there. Is Mr. Vanech there now?

JUDGE CLARK: Yes, he is there.

CHAIRMAN MITCHELL: I think Mr. Williams was probably there, also.

The Chief Justice got me up to the table and said, "What have you got to say?" I said just what I have told you, that I understood the Court was interested in Paul's argument, and I conceded that as far as I was personally concerned, there seemed to be some inconsistency in our conclusion to preserve the TVA method which worked in that type of case, and yet in other similar types of cases to switch to the jury, and that there was something to what Paul was saying about it.

Then Vanech got up, and he made an attack on the commission system. The main part of his attack was that they were getting too big money for their services and too big per diem.

Up to that time none of the judges opened their mouths about it. They were all very canny and kept quiet until he got through with that talk, and then Justice Rutledge got up and said, "Well, after hearing the Attorney General and Mr. Vanech, I know what my opinion is about it."

I called attention to the fact that the question of compensation had no place in the rule; that the fees of jurors and the salaries of judges could not be fixed by rule; that if the fault of the commission system was that they were getting too much money, they ought not to burn down the barn in order to get rid of the rat. I said it was up to the Department of Justice to get a bill through Congress, just like the TVA law, which fixes the per diem of commissioners; that that was their baby and they ought not to reject the commission system because of some evil that arose through their failure to get legislation to fix the salaries and compensation.

I admitted to the Court that I had no Committee support for this proposal, that I hadn't had a chance to consult with the Committee, except the three of us who were there, and that was in a very hurried way. It was a good thing I did, because the draft that I made was deficient in that I provided for the commission and stopped there. I didn't say anything about how it would be in practice. As soon as my draft got back to Clark and Moore, of course they saw the hole in it.

My proposal was to add after the jury provision, in line 208, page 7 of the report, after the word "fix":

> "unless the court in its discretion determines that because of the character or quantity of land to be condemned, or for other reasons, justice will be served by naming a commission of three persons to award compensation and so orders. If a commission is appointed, its findings shall be dealt with by the court in

accordance with the practice and to the extent prescribed in paragraph (2) of subdivision (e) of Rule 53 governing reports of masters."

Then we adjourned. I was a little ruffled about this fellow Vanech getting up there. They have done nothing but throw brickbats at this rule from the start and have never been cooperative. The ones who came before us were always finding fault with things they should not have complained about, because it would make it a little harder for the government. Clark got up and was very nice and wanted it understood that he appreciated the work the Committee was doing, and all that sort of thing, but I knew it had to go back to you because I didn't have your o.k. on the change. I could see that the Court wouldn't want to adopt my cursory proposal, and I didn't want them to without the Committee's passing on it. So, it came back to us.

Then I wrote a letter to the Attorney General right after that. I think I sent you a copy of that, but let me take the time, if you are willing, just to skim through it. It covers the whole ground of the things that we ought to think about. This was written December 29, 1948, right after the conference. "Dear Mr. Attorney General:

"The Chief Justice has informed me that the Court has concluded to defer action on the proposed condemnation rule and to refer the rule back to the Advisory Committee to deal with the matters which were discussed at the recent conference at which you and some of your associates were present. Before taking the

matter up with the Advisory Committee, I would like to have you and your assistants consider the various points involved and state your views to me so that I may transmit them to the Advisory Committee, and I also invite the Department to draft and present for our consideration specific amendments of the proposed rule to meet your points.

"The point which obviously induced the Supreme Court to call the conference was the provision in subdivision (h) relating to the tribunal to award compensation, and which provides that 'any tribunal specially constituted by an Act of Congress governing the case for the trial of the issue of just compensation shall be the tribunal for the determination of that issue; but if there is no such specially constituted tribunal any party may have a trial by jury of the issue of just compensation by filing a demand therefor within the time allowed for answer or within such further time as the court may fix. Trial of all issues shall otherwise be by the court.' In calling me to that conference the Chief Justice called my special attention to a letter from District Judge Paul of Virginia. That letter, dated February 13, 1947, was among those written me in response to a circular letter I had sent to all federal judges who had dealt with TVA cases. The substance of Judge Paul's objections to the tribunal specified in subdivision (h) was directed at the provision for jury trial where Congress had not otherwise provided. His point was, if you will read his letter, that in large projects covering

great areas like the TVA the commission system is preferable to a jury or a trial by a judge. Judge Paul's points about his preference for a commission in cases like the TVA were several."

JUDGE DOBIE: Could I interrupt you right there? Judge Paul, whom I know very well, I might say, is a very able and experienced district judge. As you know, under the TVA practice it goes from the commissioners to a three-judge court, all of them district judges. Paul has sat in some of those cases, so he has that practical experience with the three-judge district court reviewing the commissioners.

CHAIRMAN MITCHELL: There has been a lot of complaint about the three-judge system in the TVA, but we concluded a couple of years ago that that was a jurisdictional problem and that an Act of Congress was the only safe way to deal with it. We have never approved or disapproved the TVA system of a three-judge district court and a de novo appeal to the circuit court of appeals because we felt that that was outside our bailiwick.

The following are Judge Paul's points, which I am summing up in the letter.

"First, where large areas of similar lands are involved, uniformity in awards is an important objective and with jury trials no such uniformity resulted. Another point he made is that a commission may readily travel around and view the lands, while it is not practicable for a jury to view the premises where there are large areas and many tracts are at great

distances from the point of trial. A third objection he made to the use of juries in cases like the TVA is that the land may be located and the owner may reside at very considerable distances from where a federal court is held, and that the jury system requires many people of small means to travel a long distance to the point where a jury trial is being held in order to present their evidence of value, and this is a hardship on the owners, and that a commission moving around may take evidence locally where the owners may reside.

"The overwhelming consensus of opinion among the judges who have tried TVA cases and who wrote me in answer to my letter was in favor of the commission system in the case of large projects like the TVA. Some of those judges even went so far as to recommend a commission in every type of case. The Advisory Committee made a very careful inquiry into the operation of the TVA system and the overwhelming evidence supported the view of the TVA that commissions were preferable to juries in situations like the TVA. A further consideration was that if compensation had to be determined by jury trial or by a trial before a judge without a jury, the time of the federal court and federal judges would be overwhelmed with that sort of business. The only criticism that anybody made of the TVA system was the provision for a three-judge court to review the findings of a commission, and the Advisory Committee were afraid to tamper with that because it seemed that might involve a question of jurisdiction which could

not be dealt with by rule and had to be handled by Congress.

"The Advisory Committee, therefore, consistently with the evidence before it and taking the same view that Judge Paul took, concluded not to tamper with the TVA commission system and inserted a provision in subdivision (h) that the trial tribunal should be as specially constituted by Congress, thus preserving intact the TVA system, and incidentally the District of Columbia system. Our problem really came down to the question as to what should be done in cases where Congress had not specially defined the tribunal to award compensation, and the solution the Committee reached in that situation - by sharply divided vote - was that expressed in subdivision (h) that a party might have a jury trial on demand. When the Chief Justice sent for me to attend that conference, and called my attention to Judge Paul's letter, I realized at once that the Court was dissatisfied with the provision now in our subdivision (h) for a jury trial in all cases where Congress had not otherwise specified. That means, of course, that in every large project under similar conditions as that of the TVA a jury trial would have to be used if any party asked for it; otherwise the judge himself would have to sit and determine compensation.

"It is obvious that in preserving the TVA system for commissions as the Committee has done and then turning around and providing for a jury trial in all other cases, even though situations like the TVA, there is an inconsistency in the

Advisory Committee's action. The conclusion the Committee reached that in projects like the TVA the commission system is preferable, is inconsistent with the present proposed draft of subdivision (h) which provides for a jury trial in other cases like the TVA if Congress has not specified the tribunal. Knowing therefore what the Court had in its mind, and having been one of those on the Committee who voted against the jury trial in all cases other than the TVA and the District of Columbia, and without having had time to consult my Committee as a whole, I hastily prepared an amendment to subdivision (h) and took it with me to Washington, and as you may remember, read it to the Court. A copy of that proposed amendment is enclosed. You will see that, instead of requiring a jury trial in all cases where Congress has not otherwise specified, my proposed revision would allow the district judge to appoint a commission instead of using a jury, or trying the case himself, where because of the nature of the case and in the interest of justice the trial judge thought a commission preferable. This would enable the trial judge in cases which come before him, like the TVA enterprise, to use a commission, and to my mind it fully took care of Judge Paul's objections, and it also produces a result which is consistent with the Committee's conclusion that in the case of large projects covering great areas like the TVA the commission system is preferable. That proposed amendment of mine was hastily prepared and may need some revision. I favor the adoption of a revision of subdivision (h)

along the lines that I suggested. Those members of the Advisory Committee who were present at the conference had the same view. I realize that your Department has consistently urged the use of a jury instead of a commission, but I think it is fairly indicated that the Court thinks well of Judge Paul's views and is inclined to approve a provision such as I suggest that will allow the district judge in his discretion to use a commission instead of a jury in cases involving projects like the TVA, while on the other hand the court may prefer to use a jury in cases where a single tract or small area is involved and a jury trial is appropriate for many reasons.

"At the conference with the Supreme Court you suggested that the proposal to adopt any condemnation rule be abandoned and the situation left as it is."

This is what made me mad. They had been ragging us since 1937 to draw a rule, and then every time we drew one they got to quarreling among themselves and didn't like it, and then they withdrew their request. They had done that twice. We have spent more time on this rule of ours than on almost any other rule in the book. I am of the opinion that, after all the time and thought we have given to it, it is a first-class rule. I don't care whether the Department of Justice likes it or not, I think we have done a fine job here and that the rule is good in its main particulars. I was a little bit miffed when I heard that Attorney General Clark said we had better abandon the whole

business. My hand went down smack on the Court's table just as it is doing now, and it was then that Clark got up and was very courteous in his remarks, and all that.

"I hope on reflection that you will not press this view. If no condemnation rule is adopted you are back on the present system where the tribunal selected to award compensation in these cases must be that specified by state law."

I think I pinned his ears back in this statement.

"Of the 48 states, I understand that about 10 require the use of commissions in all cases and do not provide for a jury trial. Of the other 38 states, about 20 provide for both commissions and juries, that is, a commission to act in the first instance with the right of appeal and a trial de novo before a jury."

That is one thing the Department never did like, and we never liked it, either.

"This would leave about 18 states of the Union whose laws provide for a jury trial without a commission. The result would be that if no condemnation rule is adopted, and the practice is left to the conformity system, 30 of the 48 states would require either trial by commission alone or trial by commission followed by a trial de novo before a jury. The result would be that your preference for a jury trial in all cases would be far from realized if the conformity system remains in effect.

"I noted at the hearing that the principal criticism

you made of the commission system was based on your experience with exorbitant per diems in the way of compensation allowed to commissioners. May I suggest that the question of compensation of government employees or commissioners who are appointed as officers of a court has no proper place in the rules of procedure. That is a subject that should be dealt with by the Congress. If any abuses have existed, and doubtless they have, in the size of the compensation paid commissioners, the remedy lies with Congress, and any extravagance in that direction could be readily cured in the statutes which authorize some of these projects, or in the appropriation acts either to the project or to the Department of Justice."

JUDGE DRIVER: If I may interrupt you there, General, the concern of the Department of Justice about the compensation of the commissioners is due, I think, to the fact that the payment of the commissioners comes out of the Department budget. The payment of jurors doesn't come out of their budget. They don't consider that an expense at all. They feel that jurors cost them nothing, but jurors of course in most cases cost the government more than commissioners do.

CHAIRMAN MITCHELL: Thank you. I wish I had put that in here.

"For example, in the TVA statute there is a provision in Title 16, 831x of the Judicial Code, limiting compensation of commissioners in the TVA case to fifteen dollars a day, plus five

dollars per diem for subsistence. That seems to me rather low for competent men, but it certainly illustrates the way in which the subject of compensation should be taken care of to prevent undue extravagance, and I may suggest that the problem of restricting by legislation the compensation of commissioners is one to be dealt with by your Department, and in all fairness the commission system as such ought not to be assailed because of extravagances which have occurred in their compensation, which ought to be cured by legislation and not by rule.

"I should hope therefore that, considering the direction in which we are headed because of the apparent attitude of the Supreme Court and of the Advisory Committee, you would be willing to approve a revision of subdivision (h) along the lines I suggested at the conference. That would leave your Department in a very much better situation than to abandon the condemnation rule and remain on the conformity basis."

Incidentally, as an exhibit when we get this thing up before the Court again, I want to bring up the Department's volumes on how to run a condemnation case. They are about this thick (indicating). You have a set of them, Judge Clark. Two-thirds of them are given up to ramifications of various state practices. It has thousands of pages. We give them a little simple six-page rule in place of that.

"Another point raised by Mr. Vanech at the conference involved an objection to the provision for service by publication

contained in paragraph (ii) of subdivision (3) of subdivision (d), found in lines 103 - 128 on page 4 of the Committee's printed report of the condemnation rule. That rule as drafted allows publication of an owner whose name is known upon 'Upon the filing of a certificate of the plaintiff's attorney stating he believes a defendant cannot be personally served because after diligent inquiry his place of residence cannot be ascertained by the plaintiff or, if ascertained, that it is beyond the territorial limits of personal service as provided in this rule.' The objection from Mr. Vanech was that a diligent inquiry by the government as plaintiff would involve using the investigative branches of the government, such as the FBI, and was altogether unreasonable in its requirements. In the first place, I think to interpret the words 'diligent inquiry' to require the government to use its police and investigative services to the limit is unreasonable. I do not think any court would accept that view. In the next place, the thing that is a condition precedent to publication is not that in fact there has been a diligent inquiry, but merely that the plaintiff's attorney must file a certificate that he believes such an inquiry has been made and that it has been fruitless. The validity of the publication depends on the filing of the certificate and not the fact or nature of the inquiry. Filing a certificate, under the decisions in the state courts having similar statutes, is held to be a jurisdictional prerequisite to the publication, but that is quite a different

thing from saying that the publication can be collaterally attacked because in fact no diligent inquiry was made. As the rule stands, I think the plaintiff's attorney is left in the position where he may in good faith make up his mind that a diligent inquiry has been made with no results and file a certificate accordingly. It would be left to the government's lawyer to exercise an honest judgment as to whether he thought a diligent inquiry had been made. Such an inquiry could be made by the United States District Attorney or other local attorney for the government by getting the marshal to endeavor to serve the notice and get a return of 'not found' from him and make such other inquiry locally as to the residence of a named defendant, as is customary in ordinary cases. Nevertheless, I think the Advisory Committee would be interested in knowing what the Department thinks the provision should be--"

They have never given us a draft of anything.

"--and if the Department can propose an amendment to this provision of the rule which accomplishes the desired result, the Advisory Committee would be interested in seeing the draft. A mere criticism of what we have done in this respect, without any constructive proposal from the Department, does not accomplish much. I feel sure that the members of the Advisory Committee will insist that a diligent inquiry be made, and I am quite sure the profession at large, including the American Bar Association, would condemn any provision which left the government's

attorneys in a position to get publication without a sincere and reasonably thorough effort to locate the defendant.

"Another objection that your Department made at this conference to the rule was to the provision in paragraph (3)(i) of subdivision (d), in lines 97 - 101. That provided that if the defendant whose name and residence are known resides in the United States or in its territories or insular possessions, he must be personally served. The Department offers no reason why a defendant who owns a tract of land in Tennessee but whose name and residence are known and who is known to reside in Alaska or the Territory of Hawaii should not be personally served just as much as if he resided in continental United States. The Advisory Committee think that there is more reason to personally serve a known defendant who resides at that distance than there is to serve a defendant who resides in the community where the land is situated. I believe that some objection to this provision was raised by a representative of your Department before the Real Estate Section of the American Bar Association and the objection was not favorably received. From what I know of the profession's point of view generally, I should say to alter this provision of which I am now speaking to omit personal service on people in our insular possessions or territories would receive overwhelming opposition from the profession. It would be a very simple matter for the government's attorneys in these cases to send a copy of the notice to the United States marshal in the territory of

Alaska or Hawaii with instructions to personally serve a known defendant who resides in such possessions.

"I have reviewed as well as I can the provisions of the rule, to which you seem to have given special attention. If there are any other provisions in the proposed rule that you think should be altered, I would ask that the Department draft specific amendments and submit them to the Advisory Committee.

"I remember one other proposition the Department has presented, though it was not mentioned at the conference. One of the earlier drafts of the condemnation rule provided that all 'known' owners should be made defendants. This draft did not specifically state that any search of the land records should be made to find the names of people who had recorded interests. When that draft was issued, an outburst of objection arose from the American Bar Association, and also those engaged in the business of abstracting titles. They construed the term 'known' as not requiring any examination of the land records, although our drafting committee had intended that the word 'known' should include persons who had interests of record. Obviously the rule was ambiguous. Since then we have been endeavoring to place a provision in the rule that would require that there be named as defendants those whose interests were disclosed by a reasonable examination of the land records. When we came to draft such a provision, we had very determined objection from Mr. Williams of your Department, who appeared before the Committee and stood fast

on the proposition that there should be no provision in the rules requiring any search of the records. It developed on inquiry that the Department of Justice makes a practice of searching the land records to obtain the names of owners of the land to be condemned, and that its practice is to make just as thorough a search of the records as any proposal which has been contained in the rules. From the standpoint of the Advisory Committee, the attitude of the Department seemed to be that the Department always made an examination of the records, but did not want to be required by rule to do so. Most of the state statutes about condemnation require that all owners of record shall be made parties, and it is and has been obvious to the Advisory Committee that if we omitted from the rule a provision requiring some search of the land records, the American Bar Association and other elements in the profession would vociferously - and no doubt successfully - oppose the rule, either before the Court or before the Congress, and make objections which the Advisory Committee think cannot be successfully resisted. The present provision in our rule is found in lines 37 - 42 of the printed report. That requires 'a search of the records to the extent commonly made by competent searchers of title in the vicinity in light of the type and value of the property involved.' That particular phraseology was adopted because of the different situations as to land titles in different parts of the country. In the midwest where I came from, where all titles originated in patents from the government after a

government survey, any abstract company can complete an abstract of the title within a very short time from the patent down. In situations in the far west there may be some old Spanish grants involved, and in the eastern sections, like New England, the records may go back for three hundred years or more, even to Indian grants. The provision we have in the rule on that seems to take proper account of this situation and merely to require such a record search as is customary on the part of careful businessmen who are purchasing land on which to erect valuable buildings. If your Department thinks it can improve on this provision, we would be glad to have a constructive proposal about that.

"I would appreciate it very much if you would have your assistants consider the subject as soon as practicable, and give me a written statement covering what I have dealt with, and anything else that you care to propose.

"With personal regards,

"Very truly yours,

"William D. Mitchell."

That was December 29, 1948. On January 27, 1949, the Attorney General wrote me:

"This is acknowledging your letter of the 29th relating to the proposed condemnation rule. I have noted its contents with interest. This Department is giving consideration to your letter, and you will be advised of its view at our earliest

convenience."

I wanted to get a meeting of this Committee together, so on May 24, four months later, a letter from me to Attorney General Clark:

"Dear Mr. Attorney General:

"After the Supreme Court referred back to the Advisory Committee the proposed rule in condemnation cases, I wrote you under date of December 29, 1948, stating various aspects of the situation on which the Advisory Committee wanted to have your views. You acknowledged this letter under date of January 27 last and advised me that your Department would give consideration to the matter and advise me at the earliest convenience.

"My Committee desires to close up this problem and make a final report to the Court, but I have been letting the matter drift before asking for action by the Committee in order that we might have the Department's views before us and an opportunity to consider them before holding a formal meeting of the Committee.

"I would appreciate it very much if you could arrange to submit the Department's proposals at an early date."

That was a year ago next May, and I have never even had an acknowledgment of that letter. So, they have never sent in anything.

My draft of subdivision (h), Trial, went back to Judge Clark and Professor Moore after the event, and they took a whack at it. They came forward then and do now with an amendment to

subdivision (h) to make it read this way. I think you have a copy of it.

JUDGE DRIVER: That is attached to the letter of April 3?

JUDGE CLARK: Yes, the letter of Mr. Moore to the Chairman.

CHAIRMAN MITCHELL: A copy of that is attached to his letter. I will read it. This is the suggestion of our Reporter and staff. Amend subdivision (h), Trial, to read as follows:

"(h) Trial. If the action involves the exercise of the power of eminent domain under the law of the United States, any tribunal specially constituted by an Act of Congress governing the case, for the trial of the issue of just compensation, shall be the tribunal for the determination of that issue. If there is no such specially constituted tribunal any party may have a trial by jury of the issue of just compensation by filing a demand therefor within the time allowed for answer or within such further time as the court may fix--"

Here is the new part.

"--unless the court in its discretion orders that, because of the character of quantity of the land to be condemned, or for other reasons in the interest of justice, the issue of compensation shall be determined by a commission of three persons appointed by it. If a commission is appointed it shall have the powers of a master provided in subdivision (c) of Rule 53 and proceedings before it shall be governed by the

provisions of paragraphs (1) and (2) of subdivision (d) of Rule 53. Its action and report shall be determined by a majority and its findings and report shall have the effect, and be dealt with by the court in accordance with the practice, prescribed in paragraph (2) of subdivision (e) of Rule 53. Trial of all issues shall otherwise be by the court."

Preliminary to this meeting I considered whether we ought to do anything before we met about getting hold of the new Attorney General and his staff and getting a report. Maybe I was wrong, but I finally concluded that I thought the best thing we could do was to meet and go over this ground. There is nothing complicated about it. I have tried to get a constructive suggestion on any of these points, without result. I think our experience before when we have had representatives from the Lands Division in attendance has been that we didn't get anything in the way of constructive suggestions, but complaints about things like service in Hawaii and making any examination of the land records at all, although they admit they do it all the time. That didn't get us very far. I confess, also, that I found it very difficult to find time to come down here before this meeting and have a talk with Attorney General McGrath who, so far as I know, has never had this subject called to his attention at all. I have the feeling that if we went ahead now, after what we have done, nobody could accuse us of being impolite or of not taking cognizance of the Department's views in reaching our conclusion,

and we could then go to the Attorney General and say, "Are you going to fight this or aren't you?" I think our atmospheric situation would be a little better.

Whatever conclusion we reach about this provision, I think we ought to make it perfectly clear to the Supreme Court, which is the fact, that we have done an awful lot of work on this thing, that we think we have a fine rule, that we haven't any objections to it that we know anything about that appear to any of us as being very substantial, and that the Committee feels it ought to be adopted and tried. If it turns out in a year or two that it should be amended, that is all right.

This has been a long-winded business, but I think it brings us up to date on everything we have to deal with.

JUDGE CLARK: Could you add one thing more about your conference with the Court, as to whether you got any further light on their attitude concerning your suggestion? I gathered that Justice Rutledge probably would have been with the Department; is that correct?

CHAIRMAN MITCHELL: Yes.

JUDGE CLARK: And the others?

CHAIRMAN MITCHELL: None of them peeped. When Attorney General Clark said, "Let's drop the whole business," I got ruffled about that, and I remember hearing Justice Jackson speak on my left, and he said, "It seems too bad we can't save this rule," or something like that. The fact is that they had a

definite point about this tribunal, and they didn't like it because it did not call for jury in all cases. I had to confess that I hadn't a cure for it that I was willing to back without approval of my Committee. I had the feeling all the time that it was deficient as, for instance, in the very particulars which our staff picked up and got a workable clause about what the commission should do. There was a hole in my suggestion, so I didn't press it.

They were all very pleasant when I left the room. I was a bit ruffled and sore about the way the Attorney General had acted, and I didn't like the way Justice Rutledge went off in what I thought was a sort of half-cocked way about the compensation when the answer was perfectly obvious. It is the Department's fault entirely that they haven't a law limiting it. I started for the door and didn't wait to be excused. They all got up, bustling around, and shook hands. There wasn't any stiffness about it or anything at all. I was convinced at that meeting that fixing up this trial provision satisfactorily to meet Paul's objection, which the Court had in mind, would solve everything the Court had in mind when we went to that meeting.

JUDGE DOBIE: Do I understand that this revised rule which is at the end of the letter is the one that you advocate and that the Reporter and our expert, Mr. Moore, advocate?

CHAIRMAN MITCHELL: I haven't really gotten down close to the effect of this provision about the powers of a master.

MR. PRYOR: Referring to the matter of the compensation tribunal and particularly to the criticism of Judge Paul, would it not be true that if you had a situation comparable to the TVA it would be because Congress had passed some special legislation providing for such a situation, and in that legislation they would provide for a tribunal and the provisions of the rule that we have agreed upon would apply?

CHAIRMAN MITCHELL: You mean that is the only place the question arises?

MR. PRYOR: That is, I wonder if you could have a situation comparable to the TVA under the general laws pertaining to condemnation.

CHAIRMAN MITCHELL: What does our Reporter say? Scores of these projects have been authorized.

MR. PRYOR: That is true.

CHAIRMAN MITCHELL: Do you know of any statute other than the TVA where the procedure is prescribed by Congress?

PROFESSOR MOORE: No, I don't.

CHAIRMAN MITCHELL: You are right up against it.

MR. PRYOR: That is true, there isn't any project comparable to TVA, but if you had anything comparable to TVA it would be because Congress passed legislation providing for it, the Missouri Valley Authority, for instance.

JUDGE DOBIE: This takes care of that, doesn't it?

MR. PRYOR: Yes.

JUDGE DOBIE: In other words, it reaches into the future, and if Congress should create a big thing like the Missouri Valley Authority or such as our project in Virginia, all that would fit into this rule.

MR. PRYOR: They would do just what they have done in the TVA legislation. They would provide for condemnation by a commission.

JUDGE DOBIE: We don't stop that at all.

MR. PRYOR: No.

JUDGE DOBIE: This is not limited to past Acts of Congress. It applies to any future Act, which I think is desirable.

CHAIRMAN MITCHELL: Mr. Pryor's point is that all this talk about having the rule specify the commission system or some other system is idle because the Congress will always prescribe the procedure in its Act. I don't know.

MR. PRYOR: That is the point.

CHAIRMAN MITCHELL: There may be a great many cases where they have not. Aren't there some great enterprises in the way of irrigation and water power dams and the like?

JUDGE CLARK: There are a lot of things on flood control and the like. If you will look at my Ohio State article, which I think you all have, on page 3 you will find references to statutes, but they don't specify the form of trial. What I cited was the provision for immediate taking, which is a little

different thing.

CHAIRMAN MITCHELL: What you mean is that there are a whole lot of statutes, Acts of Congress, on the books now to authorize projects resembling TVA and having to deal with large areas and all that sort of thing, where the Congress has not said anything about it.

PROFESSOR MOORE: They go to state law, as in the channelization of the Mississippi River, which involves condemnation of vast acreage in six or seven states.

MR. PRYOR: They got along fairly well with the nine-foot channel project on the Mississippi River without a commission.

CHAIRMAN MITCHELL: In Minnesota they have commissions and juries both.

MR. PRYOR: They have in Iowa, too. I mean without one of these big TVA commissions.

CHAIRMAN MITCHELL: I know what the law was when I was in Minnesota when they started all this river work up there. We had a system by which you started out with a commission and then you had a new trial de novo before a jury. The Department has always talked about a double trial. They don't want both. That is what they get under the conformity system. That is what they are getting in some of these big projects today that call for commissions just as much as the TVA project does, maybe not so big but still there is the question of large quantities of similar land and poor people with little tracts off at a

distance, loading the courts down. If there were no statute on the books today that created any important project like the TVA, that has reasons back of it for a commission system such as the TVA project has, I would agree with what you say; but the fact is that there are a good many projects on which Congress has not done that very thing. Congress has been split about conformity. There are a lot of fellows in Congress who think that all these condemnation cases ought to be conducted according to the conformity system, and quite a lot of them object to a uniform federal system.

JUDGE DRIVER: I don't know just how this provision for a special tribunal in the TVA came about, but it seems to be, if not unique, at least very unusual. There are some very large land acquisition projects which have gone through Congress since then, and so far as I know, no special tribunal has been set up in the case of any of them. For example, the acquisitions in connection with the atomic energy program, one of them in my state, a reservation thirty miles square, to make plutonium. That land was all acquired through the War Department, with no provision for a special tribunal. We have the Columbia Basin Irrigation District and two new power dams under construction, McNary and Chief Joseph, large acquisitions, and there is no provision for a special tribunal.

MR. PRYOR: Do you have jury trial?

JUDGE DRIVER: We have a jury system there, yes, under

conformity with state law. I was one on the committee who was in favor of providing for jury trial in all cases. I thought that uniformity was desirable, that you should have uniformity as to tribunal, and that if we had only one tribunal, the jury system would be much preferable to the commission system; but I have come to the conclusion, particularly since that last meeting with the Supreme Court, that we just simply cannot sell a rule to the Supreme Court unless we make some provision for a commission in some cases. I think that this is about the best compromise that we could get.

After our meeting, General Mitchell, the Chief Justice asked me to come in and see him on another matter, and during the course of our conversation he brought up the matter of this rule. He said he was against our rule personally and that he felt sure the majority of the Court would be against a proposed rule which required a jury as the tribunal in all cases. He was very sure that the majority of the Court would turn down such a rule or would have at that time.

I think that a rule containing a compromise is better than no rule at all. So I have changed my view and am in favor of the proposal here.

JUDGE CLARK: I just wish to bring to your attention one or two statutes. Here is one for the control of flood waters of the Mississippi River, Title 33, Section 702d:

"The Secretary of War may cause proceedings

> to be instituted for the acquirement by condemnation of any lands, easements, or rights-of-way which, in the opinion of the Secretary of War and the Chief of Engineers, are needed in carrying out this project, the said proceedings to be instituted in the United States district court for the district in which the land, easement, or right-of-way is located. In all such proceedings the practice, pleadings, forms, and modes of proceedings shall conform as near as may be to the practice, pleadings, forms, and proceedings existing at the time in like causes in the courts of record of the state within which such district court is held, any rule of the court to the contrary notwithstanding."

The Atomic Energy Act, the new one, Title 42, Section 1813b, says:

> "In the exercise of the rights of eminent domain and condemnation, proceedings may be instituted under Section 257 of Title 40, or any other applicable federal statute."

Then it goes ahead and provides for immediate possession. Section 257 of Title 40 is the ordinary public works condemnation, and Section 258 of Title 40, dealing with that, is another conformity one:

> "The practice, pleadings, forms, and modes of proceedings in causes arising under the provisions of Section 257 of this Title shall conform as near as may be to the practice, pleadings, forms, and proceedings existing at the time in like causes in the courts of record of the state within which such district court is held, any rule of the court to the contraty notwithstanding."

MR. LEMANN: What does the language, "any rule of the court to the contrary notwithstanding," mean?

JUDGE CLARK: I don't know.

JUDGE DOBIE: The district court.

MR. LEMANN: Does that apply to the district court? These are rules of practice for the district courts, so in effect we would be undertaking to repeal that provision. I am just wondering whether or not it would be construed as a repeal of that provision.

CHAIRMAN MITCHELL: What is the date of passage?

JUDGE CLARK: I would say these are all very old. The last statute I read was August 1, 1888.

MR. LEMANN: But the Atomic Energy statute referred back.

JUDGE CLARK: The Atomic Energy one is of course much more recent, and it does refer back to that. The Atomic Energy one is August 1, 1946.

MR. LEMANN: But it refers back to the 1888 one.

JUDGE CLARK: That is right.

MR. LEMANN: What was the first one you read?

JUDGE CLARK: The Mississippi one.

MR. LEMANN: How old is that?

CHAIRMAN MITCHELL: You see, they had to conform these systems generally at the time the statute was passed.

JUDGE CLARK: The Mississippi one is May 15, 1928.

MR. LEMANN: I was going to ask what influence and effect the accession of the Attorney General to the Court might

have upon the resolution of this problem. As I recall it, we were egged on to this thing originally by the Department of Justice. We would not have undertaken the condemnation rule back in 1937 and 1938 except that they got hold of Major Tolman and said they needed something very badly, even before the last war. They continued to press it, but they always pressed it with insistence on trial by jury. As I recall it, they always wanted trial by jury. They wanted a uniform system, and they wanted trial by jury.

I think the profession is not very much interested because this doesn't ordinarily come across the life of the ordinary practitioner. It is only occasionally that he gets a case like this, and he doesn't care much about it. The only people who take any interest, apparently, in the bar are the officials of the sections of the bar associations who are charged with matters of this sort.

JUDGE DOBIE: The local practitioners are very much interested in districts in which they have a great deal of it; for example, the Eastern District of Virginia, where I was born, around Norfolk.

MR. LEMANN: I was speaking broadly of the country at large, and I was really developing the argument or the thought, Armistead, that the pressure for this came originally from the Department of Justice.

JUDGE DOBIE: That is correct.

MR. LEMANN: They had a lot of cases at the time, which were made more numerous by the war. Now apparently the business has slacked off. They wanted uniformity, anyhow, through the jury system, and when they finally could not get it through the jury system, as I follow the report of the discussion of the Supreme Court, other than Justice Rutledge the Court doesn't like the jury system, so the Department said, "Let's drop the whole thing." If you go back to the Supreme Court with a rule that cuts out the jury system at least in part and exposes them under the rule to the possibility of a commission, under this proposed modification, and the Department of Justice says, "We are against it," particularly now that they have a friend in Court, even if he wouldn't sit on this--and I should think he could sit because it is not a judicial matter.

CHAIRMAN MITCHELL: Surely.

MR. LEMANN: If he said, "Boys, I have talked this over with my former colleages, I know the situation, we don't like these commissions, and we would rather stick where we are," which is what he said two years ago, you will have a divided Court, apparently. The Chief Justice has gone on record as against the jury system, and Justice Clark has gone on record as for the jury system. If you have a divided Court and the report to Congress is divided, and if Congress has the opposition of the Department of Justice, I am sort of thinking aloud and don't know where I am coming out on it. I am marshalling the things that are

coming through my mind. Will we not just impair such prestige as the Committee may have in connection with future work?

CHAIRMAN MITCHELL: What is your suggestion? Stick our tails between our legs?

MR. LEMANN: Of course, nothing we do will protect us against some criticism. If we stick our tails between our legs, then Walter Armstrong and those of his school of thought will accuse us of pusillanimity. I don't know where I am coming out, Mr. Mitchell, but I am very dubious about our ability to get something through. Just on general principles I don't like to undertake something that won't result in a satisfactory rule and won't be enacted. I am really thinking partly of the influence of the Committee in rules generally, not personally. I don't think it makes any difference to any one of us personally, but I am thinking of such influence as we might command in recommending changes. As I recall it, Mr. Mitchell, we have never yet been really turned down by the Supreme Court or the Congress, except in those cases where the Supreme Court withheld approval of the amendments because they had cases pending before them which involved some of the matters that would be affected by some of those amendments. I believe that is right. I know it is true in two cases.

JUDGE CLARK: There were two cases in the original rules, however important you may consider them. One was the registration of judgment between the districts, and there was something on cross examination.

PROFESSOR MORGAN: The scope of cross-examination. They turned us down on that, and then Congress gave us what we wanted on registration of judgment afterwards, so the Court was wrong on it.

CHAIRMAN MITCHELL: I don't think the Court was wrong. I always felt that that matter of providing for registration of the judgment in the state of district in which it had been not rendered was not a thing that had to be done by Congress. I think the Court threw it out because of doubt about it.

MR. LEMANN: I think that is so. It wasn't because of disapproval of the thing on the merits. I didn't agree with you, Mr. Chairman. I thought that we could do it.

At any rate, I think we ought to take a preliminary vote as to whether we are going to continue to struggle with this thing. After all, as I understand it, nobody egged us on to this meeting except the Chairman. Am I right about that?

CHAIRMAN MITCHELL: The Court referred it back to us to act, and I think the Committee has to act. I thought we ought to get together to act.

PROFESSOR MORGAN: I think, Mr. Chairman, if we don't propose something of this sort and keep in the provisions which the members of the bar have especially approved, about notice and so on, we will get a lot of criticism from the bar.

CHAIRMAN MITCHELL: Don't you remember, for instance, that without this rule if the government goes into court and

takes immediate possession of a piece of land and doesn't take title, but seizes possession and holds it for a while and uses it, and goes on and has a trial by jury and gets a verdict for taking that it doesn't like, it can say, "To hell with you. I will get another piece of land," and dismiss the case. They have had possession of the man's land for perhaps a year or two, and the present law allows them to dismiss the case without having damages awarded for what they did take. They could require the land owner to go into the Court of Claims and sue the government.

That has been an outrageous injustice. There has been a lot of feeling in the bar about it. One of the things we attempted to do in this rule was to provide in the dismissal clause that the court couldn't dismiss the case without a stipulation on both sides in a situation like that, unless he went on and awarded compensation right then and there for what they had taken.

MR. PRYOR: Gentlemen, it seems to me that the Department ought to want a uniform procedure of some kind. Our firm, for instance, was interested in a lot of these cases in the Mississippi River nine-foot channel project. Where the property was on the west side of the thread of the stream it came under Iowa procedure and we had to have a commission hearing, and then we had an appeal and a trial in the district court by a jury. If the property was on the east side of the thread of the stream we would go over into Illinois and have it under the Illinois

procedure, where there wasn't any commission and we went right into the district court and tried it, which was a much more satisfactory arrangement. It was to us, and it certainly must have been much more satisfactory to the Department of Justice. If it had been all one way, it would have been more satisfactory.

MR. LEMANN: Suppose we adopted this proposed rule and the district judge on one side of the river said that there was no reason not to have a jury, and the judge on the other side said he didn't care for juries, that commissions were much better, then you would be confronted with a lack of uniformity on the two sides of the river.

MR. PRYOR: I haven't any answer to that.

MR. LEMANN: That occurred to me as he was speaking.

JUDGE DOBIE: I think the answer to it is that all the way through the rules as we drew them we vested a great many things in the discretion of the district judge. The basis of the whole thing is that you have district judges and that they will exercise their discretion in an admirable way.

MR. PRYOR: I am not afraid of it, but I am wondering if we won't have opposition to the rule on account of that.

JUDGE DRIVER: Mr. Chairman, it seems to me inevitable that if you submit any kind of condemnation rule, you are going to get criticism in some quarters. You will have criticism from a great many district judges. If you go one way, you will have criticism from the bar association; and if you go in another way,

perhaps you will have criticism from the Department of Justice. It seems to me that we should bear in mind that we are not adopting any rules. We are doing staff work for the Supreme Court. I think it is our duty to submit to them the best rule we can draft. I think we have a good rule here, but I don't think we should be sensitive about it if the Supreme Court doesn't see fit to adopt our proposals. It is our duty to make a proposal, I think.

MR. PRYOR: In so far as these other criticisms by the Department are concerned, I think they are utterly unreasonable.

PROFESSOR MORGAN: So do I.

MR. PRYOR: I don't think they will pursue that position to the limit because it is unreasonable. I think we have a good rule here. The only question in my mind is about this tribunal.

PROFESSOR SUNDERLAND: Wouldn't the Attorney General's Department have power here in effect to veto the use of commissions by merely failing to get an appropriation? What would a judge do with a rule like this where there wasn't any appropriation?

CHAIRMAN MITCHELL: That is true of a good many things as it stands today. The Department has to get an appropriation.

PROFESSOR SUNDERLAND: They are against the commission, so they don't get an appropriation. In effect, they veto this provision of the rule, don't they?

CHAIRMAN MITCHELL: Oh, no. They veto the condemnation

because they can't use a jury and they haven't any money for the other. That would leave them high and dry. They would not condemn it.

PROFESSOR SUNDERLAND: So really they would never do that.

CHAIRMAN MITCHELL: Of course not.

JUDGE DOBIE: I don't think we can proceed on the theory that the Department is going to act badly or act unreasonably or act in a way that is opposed to what we think is best. I think we ought to tell them what we think and put it up to them. If they want to battle-ax it directly or indirectly, that is their responsibility. I think we would be derelict in our duty if we just dropped it and said, "Oh, well, if there is objection or the Supreme Court doesn't seem to be too friendly or the Department of Justice hasn't cooperated the way it should, we are not going to do anything." I think that would be bad. I am in favor of passing it on to them.

JUDGE CLARK: I think we ought to go ahead. I agree thoroughly with what Judge Driver said. It seems to me we have a good rule and we can't back out. Of course, if you sat in military court for a while you would realize that you have to do things, whatever the Supreme Court might do. There is another possibility, of course: The Supreme Court usually hits you where you least expect it. They usually don't hit you on the things where you think they are.

I want to throw this out for consideration. Would it be at all desirable in this regard to put up an alternative to the Supreme Court, indicating our preference, of course. They are finally going to make the choice, and if they have the alternative provisions, it might be possible to push them a little and say, "This is the only point of debate. We think the better solution is this, but we think you should take either one or the other."

MR. LEMANN: Of course, you could do that partly by going back with your first suggestion. Judge Driver quotes the Chief Justice as saying there is no chance of approval of that, but that would be one alternative.

I would like to ask how closely we were divided on this question. We were reminded by the Chairman that we were very closely divided on this trial by jury question originally. I have forgotten how I voted myself.

JUDGE CLARK: We have the transcript here. I don't know whether we can ascertain that or not.

MR. LEMANN: It is not very important.

JUDGE DRIVER: If I may correct perhaps a wrong impression I may have given, the Chief Justice in talking to me didn't indicate, and I gathered from what he said that there had not been any vote taken or any formal stand or the matter submitted formally to the Court. He merely said that he was inclined to be against a rule that provided for jury in all cases, and he thought

that the majority of the rest of them were, too. That is the position he took.

MR. LEMANN: What is the Kentucky practice? Do you know, Judge Driver?

JUDGE DRIVER: I am not sure. I don't know whether they have commissions in Kentucky or not.

MR. LEMANN: Most of us have a propensity for our own practice, and I wondered if that threw any light on it.

CHAIRMAN MITCHELL: I have always had the feeling myself that the proposal of giving to the distrct judge discretion to pick the jury or the commission according to the circumstances in the case, if that sort of thing is adopted, is no good argument.

PROFESSOR SUNDERLAND: They do have the commission in Kentucky.

MR. LEMANN: The Kentucky practice is commission. That supports my hunch.

PROFESSOR SUNDERLAND: They have four methods. Three of them provide for commission.

JUDGE CLARK: What is the other one?

PROFESSOR SUNDERLAND: A writ of ad quod damnum is issued.

CHAIRMAN MITCHELL: With this proposal that the Reporter got up, if you approve that, I can't think of any just argument that can be made against this rule. I read you that paragraph of my letter where I analyzed the laws in the different

states under the conformity system. There are two states in which they have a commission plus the jury, and they are all a mess. That is a terrible waste. A lot of them have commissions anyway.

There is only one thing that has ever troubled me. I have read the debates on both the bills when the Congress was asked by the Department of Justice to pass a bill providing for jury trials in all condemnation cases. Both those bills were defeated. I went through the Congressional debates to see just what the Congressmen were thinking about. They were pretty well confused, but I gathered one thing. Whether they were for jury trial or for commissions or what, when they are taking a man's property away from him there were a whole lot of them who said, "Let's take it away in the manner provided in our state law." That is the feeling of a substantial number of Congressmen favorable to the conformity system.

MR. LEMANN: That is just what Vinson was influenced by when he wanted to do what his state practice called for. If he had been in Congress, that is the way he would have voted.

CHAIRMAN MITCHELL: By the same argument, we ought to abolish this rule.

MR. LEMANN: Yes, I thought of that, too, in fact, on the way up here. We were discussing how far the Supreme Court would carry some of their decisions. They may eventually abolish them. Land is a very local thing. It is tied up with the idea

of a man's home being his castle, his freehold. Much of this land they take belongs to large land owners, it is true, but land titles and anything affecting land is local in nature.

Before we vote on this alternative, I would like to ask Judge Driver, if he would, to summarize again his reasons for preferring the jury system. Justice Vinson preferred the commission system. We would give the preference, would we not, in this alternative to the jury system?

CHAIRMAN MITCHELL: Yes.

MR. LEMANN: You were against the jury system?

CHAIRMAN MITCHELL: We say a jury unless there are special facts which the judge thinks require the commission. The emphasis is on the jury.

MR. LEMANN: Would you write it the other way? If you were against the jury system, would you say commissioners unless the judge sent it to a jury?

CHAIRMAN MITCHELL: No, I wouldn't put any stress on that. I would say that the court shall order either jury or commission, depending on the facts, not laying any emphasis on one or the other. As far as that is concerned, I am content to leave the emphasis on the jury, where the majority of the Committee put it in the first place, bringing the Supreme Court around to our view by meeting Judge Paul's protest, which obviously impressed the majority of the Court.

MR. LEMANN: How did they get hold of Judge Paul's

protest?

CHAIRMAN MITCHELL: Because I wrote the judges on the TVA procedure.

MR. LEMANN: I know how we got it. How did the Supreme Court get it?

CHAIRMAN MITCHELL: I got these mimeographed copies, and I thought the Court ought to have his views. I asked the secretariat here in this building to supply the Justices with those papers. Paul didn't write a letter to the Supreme Court. They just picked up his letter in that group as one of the outstanding statements of the advantages of the commission system in these big projects. They were impressed by it. That is how they got it. They got it from us, and not from Paul.

JUDGE DOBIE: I am satisfied Paul got it from his experience with the TVA because he is the district judge in the Western District of Virginia, which is where I live, and there is hardly any district in the United States where there has been less condemnation than in the Western District of Virginia, during the war and even after the war. On the other hand, there has been more in the Eastern District, where Norfolk is, than in any other district comparable in size. I know Paul because I sat on the circuit court of appeals in a review of one of his decisions when he sat with a three-judge court in connection with the TVA.

CHAIRMAN MITCHELL: You realize what my attitude is

here at this meeting. We were egged on by the Department of Justice twice to tackle this job. Cummings asked us first the year before we ended our work. We all realized it was a difficult job, but we tackled it and got out a draft that was a pretty good start. As soon as the Department of Justice crowd and the lawyers around the government saw it, they commenced to quarrel like pickpockets among themselves. They didn't want this, that, or the other. There was such a disturbance inside his own organization that Cummings withdrew his request. That satisfied us. We dropped it. Then it was renewed. I have forgotten who did it later. Now we have gone through to the end and have done a very difficult task and drawn up a rule that we think is good and which certainly simplifies things over the conformity system and all its double trials, which are terrible. I think we may be slapped by the Court, but I have the feeling that if we have a good rule and it is in the public interest, it will be adopted. It cures a lot of defects in the present law that are unfair to property owners, and it simplifies things.

If we decide to submit this, my idea would be that the first thing to do after we reached that conclusion is to submit it to the Department and lay our cards on the table. "We have been all over this thing again, and here is the situation. Won't you acquiesce and give your support to this rule?"

I also have in mind that we ought to go before the American Bar Association section which has to do with this at the

fall meeting, take this up with them, thresh it out, discuss all these things, and try to convince at least that section that the rule is a good one and get their endorsement. I am thinking more of Congress than I am of the Court. Then put it in to the Court for such backing and opposition as may appear and let them do as they like.

JUDGE CLARK: Mr. Chairman, I can answer Mr. Lemann's question now. I don't know how informative it is, but the Chairman reported we were all unanimous when we adopted this. I think perhaps we weren't quite as unanimous as that.

CHAIRMAN MITCHELL: Unanimous on what?

JUDGE CLARK: On these provisions which we voted on February 3, 1948. Monte asked a few minutes ago how the vote stood on this.

MR. LEMANN: I saw either your article or someone else's, and the Chairman stated we were sharply divided on this rule. I think you said that in this article I read on the way up.

CHAIRMAN MITCHELL: I think we waived our individual views. We have done that time and time again.

MR. LEMANN: Yes. I just asked that Mr. Tolman pick out our first draft of rule to see how we settled it in the rule we drew and suppressed. Apparently, on a quick look, we voted for commissions at that time. I have just opened the volume to it to look at it. Maybe that was the Chairman's influence at the time.

PROFESSOR MORGAN: Monte, the point is that the majority of us were against jury trial until we heard the argument of the Department of Justice men here as to the way they conducted those jury trials. When they had a jury for the whole business, actually they tried only two or three pieces, and then all the rest of them fell in line with reference to those two or three pieces, so you got practically uniformity. They found that much more satisfactory than the other way. Bob Dodge said he had always found it more satisfactory, and so on. I came into this meeting determined that one thing I didn't want was jury trial, and I went out convinced that it was the better way for men who had a tremendous amount of experience with it.

MR. LEMANN: I think I went through the same process as you, but I couldn't now be sure which way I finally voted.

PROFESSOR MORGAN: I know I voted for it.

MR. LEMANN: But this first draft in 1937, which we ourselves afterwards abandoned, provides for commissions. That shows how we have fluctuated ourselves in our own thinking from time to time as to the way to do it. My recollection is like yours, that the Department of Justice had a large part in our final decision.

PROFESSOR MORGAN: I had a letter from Learned Hand who said, "For God's sake, don't use the commission. It is the most extravagant and wasteful thing in the country."

MR. LEMANN: Really?

PROFESSOR MORGAN: Yes. He said, "We have just had a jury trial in New York," and he gave me the case and showed how long it took them to get it and how much it cost. He said, "The commission is the last thing you want." That is what he said. Then, with the Department of Justice saying the same thing, who was I to vote against all that?

JUDGE CLARK: At the last wind-up Professor Morgan and Mr. Pryor were the strong people. There was a little dissent possibly from the Chairman, although he presided very impartially, and from Judge Clark and Judge Driver, too. Mr. Lemann seems to hav e been very quiet. I thought for a moment he wasn't there.

MR. LEMANN: I couldn't have been there.

JUDGE CLARK: This is the morning of February 3, 1948. Professor Morgan said, "I think they made a wonderfully good case yesterday." We had at that time two alternatives in the draft, and that is what we were voting on. The second alternative was the jury trial. The first alternative was jury trial only when the procedure called bona fide conformity.

"Chairman Mitchell: Where Congress has not specified a system, what is your pleasure about that? Do you want to provide for a jury trial or do you want to provide for the local law or a commission?

"Professor Morgan: I will take the jury trial.

"Judge Clark: Couldn't we discuss a little bit how to approach it? We might look at the alternatives we have here,

unless you have them in mind. These were worked over very carefully.

"I think the issue could be a modified conformity, if I may put it that way. The issue might be stated this way, I suppose, either local conformity or jury or you can make a situation in between.

"If you look at the alternatives we had, for example, the first one was a modified conformity or is conformity only for jury trial, and that gets away from this double-barreled thing that nobody would approve; that is, the commission plus the jury.

"Chairman Mitchell: We are all against it if we can get by with it.

"Judge Clark: That is really the point of my suggestion, that we do not need to go completely along with state conformity. These provisions go to a modified conformity and the issue might be between a complete jury and this kind of modified conformity.

"Professor Morgan: The Department of Justice made a very good case for a regular rule for a jury trial normally unless the parties waive it. It seems to me they made an excellent case for that. Let's not talk about state conformity; let's have a jury trial according to the rule.

"Chairman Mitchell: Let's take a vote on that. All those in favor of not having a commission and for a jury say 'aye.'"

You will notice what comes next. There is no call for

"noes."

"You are all agreed about that, I guess. If that is so, it knocks out the conformity idea completely doesn't it?

"Professor Morgan: Absolutely.

"Chairman Mitchell: And we are left now to a jury trial in all cases where the parties ask for it, either party asks for it, in all cases except where Congress has specified another tribunal."

MR. LEMANN: He says he was always against it, Mr. Mitchell, but he evidently didn't feel that he was called upon to express himself.

JUDGE CLARK: Then Judge Driver comes along, and I suggested that he was dragging his feet a little.

"Judge Driver: I was impressed yesterday by what you said, Mr. Chairman, about the possible difficulties in Congress. I wonder if that doesn't mean we could largely meet that difficulty by having the first alternative," which was this modified conformity. "We could point out in the section that where they have a local commission the judge in his discretion can provide for it in any particular case.

"Chairman Mitchell: That is the note I tucked into the note myself here, as a possible aid in getting it through Congress. Another alternative to those stated in the draft would be to provide the tribunal be a commission with review by the district court, with power in the court to permit a jury trial

upon the request of either party.

"You reversed that. You have a jury trial but give the court power to order a commission instead of a jury.

"Judge Driver: Yes, a commission instead of a jury. If that is put in, I wouldn't want then an appeal to a jury because you would get back to the old system.

"Mr. Pryor: I like this second alternative," which is the jury trial. "It doesn't provide for any commission at all. You can have a jury if you are willing to accept the second alternative, or you can waive the jury, you don't have to demand it, and it can be tried to the court."

Then there was some more discussion, and then:

"Chairman Mitchell: * * * Charlie, it looks to me as if the committee is unanimously agreed all along the line as to principle. What alternative will carry out what we have just agreed to?

"Judge Clark: The second will do it more completely. The second can do that with some slight revisions, but the second was intended to do that anyhow.

"Mr. Pryor: I think it does it.

"Chairman Mitchell: That second alternative hits it right on the head."

That is how we went along. Some of us had a little doubt. I come from a state without a jury trial. In the interest of settling it, because there was a good argument, I went along

and I guess that is what we all did. There were some doubts we had.

PROFESSOR MORGAN: You had some doubts, Charlie. You wanted to have the Connecticut system used, where a retired judge could handle the thing.

CHAIRMAN MITCHELL: I wouldn't attempt to go back and say how I felt at one time or another about this thing, but as I think back now it seems to me that this idea of a provision to provide for a commission in one kind of case and for a jury in another type is a development in my mind. I used to think in terms of one or the other as a general provision. After all this TVA business and what the Court thought about Paul's ideas, I swung around to the idea that, whatever might have been in my mind before, it wasn't right to have an absolute rule for either because it would depend on the conditions and circumstances in the case. So, I have worked my mind around to the point where I think it is impossible to define in a rule conditions which will cause the selection of a commission or, in the alternative, a jury. We can't draw any rule which will line up the conditions and say, "These are the conditions which need a commission, and under these conditions it will need a jury." The solution is to leave it to the discretion of the court. I have considered this thing because I was worried about Congress and its views.

The true solution is to recognize the fact that in certain types of projects the commission is obviously preferable.

The Department of Justice has never had anything to do with any TVA claim. That is handled by the lawyers of the TVA. So, they are not judges of how well that work is done. The evidence is pretty conclusive on that. However much I may have wobbled on it, I have finally come around to the idea that the true solution is to preserve the TVA and the District of Columbia system, the latter having a five-man system.

JUDGE DOBIE: I said a little while backthat I thought we could trust the discretion of the district judge, and I still think so. I am inclined to think it might very well be that where a judge has had a great deal of experience with the commission system and is familiar with it and likes it, he probably would be a little more prone to grant the application for a commission than would be another judge who rather prefers the jury system. I think that is something we can't grapple with.

CHAIRMAN MITCHELL: It gives the judge the power to follow the conformity idea if local opinion and counsel are for the jury, but it does cut out the double trial.

JUDGE DOBIE: Yes. I am in favor of that.

CHAIRMAN MITCHELL: Judge Learned Hand never had any condemnation case involving a big project. He is thinking about condemning a lot for a post office or something like that. The government hasn't had any big water projects in New York that I know anything about.

JUDGE DOBIE: They had one big one, didn't they,

Charlie, where they condemned a large part of Brooklyn for the Navy Yard?

JUDGE CLARK: That is right, the Brooklyn Navy Yard business. Of course, Judge Hand was strong for the court alone. He didn't care much for the jury, for that matter, but he thought the commission was worse because of delay and expense.

CHAIRMAN MITCHELL: I want to remind you that I was in the Department of Justice for eight years, and I had a lot to do with condemnation. That is to say, I had an Assistant Attorney General from the Lands Division in my office about once every two or three weeks yelling his head off about some jury that had soaked the government. When you say that the jury system produces results satisfactory to the government, that is damned nonsense. I know better. They will soak the government sometimes as hard as they can and fix extravagant sums. Why the Lands Division of the Department of Justice should say they always get a good result with a jury is beyond me. Seth Richardson, who drew the TVA statute, was my Assistant Attorney General in the Lands Division for four years. He had a lot of condemnations, and he had bad results with juries.

JUDGE DOBIE: When were you Attorney General?

CHAIRMAN MITCHELL: 1929 to 1933. When Senator George Norris, who was the father of the TVA, and who used to run around with a radical Republican group, wanted the TVA law drawn, he went to Seth Richardson, and Seth drew the TVA statute as a result of

his experience in the Department with juries.

JUDGE DOBIE: Isn't it the general contention that the TVA has worked very well? It is my understanding that the TVA has worked well in practice in a great majority of cases.

CHAIRMAN MITCHELL: The legal staff of the TVA say so unqualifiedly and convincingly. As you remember, they gave us memoranda on that. As we just cited, the judges who handled the TVA cases say so also.

JUDGE DRIVER: They still get big verdicts. About ten days ago I set one aside or reduced it or in the alternative granted a new trial. I thought the verdict was outrageous. I am reluctant to interfere with the jury in these cases, but I thought they gave an outrageous verdict. The property owners had very competent counsel, and they just walked away with the trial. That is a condition that still prevails.

JUDGE CLARK: How much did you reduce the verdict?

JUDGE DRIVER: It was a leasehold condemnation, an annual leasehold that they were condemning. The jury awarded $16,000, and I reduced it to $12,000 a year. That is in connection with an artillery range.

By the way, I have not had time to analyze this proposed (h) as attached to Professor Moore's letter, but as I understand it, that would eliminate the dual trial, would it not, before a commission and a jury on the merits de novo?

CHAIRMAN MITCHELL: Yes.

JUDGE DRIVER: The commission, if it is adopted, would simply make a finding as a master would. That is returned to the court, and if it isn't accepted, then there is a trial before the court on the commission's report. Is that true?

CHAIRMAN MITCHELL: Not a trial de novo. He could modify the master's conclusions.

JUDGE DRIVER: Not a trial de novo, but a court finding as in the case of a master's report.

JUDGE CLARK: The clearly erroneous rule applies there to the master's findings of fact.

CHAIRMAN MITCHELL: You mean the judge can't set it aside unless it is clearly erroneous?

JUDGE CLARK: That is on the findings of fact.

(Off the record.)

CHAIRMAN MITCHELL: I think as long as we have gone this far, asked the Chief Justice to get an appropriation as we did for this meeting to reconsider this thing which they recommitted to us, and since they expect us to come back with our final views about this thing, we ought to go ahead and fix the rule the way we think it ought to be.

JUDGE DOBIE: As I understand, there is pretty general agreement on (h) as modified, is there not? I would like to move the adoption of (h), if that is in order.

CHAIRMAN MITCHELL: Is there any discussion of that? Can anybody think of any holes that there may be in a rule like

this that calls for application of the master rule?

JUDGE DOBIE: I think there ought to be a comma after "tribunal" in the sixth line, but that is not vital. "If there is no such specially constituted tribunal, any party", and so on.

MR. LEMANN: What was that, again?

JUDGE CLARK: While you were talking, Monte, Armistead said, "We are all agreed on this now, so let's just go to the punctuation."

MR. LEMANN: I think we are all headed this way, but there are three possibilities that we might consider: The first would be to leave it to the judge without any direction which way presumptively to go. The second would be to direct him presumptively to the jury. The third would be to direct him presumptively to the commission. I would suppose, if you can consider compromises, those would be the three that you might consider.

CHAIRMAN MITCHELL: I remember after that conference with the Court, the draft I hurriedly got together did place the emphasis on jury trial. It said that it shall be a jury trial unless there are certain circumstances. I wasn't quite sure that I liked it, but I became reconciled to that because the Department wants the jury trial. We are throwing a little sop to them by putting the emphasis on the jury trial and putting the burden on the fellow who wants a commission to satisfy the court.

MR. LEMANN: This is to permit the same court to go in different directions in different cases.

JUDGE DOBIE: Certainly.

PROFESSOR MORGAN: Certainly.

JUDGE DOBIE: That is the big idea. If you have some simple piece of land, Monte, then the jury is simple and easy. On the other hand, if you have quite complicated ones that involve, a most of ours did, questions of whether or not there was any value to be attributed to the land on account of potential water power, then a commission is preferable. To show you how close the experts were together, in one case we had the big Massachusetts Institute of Technology said that the water rights were worth zero, and four other witnesses said they were worth 15 million dollars.

CHAIRMAN MITCHELL: Judge Driver, let me ask you something that just popped into my head. When you have a condemnation case under state law and use a commission, and there is no federal statute fixing a limit to their compensation, are the commissioners paid according to the state standards?

JUDGE DRIVER: Yes, their compensation would be according to state standards if there is no other provision for it. There is no provision in the federal statutes for the payment of jurors' fees and for the payment of commissioners, except TVA, as far as I know.

CHAIRMAN MITCHELL: If there is a state law fixing the compensation, would that be automatically applicable under the conformity system? The conformity system regulates the practice,

but it doesn't regulate the pay, does it?

JUDGE DRIVER: I should think not. It is difficult for me to answer that, General Mitchell, because in our state when we try condemnation cases under the conformity statute, we have jurors. We haven't had any commissioners there, so practically I don't know what is done in practice.

CHAIRMAN MITCHELL: There would be no present federal statutory limitation which would apply, and if the state standards applied, probably the judge fixes the compensation and that is where this extravagance creeps in.

JUDGE CLARK: That is what the Department of Justice asserts happens now. The Department says that the judge fixes it and is not bound by state law. That is one thing they don't like.

MR. LEMANN: He is not bound by state law? He appoints them under the Conformity Act.

JUDGE CLARK: He appoints the commissioners, and then he grants them such amount as he thinks is correct, which is more than the Department of Justice thinks is reasonable.

MR. LEMANN: At least he has the Conformity Act to guide him.

CHAIRMAN MITCHELL: He can follow the state rule as to pay, if he wants to, but he doesn't have to.

MR. LEMANN: That is the result.

CHAIRMAN MITCHELL: That would be my idea about it. Mr. Pryor thinks that is what happened.

MR. PRYOR: Yes.

MR. LEMANN: Then he makes the government liable for that.

CHAIRMAN MITCHELL: What he needs is a general statute in the appropriation act for the Department of Justice, appropriating the money which they have to use to pay because of condemnation cases or whatever appropriation it is which provides compensation.

MR. LEMANN: We have never had this problem, have we, because when we had masters before we said nothing about it because that is part of the cost of the case. There we didn't have the government to consider, and here we do have.

CHAIRMAN MITCHELL: The master's compensation fixed by the court is spread between the parties in the discretion of the court.

JUDGE CLARK: Let me give you this. This is what Mr. Vanech said to us. This appears at page 61 of the February 1948 meeting.

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

This is in connection with the payment of commissioners. Then, Mr. Vanech, the Assistant Attorney General:

"Mr. Vanech: We do it because under the mechanics of the law the U. S. attorney or the attorney handling the case engages the commissioners under a court order and pays $50 a day and in some states $100 a day.

"Chairman Mitchell: Who fixes that?"

MR. LEMANN: The U. S. attorney engages him?

JUDGE CLARK: That is what he said.

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

"We objected to that and worked out a compromise.

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

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

"Chairman Mitchell: What did the state law provide for commissioners in that case?

"Mr. Vanech: To be fixed by the court.

"Chairman Mitchell: How about your authority to spend

that money? Do you have an appropriation in advance for it?

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

CHAIRMAN MITCHELL: You see, they have an appropriation out of which they pay whatever the court fixes.

JUDGE DRIVER: It seems to me, if this rule were adopted as proposed here, the commissioner would become a part of the machinery of the court the same as the jurors, and he would be paid out of the appropriation for the administration of the courts rather than the appropriation for the Department of Justice. It would seem to me that it would not be difficult to get an Act of Congress, if this rule is adopted, fixing the compensation for commissioners under the rule. In the meantime I suppose the court would fix them in its discretion.

CHAIRMAN MITCHELL: It has been going on for years with this vast expense that they are yelling about. All they have to do is to go up with their budget before the Appropriations Committee for the fund out of which these commissioners have to be paid, and put a clause in there limiting it to $25 a day, or a maximum of $50, or whatever they wish to provide.

MR. LEMANN: Is the idea that this would be under Chandler's office, under the Administrative Office of the United States Courts?

JUDGE DRIVER: I should think so, if the rule is

adopted.

MR. LEMANN: Are jurors paid through that office now? Are jurors paid through the Administrative Office?

JUDGE DRIVER: Yes, through the Administrative Office.

MR. LEMANN: It is from an appropriation that comes through the Administrative Office, not through the Department of Justice.

JUDGE DRIVER: Yes, that is right.

MR. LEMANN: That is rather interesting. Then the Department of Justice as such is not concerned with it and won't be concerned with it. It will come through another office. Have we discussed this with Mr. Tolman, representing the Administrative Office? Do they object to this?

MR. TOLMAN: No. We haven't had any problem with it.

MR. LEMANN: You wouldn't have any trouble with this. You would just have to get a larger appropriation.

MR. TOLMAN: It might be a little larger.

CHAIRMAN MITCHELL: You would save money on the jury. You wouldn't have any more money to spend, would you? When you have a jury trial with twelve jurors, and they increase the fees and have a couple of bailiffs and watchmen, and you add the hotel rooms and a few other little things, you are running into real money.

JUDGE DRIVER: It seems to me, however it is determined, there should be some element of discretion left in the trial court

as to the compensation to be paid the commissioners, because obviously the amount they should receive would depend upon the character of the case. You might have one case where they go out and view some vacant lots and decide what should be paid, but suppose they had a case such as one we had in my district not long ago where the government acquired an entire power plant, in which all the facilities of the irrigation district and the power generating plant had to be condemned. There you would need technical people, who would be entitled to much larger compensation.

MR. LEMANN: What sort of people would you need for ordinary land? Real estate agents?

JUDGE DRIVER: Real estate experts ordinarily, I should think.

MR. LEMANN: You would never get anybody today, I should think, for $15 a day who was really much of an authority in his field. You can hardly get a doctor for $15 an hour or $25 an hour.

CHAIRMAN MITCHELL: The TVA has had a $15 minimum for years.

MR. LEMANN: I was wondering how they got them. Farmers?

CHAIRMAN MITCHELL: Judge, do you mean to suggest there ought to be some clause in the rule covering the point you make?

JUDGE DRIVER: No. I think the rule should stand just as it is. I think the determination of the compensation is a

matter that is beyond our province to decide.

CHAIRMAN MITCHELL: I may have been wrong in placing the matter of the pay in the lap of the Attorney General as I did, but I am not sure that I was, because if there is extravagance he can go to the Administrative Office, if they are the ones who handle the thing, and see that some rule is established.

Has anybody any detailed criticism of this draft?

MR. LEMANN: When you say "because of the character or quantity of the land", does "character" include location? For instance, I was thinking that one of the objections to the jury might be that the land was situated relatively remote from where the jury came from, that this is not a jury of freeholders of the neighborhood or vicinity. In my state we have a spillway twenty miles above New Orleans. When that was condemned I should think you might have made a plausible case under this rule to appoint a commission because the land was far away.

CHAIRMAN MITCHELL: Isn't that taken care of by "or for other reasons"?

MR. LEMANN: Yes, but you have put in those two words, and I wondered whether "character" included the location of the property.

CHAIRMAN MITCHELL: It may be that there is personal property. Why don't we say "property"?

JUDGE DRIVER: I was just about to suggest "property" because in our first subdivision we have said, "The Rules of

Civil Procedure for the District Courts of the United States govern the procedure for the condemnation of real and personal property * * *". So, it should be "property", obviously, I think, rather than "land".

JUDGE CLARK: I think it should read that way.

CHAIRMAN MITCHELL: Strike out "land" and make it "property", then.

PROFESSOR MORGAN: I think that is right.

CHAIRMAN MITCHELL: There doesn't seem to be any objection to that. That is the sort of thing I had in mind.

JUDGE CLARK: Would you want to put in the character and the location, Monte?

MR. LEMANN: I thought it might be well because "character" certainly wouldn't cover it. "character, location, quantity of the property to be condemned, or for other reasons".

CHAIRMAN MITCHELL: That covers a great deal. It covers the distance from the court. One of the important things is the location.

MR. PRYOR: That is all right.

JUDGE DOBIE: You don't think it is necessary to put anything in the rule, do you, about the payment of the commissioners?

CHAIRMAN MITCHELL: Not any more than we have about masters. That is done by appropriation. We have always shied away from anything that looks like it is tampering with

appropriations.

What is the rule now where there is a commission? Do they have to be unanimous? We have a majority. What is the present practice where you have three commissioners? Does it make any difference? I believe majority is all right.

JUDGE DRIVER: Yes.

CHAIRMAN MITCHELL: If there is a dissent, one of the things the judge is going to take care of is to see whether the dissenter may be right. I can't think of anything more myself.

JUDGE CLARK: It is a fact that the first provision of Rule 53(a) does cover compensation. I don't know whether that is important here or not.

CHAIRMAN MITCHELL: We may be bringing that in by implication.

JUDGE CLARK: We don't refer back to 53(a). As Mr. Moore pointed out, that is taxed against the parties there.

CHAIRMAN MITCHELL: "The compensation to be allowed to a master shall be fixed by the court, and shall be charged upon such of the parties or paid out of any fund or subject matter of the action, which is in the custody and control of the court as the court may direct."

That doesn't deal with public moneys for that purpose. Are we importing that clause about charging?

MR. LEMANN: You refer only to subdivision (c), subdivision (d), paragraphs (1) and (2), and to subdivision (e),

paragraph (2).

JUDGE DOBIE: As the rule is drawn, don't you think it is implied that compensation of the commissioners would be determined by the court?

JUDGE CLARK: I should think so. I don't believe it needs to be stated.

CHAIRMAN MITCHELL: What was your question?

JUDGE DOBIE: Whether, as the rule is now drawn, it does not contemplate that the fee to be allowed the commissioner shall be fixed by the court.

MR. PRYOR: It seems to me there is just as much reason for so providing as there is for providing that the master's compensation shall be fixed by the court, which is done in 53(a).

JUDGE CLARK: That is one reason I mentioned it. I think it is something we well ought to consider.

JUDGE DOBIE: In other words, I was considering the situation where you might have some kind of local rule and the judge might be troubled as to whether or not he is bound by that in fixing the fees to be allowed the commissioners. I don't think he should be.

CHAIRMAN MITCHELL: You would have to go a step further as long as you are dealing with public money and say "within the limits of any Act of Congress," if there were any limits established by any Act of Congress. Otherwise, the court could still go on.

JUDGE DOBIE: I don't think the Department of Justice would object to that. I think the court should fix it. We have allowed discretion in the court in a number of instances. In a case where commissioners should handle it rather than a jury, they probably would save money to the government much beyond the fees of the commissioners. My only idea, General, is that I think we ought to have it fixed by the court. If the rule clearly says that, I wouldn't change it.

CHAIRMAN MITCHELL: I doubt that it does, because it doesn't refer back. My thought was that maybe we were importing 53(a) about compensation into this rule, but I am told not, because our rule doesn't refer to 53(a) at all.

MR. LEMANN: We couldn't import 53(a) as it stands, anyhow, because it has language in it that would be inappropriate. If we are going to do anything about it, we would have to put in another sentence along the line that you suggest, that the compensation of the commissioners shall be fixed by the court, subject to any limitations established by Act of Congress. I don't know that that "subject" clause is really necessary. We could always establish limits.

JUDGE DOBIE: It would please Congress, I think.

JUDGE DRIVER: It would be tactful, if nothing else.

MR. PRYOR: Whether you say anything or not, they can put a limit on it.

MR. LEMANN: That is what I was thinking. It is really

surplusage.

CHAIRMAN MITCHELL: As the matter stands, we don't say anything about it and the only way they can be fixed is by the court. We take that for granted, whether we refer to 53(a) or not. The minute we get the court fixing it, we seem to be taking the control of the amount away from Congress, or trying to do so. If we say nothing about it, it has to be fixed by the court as it is now. The thing for the Administrative Office to do is to put an outside limit on it in the appropriations act.

MR. LEMANN: It might be tacked on to the section that fixes the compensation of jurors, another sentence or two.

CHAIRMAN MITCHELL: One trouble with the jury is that they know what they have to pay; they can fix an absolute limit for any kind of case or any kind of juror, regardless of whether we have a technical evaluation of electric machinery, an expert engineer, a real estate man, or something else.

MR. LEMANN: If you put in a maximum limit, it would meet resistance by implying that that would be considered the normal allowance.

CHAIRMAN MITCHELL: Surely.

MR. LEMANN: If you put in what you really ought to pay to a competent expert, it might terrify Congress.

JUDGE DOBIE: I was just telling Professor Sunderland that we had a case involving a conciliation commissioner who worked for four years, and the maximum we could allow him under

the statute was $20 a day. In other words, the limitation there was perfectly absurd. It just contemplates the ordinary case, a small farmer who works for a couple of days.

MR. LEMANN: I should think it would be better not to say anything about it. The Administrator can get his appropriation fixed according to what the needs turn out to be. If he finds he is running out of money, he will have to get another appropriation to pay it, that is all. The fellow might have to wait. I served as special master under appointment by the Supreme Court in the case of Arkansas v. Tennessee, and I had to wait quite a while to get my compensation because the State of Arkansas didn't provide the funds to pay it. They were ordered to pay it, but I had to wait until they got an appropriation to pay it. It wasn't a very large amount, but they had no source from which to take it.

CHAIRMAN MITCHELL: I think it would be better not to say anything about it.

Is there anything else? We have the word "property" in place of "land", and after the word "character" we have inserted the word "location".

Have we fixed the thing so that under this rule the commission would always have to have formal hearings and be limited to the evidence that was introduced before it?

JUDGE CLARK: That is 53(d), (1) and (2).

CHAIRMAN MITCHELL: What about a master? Can he go out

and inspect the land and form a conclusion by observation? I just want to be sure.

MR. LEMANN: Yes. I did as master in two cases. I went out and inspected the premises. None of the counsel ever questioned my right to do it. I took my observations into account in writing my report. I don't think there would be any question about that.

JUDGE DRIVER: I don't think so.

JUDGE CLARK: Rule 53(c) is perhaps more apt. The first sentence is that the order of reference may fix the powers, and so on. Then the second sentence: "Subject to the specifications and limitations stated in the order, the master has and shall exercise the power to regulate all proceedings in every hearing before him and to do all acts and take all measures necessary or proper for the efficient performance of his duties under the order."

MR. LEMANN: To take all measures necessary.

CHAIRMAN MITCHELL: Do you think as far as inspection is concerned, which is an important job of the commission, the order appointing the commission would have to specify that?

MR. LEMANN: No. Look at the second sentence.

PROFESSOR MORGAN: It provides for the court's order fixing the limits, and so on.

MR. LEMANN: If it doesn't fix it, Mr. Mitchell, look at the sentence Judge Clark read, the second sentence of 53(c).

"Subject to the specifications and limitations stated in the order, the master has and shall exercise the power to regulate all proceedings in every hearing before him and to do all acts and take all measures necessary or proper for the efficient performance of his duties under the order."

CHAIRMAN MITCHELL: That is all right.

MR. PRYOR: He would have the right to inspect the property anyway. He should do that.

CHAIRMAN MITCHELL: Can anybody else find any more captious objections? (Laughter) I want to be sure we know what we are doing and that we haven't made a slip of any kind.

JUDGE CLARK: I take it that there were no suggestions anywhere in this discussion of a single person to consider this. That happens to be our practice in Connecticut. It is most usual to refer to a referee who is a retired judge.

MR. LEMANN: You can say "not more than three". That would cover your point.

JUDGE DOBIE: How many of the states work with a single commissioner?

JUDGE CLARK: That is what we use in our state practice.

JUDGE DOBIE: Just one man?

JUDGE CLARK: Yes, although they don't call him commissioner there. The practice now is to refer to a state referee. A state referee is a judge who has retired at the age of seventy, and he is automatically appointed state referee. That is one way

they help to earn their pension.

MR. PRYOR: Is there any other state which uses the one commissioner?

JUDGE CLARK: That I don't know. Edson, you know that. Mr. Pryor wants to know if any state other than Connecticut has just the one commissioner.

PROFESSOR SUNDERLAND: Some of them have five. Almost all of them have three.

MR. LEMANN: If you had one, of course that would be no worse than the master, and he could be reviewed by the judge.

CHAIRMAN MITCHELL: I was thinking that with three, that gives a chance to the court to ask counsel for the property owner and for the government for suggestions of names.

JUDGE DOBIE: If the character of the land was such that you would rather have a commission than a jury, and the value of it might not be very great and the expense of three might be considered by the court to be a little extreme, I was wondering whether we ought to put in there a provision for not more than three. Of course, we all know that in suits in admiralty and in patent cases the master fixes damages in very important matters that, as the General knows, often run into millions of dollars.

CHAIRMAN MITCHELL: We would have to do something about the majority statement.

MR. PRYOR: What is a majority of a commission of not more than three?

JUDGE DRIVER: A majority is two.

PROFESSOR SUNDERLAND: I don't think one commissioner would be very satisfactory. It seems to me that puts too much in one man.

CHAIRMAN MITCHELL: Thinking in terms of using the commission in the case of a very large project for a great area, one of the TVA arguments for the commission was that it established a standard for a great area, which you didn't get with spotty jury verdicts here and there. So, if we are right in our theory that the commission will not be used except in these big areas generally, and if that is why we are giving this, there is no use fooling with two or one. They have an important function to settle on a standard, and they are going to apply it throughout miles of the country.

PROFESSOR MORGAN: Suppose you said that in all other cases it should be tried by the court, couldn't the court under that just appoint a master? If he wanted only one, he could appoint one master to take evidence.

CHAIRMAN MITCHELL: That isn't trial by the court.

PROFESSOR MORGAN: Wouldn't that be a trial by the court?

CHAIRMAN MITCHELL: I should not think so, within the meaning of that clause, where we are dealing with what amounts to appointment of a master.

PROFESSOR MORGAN: Why don't you say "judge," then,

instead of "court"? If it is the court, I should think the court would have power to appoint a master if he wanted to.

CHAIRMAN MITCHELL: I would construe the provision, "Trial of all issues shall otherwise be by the court," to mean to the exclusion of anybody resembling a master or commissioner.

PROFESSOR MORGAN: It might, that is true.

CHAIRMAN MITCHELL: It means the judge himself; isn't that true?

MR. LEMANN: "Court" is the word we have used in Rules 38 and 39. If you used "judge," it would be rather a departure from our usual terminology.

CHAIRMAN MITCHELL: The court in its discretion.

PROFESSOR MORGAN: It is all right. I don't urge any change.

CHAIRMAN MITCHELL: I really think generally speaking you may be right, but it seems to me--

PROFESSOR MORGAN: I think perhaps you are right. I just wonder if we get away from changing this by putting in "not more than three", so in a case where there was a simple issue the court could try it without a jury.

PROFESSOR SUNDERLAND: I think we would get wider good will if we made it three than to open the possibility of less than three.

CHAIRMAN MITCHELL: That is why I suggested that the property owner would shrink a little bit from a single man

appointed by a court, whose findings can't be disturbed unless they are clearly erroneous. It gives the property owner a chance to suggest a name.

PROFESSOR MORGAN: To suggest one of the commissioners, at any rate. I think we don't have to worry about little cases of that kind.

MR. LEMANN: I guess ordinarily they would go to a jury.

PROFESSOR MORGAN: We have to leave something to the common sense of the court.

CHAIRMAN MITCHELL: If nobody has any further amendment to make, shall we approve subdivision (h) as recast?

PROFESSOR MORGAN: I so move.

JUDGE DOBIE: I second the motion.

CHAIRMAN MITCHELL: All in favor of subdivision (h) as recast say "aye"; those opposed, "no." That is agreed to unanimously.

We still have a few minutes before our lunch hour. Let us go to Mr. Moore's letter of April 3.

JUDGE CLARK: Let me ask this. I take it that we will put up only this one draft.

PROFESSOR MORGAN: I think so. I don't see why we should put up a half dozen.

CHAIRMAN MITCHELL: It is my idea that we have adopted that as our view. If the Court wants to go back to what we had before, it can do it. There is the draft.

MR. LEMANN: As I understand it, this will not go to the Court until it has been submitted to the bench and the bar?

CHAIRMAN MITCHELL: You see, we couldn't submit it to Congress anyway until next January as the law stands. There is an amendment now in the course of making that gives the Court a chance to put the thing through at any session of Congress, even in the middle of a session, provided it lays over the required time. My idea was that we wouldn't try to rush it.

MR. LEMANN: That is what I thought.

CHAIRMAN MITCHELL: We will first take it up with the Attorney General and see if we can persuade him to go along with us, and then take it up with the American Bar Association and get an endorsement from them. I think we could get it, and I think it would be very influential with the Court and with the Congress.

MR. LEMANN: They meet in September, don't they?

CHAIRMAN MITCHELL: Yes.

MR. LEMANN: We could get their views then. I think there ought to be some spadework done with a committee before then.

CHAIRMAN MITCHELL: We ought to get it over to the Section on Real Estate Law, or something like that, which has dealt with this thing before.

JUDGE DRIVER: I was going to say, Mr. Chairman, I think there should be some definite arrangement made at this time, if you propose to try to get endorsement from the American Bar Association, to have representation from this Committee officially

there, and not have a repetition of the situation we had at Seattle, where the matter came up and there was nobody there charged with the duty of representing the Committee. I think someone should be sent from the Committee with their expenses paid and delegated to go--the Chairman, if possible, and Judge Clark, who could best represent the Committee--and have them there on the ground.

CHAIRMAN MITCHELL: Where is the meeting going to be held?

JUDGE DRIVER: I believe it is Washington, D. C., is it not?

MR. TOLMAN: Yes, it is Washington.

CHAIRMAN MITCHELL: What section was it that took it up?

JUDGE DRIVER: It is the Real Property Section.

CHAIRMAN MITCHELL: Do you think that is the right section?

JUDGE DRIVER: That is the one that took it up before for discussion. Mr. Dillon, of Chicago, is the chairman of that section. That is where it originates. In the normal course of events the recommendation of that section would be adopted.

MR. LEMANN: It seems to me it would be well to talk to the members of that section in advance and line them up before the meeting. If you lined them up, you would have most of your battle won, wouldn't you?

CHAIRMAN MITCHELL: Is there any executive committee or

subordinate body of this section that meets before the regular meeting?

MR. PRYOR: They have what they call a council, don't they?

JUDGE DRIVER: They have a council of the Real Property Section. I don't know how large the council is, but there are only six or eight, something like that.

MR. LEMANN: If they operate like the Section on Taxation, they function throughout the year through their chairman. I don't know whether they have any meetings, but they exchange letters.

CHAIRMAN MITCHELL: My idea would be that if we could get hold of a subordinate committee or council of that section in advance of the meeting of the section at the Bar meeting and talk it out and get their support in advance, then we could go before the whole section, and maybe they could arrange to get it before the House of Delegates.

MR. LEMANN: That is right. They would do that then, I think. In fact, my impression is that the procedure of the Bar Association would be for this section or committee or council to present a report at the annual meeting. If you could get into that report the recommendation that this be approved, it would come automatically before the House of Delegates for action at that meeting. I think that is what we should aim to do.

I noticed that there was some criticism expressed in

your letters with Mr. Armstrong that we haven't sufficiently circularized this draft. You pointed out that we had sent out quite a number of copies of the draft to people who seemed to be interested, but perhaps we ought to consider a somewhat wider circulation in view of that comment, to forestall any criticism. I think your point at the time was that it was rather expensive to give as wide distribution as we had to the other rules.

MR. PRYOR: I wonder if the Real Property Section of the Bar Association gets out a quarterly or monthly magazine like some of the other sections.

JUDGE DRIVER: I am not sure.

MR. LEMANN: If not, we might at least send it to all the members who are enrolled in that section.

MR. PRYOR: I was thinking if they get out their own publication, we might persuade them to publish it in that.

MR. LEMANN: I agree with you. I was thinking beyond that, that if they haven't any publication, we might at least distribute this to the people who are enrolled in that section. I should guess there might be two or three hundred of them.

JUDGE DRIVER: I have just referred to a letter I wrote shortly after the Seattle meeting, and I notice the official designation of the chairman is Mr. William H. Dillon, Chairman of the Council of the Real Property, Probate and Trust Section of the American Bar Association.

CHAIRMAN MITCHELL: After we adjourn suppose that right

away I find out who is running that council today, and if it is still Dillon, take it up with him and tell him what we want to do and get his suggestion on wehther we can't get some consideration and approval in advance of the Bar meeting so we can do something at the Bar meeting.

MR. LEMANN: I think that during the recess Mr. Tolman could probably get hold of the Bar Association journal.

MR. TOLMAN: I have already asked for the roster.

CHAIRMAN MITCHELL: I have a roster at home.

JUDGE DRIVER: I think that would be very helpful because you will find, as those conventions go, the sections get together in a hurry in some hotel room, and if you have not taken it up with them in advance you will have all sorts of queer and unexpected objections raised that you never thought of. They haven't any merit, but it is difficult to answer them sometimes on the spur of the moment. You could iron a lot of that out in advance, I think, if you took it up with them.

CHAIRMAN MITCHELL: When I found out that we could get it before some subcommittee of that section, in order to lay our proposition before them as soon as possible, I would consult with the Committee and find out who there is on this Committee who is available or nearby who could go and represent the Committee before that group.

MR. LEMANN: I second Judge Driver's idea that their expenses ought to be paid, and I should think there ought to be

at least two, perhaps three if we could get them.

CHAIRMAN MITCHELL: I think three are none too many to deal with the Bar Association right along the line. I wouldn't have any difficulty, I guess, in getting the Chief Justice to authorize the travel expenses and perdiem for three members of this outfit to appear before the American Bar Association to discuss this matter. It is just as much in line with our work as printing and distributing copies to the bar.

MR. LEMANN: That will reach the title companies, too, won't it? You remember at one time we had some kick from the Title Section. They are in that section, Mr. Pryor?

MR. PRYOR: Yes, I think so. They were thinking about the search of records.

MR. LEMANN: They are satisfied now?

CHAIRMAN MITCHELL: They are satisfied now.

MR. PRYOR: Yes.

MR. LEMANN: I approve Mr. Pryor's suggestion about publishing this in any magazine that section may have, and failing in that, Mr. Mitchell, if they haven't any magazine, if we could get the approval of the section, we might get the American Bar Association journal to publish it. It would take only two or three pages, and it would meet your point of the expense.

MR. PRYOR: I know that the Commercial Section gets one out called The American Business Lawyer, or something like that. Some such publication would emphasize this thing.

MR. LEMANN: I agree. I think so. It would be very good to put it in there if they have one. The Section on Taxation gets out bulletins, too, all through the year.

CHAIRMAN MITCHELL: This bill which is now pending for submission of these rules to Congress so that they will become effective, says that they can be presented after the beginning of the session, but not later than the first day of May. So, we will not get this before Congress prior to January 1 next, because we couldn't get it in before May 1 now.

MR. LEMANN: No.

CHAIRMAN MITCHELL: That will give us all the rest of this year up until maybe November or December, when the Court will take a last crack at it, to do all this spadework.

JUDGE CLARK: Would it be your idea, Mr. Mitchell, that we have this printed at all or not? We would have to make some changes of detail, very minor things like the change of name of the district court and of the court of appeals. We will have to go through that. There may be some differences in citations of the Judicial Code. How would that be handled?

CHAIRMAN MITCHELL: I will have to find out how much appropriation we will have left. Our appropriation will expire June 30, with all the printing we are going to do beforehand.

JUDGE DRIVER: The American Bar meeting will be within the next fiscal year, won't it? Next September would be in the next fiscal year.

CHAIRMAN MITCHELL: Yes. I have never failed to get an appropriation retroactively for spending some money. Once or twice I have gotten an appropriation for back payments.

MR. LEMANN: I think you could defer the official print and the printing of the forms until after you pass the American Bar Association section. What we have been talking about getting published in the journal would give us the distribution we needed, without using any of our appropriation for that, and then you could spend the money for that final purpose you are talking about, Charlie, when you went to the Supreme Court.

CHAIRMAN MITCHELL: My idea is that if you have any considerable number of our report available in the files--I don't know how many we have, but there must be quite a number of copies of that, enough for the use of the section of the American Bar Association--we could just print a list of corrections and alterations as a rider and stick it right in the existing copies, if we have enough of them to serve our purpose.

JUDGE CLARK: Do you have copies?

MR. TOLMAN: We have plenty of copies, Mr. Mitchell.

CHAIRMAN MITCHELL: That is fine. We won't have to reprint at all, even for our report. We can take our report and put a rider in it changing the name of the court from the District Court of the United States to something else and put these amendments in, inserting them at the proper pages. There is no trouble about that. I think we can get along with that.

Then it is understood that after we adjourn sine die I will take it up immediately with the American Bar Association Section on Real Estate, find out who is the chairman, and communicate with him and find just what is the way to get this thing dealt with beforehand, before the meeting of the American Bar; then, having done that, fix a date for a committee of three of you who are willing to go and work it out.

JUDGE CLARK: The chairman of that council has changed. Mr. Dillon now goes on the council. The chairman is now Walter L. Nossaman, of Los Angeles. I note on the council one of Edson's colleagues, Lewis M. Simes.

CHAIRMAN MITCHELL: Council of what?

JUDGE CLARK: Of the Real Property, Probate and Trust Law Section. They have a council, officers, chairman, vice chairman, secretary, and so on. They have a council of which the officers are ex officio members. Walter W. Land, of New York, is one who is on the Council.

MR. LEMANN: How many are there on the council?

JUDGE CLARK: Nine in addition to the officers, and there seem to be eight officers.

MR. LEMANN: There would be about fifteen people that you ought to send this draft to, through the chairman, I suppose. I suppose he would be the one to distribute them or to tell you to distribute them.

CHAIRMAN MITCHELL: As soon as I get back to New York

I will communicate at once with the man on the list who ought to start it going, tell him what we want, and see what he has to suggest.

MR. LEMANN: Wouldn't it be well, too, to ask him about publishing the draft we have in his magazine, if he has one, and in the American Bar Association journal also?

CHAIRMAN MITCHELL: Has the section a magazine?

MR. PRYOR: Some of them have. I don't know whether this one has or not.

MR. LEMANN: In the American Bar Association journal in any event.

CHAIRMAN MITCHELL: I think we can arrange that. Our printing appropriation goes by the board on June 30. If it can't be printed in the American Bar Association journal, I think we can get the Chief Justice to authorize the expense of printing it.

MR. LEMANN: I don't think you would have to. I think they will be glad to print it. It would be only three or four pages in that journal.

JUDGE DOBIE: Leland backs me up that they would be delighted to print it.

MR. LEMANN: When they print it, invite anyone who has suggestions to communicate either with us or with the chairman of their council on this subject. Then we would know the objections before we went to the meeting in September. Then nobody could say that you had not circularized them. You would have to send

it, too, to all the U. S. judges. You did that before. You could do that by your errata sheets pasted in the June 1948 report.

JUDGE DRIVER: If they weren't sufficiently interested to keep the May draft, they are not entitled to it.

MR. LEMANN: Mr. Tolman says he has plenty of them. All you have to do is print the changes, as Mr. Mitchell suggested, and put that in the pamphlet and send it to the district judges with an appropriate letter.

MR. TOLMAN: I think we could avoid the expense of printing if you wanted to send it out in a mimeographed or otherwise duplicated form. We could duplicate it in our section right here. Our office would take care of it.

CHAIRMAN MITCHELL: Of course, if we have a lot of printed copies left, that is more convenient.

MR. LEMANN: You could use the printed copies, and in your mimeographed letter accompanying it say, "The Committee has made" or "proposes the following changes in the attached printed draft which is again sent you herewith." Put it on your mimeographed sheet, and then you haven't any money problem at all, Mr. Mitchell. He will do the mimeographing for nothing.

CHAIRMAN MITCHELL: The printing of a rider to go into the printed report would just make a recast of subdivision (h).

MR. LEMANN: Have you anything else to change?

CHAIRMAN MITCHELL: The Judicial Code requires us to change the name of the United States courts.

MR. LEMANN: I mean, do we have to review any other possible changes?

CHAIRMAN MITCHELL: Before we got on to this I started to take up the other points to which Professor Moore calls our attention as having been discussed by the Department of Justice.

(The meeting recessed at one o'clock p.m.)

THURSDAY AFTERNOON SESSION

April 6, 1950

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

CHAIRMAN MITCHELL: In Professor Moore's memorandum which I called to the attention of the Committee, he speaks of three or four different features which have been a metter of discussion with the Department of Justice. I will go over them. I would like you either to express content with what we have now or else to make a change so that when we report to the Court we can say that we have reconsidered all these points.

PROFESSOR MORGAN: It seems to me, Mr. Chairman, you have covered practically all those in your letter to the Attorney General.

CHAIRMAN MITCHELL: Yes, but I have not taken them up with the Committee.

PROFESSOR MORGAN: Our position is unanswerable, as far as I am concerned.

MR. PRYOR: As far as I am concerned, I would be willing to vote for a motion to concur in the opinions expressed by the Chairman in his letter to the Attorney General as to all of the criticisms offered by the Department.

PROFESSOR MORGAN: Certainly I should.

JUDGE DRIVER: I would, too.

CHAIRMAN MITCHELL: Does anybody disagree with that?

(No response.)

There is one thing here that I didn't mention in my letter that Professor Moore speaks about, (k), on page 2, Condemnation under a State's Power of Eminent Domain. He says:

"It may not be clear under this subdivision as to the method of trial to be utilized where the state power of eminent domain is invoked."

These are rare occasions, of course.

"Under subdivision (k) the method of state trial would have to be applied provided this could be said to be a 'condition affecting the substantial rights of a litigant'. In the first alternative of subdivision (l) in the June 1947 draft there was a provision which required the federal court to accord a trial by jury when the state practice so required. In that draft, trial by jury was treated as a 'condition affecting the substantial rights of a litigant'. It could be reasonably contended, I suppose, that a different state method of trial, as by a commission, or by the court, is just as substantial a condition as the method of trial by jury."

The sub and substance of that, as I get it, is the question whether or not the clause as we now have it is vague and ambiguous. We now have in subdivision (k):

"If the action involves the exercise of the power of eminent domain under the law of a state, the practice herein prescribed may be altered to the extent necessary to observe and

enforce any condition affecting the substantial rights of a litigant attached by the state law to the exercise of the state's power of eminent domain."

I think we are content with the idea. The question is whether we are opening a Pandora's box.

PROFESSOR MORGAN: We used to know a little bit about what "substantial rights" meant, but we don't any more after the cases under Erie Railroad v. Tompkins.

JUDGE CLARK: May I speak about this just a little more? At one time, in the draft of March 1948, for example, we did have in it the clause, "and the tribunal to try the issue of just compensation shall be as specified by state law."

PROFESSOR MORGAN: We cut that out.

JUDGE CLARK: Yes, that is right, we did. That was only to be applied under (k). You notice it is limited, therefore, to a condemnation under the state's power of eminent domain. We had that in, and the Committee was rather against it under its general belief in uniformity and jury trials at that moment. By cutting it out we did perhaps leave the matter somewhat ambiguous, and some question has been raised as to just what was meant. There is, first, the question whether you want to clarify it somewhat, and second, the question, if you do clarify it, which way?

I would like to suggest, contrary to what I suppose was the view of the Committee at that time in favor of jury trial, that I really think it ought to be made clear that it is the state

tribunal, the state system. I really think it would be on the whole a bit unfortunate to provide otherwise. Take the situation in a state such as my own, Connecticut, for example, where we never think in state procedure and never have thought in federal procedure to this date of a jury trial. I should think it would be a little unfortunate in such a situation to provide for a jury trial and to make it an incentive to get these matters in the federal court if possible, or to make it a case of shopping, so to speak. You would have to have conditions proper to get into the federal court. I suppose the most natural one would be diversity of citizenship. I suggest that that might be unfortunate. Suppose in a condemnation for a state highway it goes through a long tract and most of the people are local and can't get in the federal court, and they take the local procedure. However, there happens to be some property owner who lives in another state who can get in the federal court, get a jury trial, and get one of these juries like Judge Driver has. That is the situation.

First, is there or isn't there a slight ambiguity? Second, what will we do in the light of that?

MR. LEMANN: Mr. Mitchell, I notice from reading on the train his letter of July 7, 1948, thought that this was quite ambiguous, but apparently his doubts were in the opposite direction from those suggested here.

CHAIRMAN MITCHELL: What is that?

MR. LEMANN: It is a letter you wrote to Judge Clark on

July 7, 1948. You said:

"I am afraid the way the rule is now drawn we have left the state cases in a situation where they do not get a jury trial, but get a trial by the court where a right to a jury trial could not be said to be a substantial right attached by state law to the exercise of the state's power of eminent domain."

Then you went on to elaborate on that point.

It seems to be the general view now that this would give you a right to a jury trial unless the state law could be considered to substantially require some other method.

PROFESSOR MORGAN: The Reporter made exactly the same illustration before, and I think the majority of the Committee last time were definitely of the opinion that when you were in the federal court, you ought to have the federal court procedure from top to bottom. Of course, we thought then that by cutting out that last phrase, that is what we had done, but under the Stoner case the right of trial by jury may be regarded as a substantial right. Certainly a United States district court can't direct the verdict where the state court couldn't after the Stoner case.

JUDGE CLARK: Let me complete this by saying that Professor Morgan states it correctly. I think I did make the same argument. I was overruled. I have no ground for reopening the question except that it does seem a bit ambiguous in the light of current decisions, and then as to which decision we now

make, we are retreating somewhat from uniformity, and therefore the main argument which was used against my suggestion is certainly weakened, if not gone. So, possibly I have a chance to repeat what I said before.

PROFESSOR MORGAN: Surely. I am not saying that it is improper at this time, Charlie.

MR. LEMANN: Armstrong criticizes a retreat from uniformity.

MR. PRYOR: I would like to see the same procedure in a case removed to the federal court on the ground of diversity or whatever the ground is, as you have in a case originally in the federal court. I think there is a great advantage in that. In Iowa, for instance, if you have a case removed to the federal court on the ground of diversity, you might have your commission appointed to appraise the value of the damages, and then you go into the federal court and have another trial of the thing. That would be the state practice which would be followed under this, if you held that was a substantial right.

MR. LEMANN: This also leaves it open to the possibility that it might be held by the commission to be a substantial right. That is the practical phase of it which you were just stating, isn't it?

MR. PRYOR: That is right.

MR. LEMANN: Yet, Mr. Mitchell seemed to think in his comment, as I got it, that this might interfere with the jury

trial. So, one argument is that it might interfere with the jury trial; the other argument is that it might interfere with the trial by commissioner. That emphasizes its ambiguity.

PROFESSOR MORGAN: I think it ought to be clarified. I agree with that.

MR. PRYOR: I think when we discussed it before mention was made of the possible opposition in Congress, arising out of the state's rights idea, to anything other than following the state procedure with respect to a case of that kind.

JUDGE DOBIE: What cases are you considering? Cases removed to the federal court?

MR. PRYOR: Yes.

MR. LEMANN: Where they arise under the state's power of eminent domain.

PROFESSOR SUNDERLAND: Either removed or originally brought. It might be both.

MR. PRYOR: It could be either way.

JUDGE DRIVER: Where the state or subdivision is acquiring property for public use and it gets into federal court because of federal jurisdiction.

JUDGE CLARK: Probably no state would do it. I suppose theoretically they could, but it is hard to imagine that a state would do that.

MR. PRYOR: It is very unlikely to have a case where the case was originally brought in the federal court, but I have

had cases that have been removed to the federal court.

JUDGE DOBIE: I think the procedure ought to be the same. I think we provide in our rule, don't we, Charlie, that they apply in all cases removed to the federal court?

JUDGE CLARK: What do you mean by the same? That can mean the same as the state procedure or the same--

JUDGE DOBIE: I mean according to the uniform federal rules.

PROFESSOR SUNDERLAND: A removed case proceeds under our rules, under the federal rules.

CHAIRMAN MITCHELL: That is all right, but suppose the state has a constitutional provision or statute granting power in such shape that the method of trial is attached to the power, so if you exercise the power, it is on condition that you exercise it as the state law provides. Can you disregard that condition?

PROFESSOR SUNDERLAND: I don't believe you can.

CHAIRMAN MITCHELL: That is the point I had in mind. Can you throw it aside and say that that is a condition imposed by the state to the exercise of this power? When you get over in the federal court can you still exercise the state power but throw the condition in the wastebasket?

PROFESSOR SUNDERLAND: I don't think you can do it.

CHAIRMAN MITCHELL: That is the trouble. That is the thing that this rule was intended to cover. I think Judge Donworth kept harping on that. You remember, he spoke about a

lot of western state statutes that gave power of eminent domain, and he thought there were things in them about procedure that were really conditions to the power. He was afraid of the point. That is why we worked this out. I think it is difficult, because who is going to say whether it is a condition?

PROFESSOR SUNDERLAND: The state court would have to say that, wouldn't it?

JUDGE CLARK: Let's push the thing a little further than that.

PROFESSOR SUNDERLAND: If it hasn't passed on it, then the federal court would have to take a chance.

JUDGE CLARK: Let me push this a little further, and I will ask you, Mr. Pryor, because you would be a good one to answer this. In the light of the recent cases in the Supreme Court, particularly those last June, extending or at least applying the Erie doctrine, suppose it is not so strong as to be a condition to the right; suppose it is merely state practice in a diversity case; suppose that our rule is definitely to the contrary and the case is removed under those recent cases of the Supreme Court where there is a requirement of a bond in a stockholders' suit, for example. Must we follow the federal rules? What would be the answer there? Wouldn't our rule be superseded?

MR. PRYOR: I should think it would be up to the federal court to which the case was removed to make the determination, but I think they have to make their determination upon the

decisions and the rules that have been adopted in the state courts.

PROFESSOR SUNDERLAND: If any.

MR. PRYOR: If any, of course.

MR. LEMANN: I didn't like the words "substantial rights" in here myself because it seemed to me to confuse you that there is a difference between "substantial" and "remedy." We have always said we hadn't anything to do with substantial rights and that we couldn't change them. I didn't like the implication here that you had to make an express reservation of substantial rights. It seemed to me to be rather inconsistent with our general position.

JUDGE CLARK: As far as I know, they provide only one method of doing it.

CHAIRMAN MITCHELL: There is a little finer point in this thing, as I read the letter I wrote a year ago.

MR. LEMANN: Your point in that letter was that you thought you might be interfering with a trial by jury in a removed case.

CHAIRMAN MITCHELL: As I read it over, my letter is more obscure than the rule. I will admit that. Here is what is bothering me. I suggested that the difficulty could be solved by doing something to subdivision (h). Subdivision (h) covers only cases involving the exercise of the power of eminent domain under the law of the United States and prescribes the tribunal.

It doesn't say a word about exercising state power. Now we go over to (k) and say "Condemnation Under a State's Power of Eminent Domain." That is not covered at all by (h) now. Then we say:

"If the action involves the exercise of the power of eminent domain under the law of a state, the practice herein prescribed may be altered to the extent necessary * * *"

JUDGE DRIVER: I think that "may" should be "shall".

CHAIRMAN MITCHELL: The point here is that we have to prescribe that the practice herein provided for under (h) does apply to a state condemnation.

PROFESSOR MORGAN: That is right.

CHAIRMAN MITCHELL: My suggestion for changing (h) was probably wrong. It ought to be (k), where we say:

"(k) Condemnation Under a State's Power of Eminent Domain. If the action involves the exercise of the power of eminent domain under the law of a state--"

Then we ought to have said:

"--the practice herein prescribed shall be followed, except that it may be altered to the extent necessary to observe and enforce any conditions of state law * * *"

That is a fine point, but there it is. The whole thing was left up in the air. I wasn't so much interested in the jury trial. Of course, we had a jury trial in the rule at that time, and that is why.

MR. PRYOR: You insert following "prescribed," "shall

be followed"?

CHAIRMAN MITCHELL: I would say, "the practice herein prescribed shall be followed".

MR. LEMANN: You could say, "the practice prescribed under subdivision (h)". It applies to all of it, I guess.

CHAIRMAN MITCHELL: The whole thing. "except that it may be altered to the extent necessary to preserve and enforce any condition attached by state law to its exercise." (k) could be fixed as far as my point is concerned by saying that:

"If the action involves the exercise of the power of eminent domain under the law of a state, the practice herein prescribed shall be followed."

MR. LEMANN: Doesn't your comment go further than that? It seems to me that it does.

CHAIRMAN MITCHELL: That is the way I read it. I had to read it twice to know what I meant. You are hitting on something that I missed. There is still the problem as to what is the condition attached. It is hard to answer that. There are two points here. The rule itself, even if changed that way, is still ambiguous, I admit, but without it, it seems to me there is a hiatus and there ought to be a clause there that the practice herein shall be followed.

MR. LEMANN: We had it better in the first draft to cover the point you have just made, and it would be better on some other points. In the draft of 1947 the first alternative

read:

"If the action involves the exercise of the power of eminent domain under the Constitution or laws of a state, the provisions of this Rule 71A shall apply * * *"

That covers the point.

CHAIRMAN MITCHELL: That is the point I am trying to make.

MR. LEMANN: "* * * with the proviso that the practice herein prescribed may be altered to the extent necessary to observe and enforce any condition affecting the substantial rights of a litigant attached by the state constitution or laws to the exercise of the state's power of eminent domain, including any applicable provision relating to trial by jury."

I think that is better than this. Certainly it covers the point you last made.

CHAIRMAN MITCHELL: I am not sure. Unless the trial by jury provision was a condition attached to the exercise of the power, you wouldn't have to give them a jury trial, would you? Read that over again.

MR. LEMANN: "* * * that the practice herein prescribed may be altered to the extent necessary to observe and enforce any condition affecting the substantial rights of a litigant attached by the state constitution or laws to the exercise of the state's power of eminent domain, including any applicable provision relating to trial by jury."

CHAIRMAN MITCHELL: Including the jury provision doesn't do you a bit of good unless there is a condition attached.

MR. PRYOR: Put a period after that, and you are all right.

MR. LEMANN: It covers the point I thought you were trying to make that otherwise we might be depriving him of the right of trial by jury and forcing him to the court. I think that is the point you were making in that letter I mentioned.

CHAIRMAN MITCHELL: No. I used the words "trial by jury" because our main rule doesn't call for trial by jury.

PROFESSOR SUNDERLAND: That rule as you just read it, Mr. Lemann, might be interpreted to mean that under the rule, trial by jury was a condition.

MR. LEMANN: It might be, I think.

CHAIRMAN MITCHELL: I construe it to mean that the jury trial provision might be a condition attached to the exercise of the power.

MR. PRYOR: I think the rule would be all right if you struck out the words commencing with "including" and down to "trial by jury."

MR. LEMANN: It would still be open to the objection of ambiguity, I think, Mr. Pryor.

CHAIRMAN MITCHELL: You mean as to what is the condition attached?

MR. LEMANN: Yes.

CHAIRMAN MITCHELL: I don't think the ambiguity is in the rule. I think it is in the state law.

MR. PRYOR: I don't think there is any ambiguity in the express words there, but it might give rise to a question of what is the condition.

MR. LEMANN: That is what I mean. In applying the rule you will have to determine what is the condition attached by state law which affects the substantial rights of a litigant.

MR. PRYOR: That would be up to the federal court in the case to determine, wouldn't it?

MR. LEMANN: Will they consider the right to trial by jury a substantial right?

MR. PRYOR: They might in some cases, and they might not in other cases.

MR. LEMANN: That might be ambiguous. Suppose the state law provided always for commission trial, would they consider that a substantial right?

PROFESSOR SUNDERLAND: They might.

MR. LEMANN: Then are you going to leave it to each court to decide that, and let the Supreme Court of the United States finally work it out?

MR. PRYOR: Yes.

PROFESSOR SUNDERLAND: You have to leave it to the highest court in the state.

MR. LEMANN: Or do you maintain that they are not

substantial and that it doesn't affect substantial rights?

CHAIRMAN MITCHELL: You might make the rule read this way: "to the extent necessary to observe and enforce what the trial court may consider conditions attached to it," and make his judgment final on it.

MR. LEMANN: You could probably do that.

JUDGE CLARK: The only thing that would happen then is that the Supreme Court would say that the trial court would have to hold it until a declaratory judgment action could be started in the state court to find out if it was a condition.

CHAIRMAN MITCHELL: And exhaust the remedies of the state law.

PROFESSOR MORGAN: If you wanted to make the tribunal clear, why don't you just say, "including the provisions of subdivision (h)"?

MR. LEMANN: That is what I was thinking.

PROFESSOR MORGAN: "The practice herein prescribed, including the provisions of subdivision (h), shall be followed."

PROFESSOR SUNDERLAND: Why do you have to have that "including" clause, anyway? How does that help any? It seems to me that that would just follow from our general proposition.

MR. LEMANN: Why not eliminate the first three lines in subdivision (h)? Then eliminate all of (k) and make this a uniform rule, especially as you are now amending (h) to give the trial court discretion whether to order a jury or a commission.

The presumption is that he shall have a jury, but he may appoint a commission. Why shouldn't that be the rule applying also to suits under state statute? You no longer have any cast iron rule in (h).

MR. PRYOR: Following out your idea, it might be that the court could say that in the interest of justice there should be a jury trial here because under the state law he would have a right to it. We have it in the amended (h).

MR. LEMANN: What we have put into this compromise provision would give them the right, as you point out, to apply the state law if they want to. The point I am making in substance, Mr. Mitchell, is that under our new draft of (h) you have an elastic scheme, haven't you?

CHAIRMAN MITCHELL: Yes.

MR. LEMANN: Why shouldn't that apply also in removed cases or in cases under state statute? We have "interest of justice" in our substitute formula, as Mr. Pryor points out, and if the court thought the interest of justice required that the state statute be followed, they could say so. They would be limited to one of the two alternatives. I don't think they could have a double-barreled scheme of trying one first and then the other, as I believe you said you had in your case.

MR. PRYOR: I would be in favor of the point you have raised here, which I think is a good one, of putting in (k) just the statement that "If the action involves the exercise of the

power of eminent domain under the law of the state, the practice herein prescribed shall be followed."

MR. LEMANN: You wouldn't have to do it that way, Mr. Pryor. Just go back to (h) and take out the limiting language in (h).

MR. PRYOR: Yes, you could do that.

MR. LEMANN: I think that would be better than labeling (k).

JUDGE DOBIE: Let's leave it to the federal court in every instance to decide which way.

MR. PRYOR: That is right.

MR. LEMANN: And then apply the same rule in all cases.

JUDGE DOBIE: Suppose the state constitution prescribes some particular form of procedure as a condition to the exercise of the right, would you say that this, being a federal law, would supersede it?

MR. LEMANN: That depends on whether they will follow these last decisions or not. I agree that we can't settle everything, but we won't be creating any new difficulties by the use of ambiguous language. We will be leaving that just the way it is now, because we all recognize that the Supreme Court decisions are creating a twilight zone now as to when these rules apply and when they don't, Armistead. This will only be another one of those instances.

JUDGE DOBIE: You want to leave all this out about the

state and just modify the rule as we have drawn it by putting in the laws of the United States or the laws or the constitution of the state.

MR. LEMANN: No. I think you can do it more simply. Go back to (h) and take out the words following "if" down through "United States."

MR. PRYOR: Yes.

JUDGE DRIVER: That wouldn't do it.

MR. LEMANN: You will have to modify it somewhat.

PROFESSOR MORGAN: "If an Act of Congress prescribes".

MR. LEMANN: "If an Act of Congress specially constitutes a tribunal for the trial of the issue of just compensation".

CHAIRMAN MITCHELL: That would do it.

MR. LEMANN: "such tribunal shall be the tribunal for the determination of that issue." That is the only limitation. the rule as it stood would cover all kinds of cases, and you could do without (k).

JUDGE DOBIE: I think you have something there.

CHAIRMAN MITCHELL: Yes. I still bring you back to Judge Dobie's point. You say we are not creating any troubles.

MR. LEMANN: I say we are not creating them.

CHAIRMAN MITCHELL: If we are adopting a rule which gives the district judge discretion to have a commission when the statute of the state attaches a condition to the power that it shall be by jury, your rule raises a difficulty doesn't it?

MR. LEMANN: Our rule has to bow if the Supreme Court says it has to bow, but so do other of our rules bow to state statutes according to the Supreme Court of the United States.

CHAIRMAN MITCHELL: Let's not make a rule that they have to hold invalid.

MR. LEMANN: They wouldn't have to.

CHAIRMAN MITCHELL: Yes, they would.

MR. LEMANN: Why?

CHAIRMAN MITCHELL: If under our rule as it is worded the judge in the federal court has a right to fix, we will say, a commission, and the state law creating the power of eminent domain and the exercise of it says that as a condition to the exercise of that power you must have a jury, it seems to me you are faced with two rules.

MR. LEMANN: You are assuming that is a condition of the exercise of that power. I don't know whether it is or not.

CHAIRMAN MITCHELL: Surely. If it isn't, you are assuming that they can't impose the condition.

MR. LEMANN: If you are going to say it is a condition, then I think your best solution will be to adopt conformity in any case arising under the state power. Just adopt conformity.

CHAIRMAN MITCHELL: I don't know whether it is a condition or not, but Judge Donworth quoted constitutions by the dozen out there in the West that seemed to provide constitutional requirements that if you took a man's property under the state's

power of eminent domain, he was entitled to jury trial. He said that imposes a condition to the exercise of the power. In other words, the power was granted on condition that it be exercised in a certain way.

MR. LEMANN: Wouldn't that be always so, then? Can you imagine any case in which it would not be a condition of the power?

CHAIRMAN MITCHELL: Yes.

MR. LEMANN: What would it be?

CHAIRMAN MITCHELL: The constitution might grant the power without any condition.

MR. LEMANN: The statute certainly provides the method by which this right should be exercised. I don't think you could suppose a vacuum on the subject. If it is not in the state constitution, it will be in the state statute, and this limitation we have here would be applicable to a statute as well as the constitution.

CHAIRMAN MITCHELL: You are arguing that, no matter what the state law says, there never is any condition attached to the power.

MR. LEMANN: They may not consider it a condition, but I conceive that a court may so hold, and if it does, I can't help that. I revert to this: I think you have two logical alternatives, and only two. One is to put them all in under the general federal practice.

JUDGE CLARK: I don't quite see the strong argument for shifting this back to (h) in any event. I suppose what we are looking for is clarity. The argument, if any, for putting it back in (h) would be with the hope that it might be clearer there. On top of Mr. Mitchell's point, which I think is a substantial one, I suggest that I don't believe it would add clarity, anyway. I think that on the whole it would be more confusing. Bear in mind that we have (h) fairly long and a little complicated now; not too bad, I hope, but it is getting that way a little. You would add these state provisions, too, which would not operate in many places. I mean this state power is not extensively used.

CHAIRMAN MITCHELL: Very little.

MR. LEMANN: I wouldn't add to (h). I won't labor this point because I don't think it is very important, we would simplify (h) by removing limiting language. I don't think that would complicate it. Whether you prefer to do that or to leave (k) in is, I think, not very important. The main question will be, Which way do we want to head? There are three ways we could head, as I get it. One is that our rule should apply, especially as we are now modifying it, to cases under the state laws as well as the federal. The opposite result would be to say that we don't cover cases removed under state law. They are very rare. There aren't very many of them. We will leave them alone and assume that when the state law provides the method, that is the method that has to be followed. That is the opposite rule. The third would be

something like this in between, a compromise, which leaves us uncertain as to whether it is a substantial right or whether it isn't. As I would follow Judge Donworth's argument as you quote it, you would always say it was a substantial right. If it is always a substantial right, why do we want to do anything about it?

CHAIRMAN MITCHELL: Now I would like to say a word about tampering with (h). Whatever we do about the ultimate problem, I think it would be a mistake to put it in (h). Subdivision (h) is the controversial section today. We are here because of the controversy over (h), the split with the Department of Justice about it, and the dissatisfaction of the Court about it. We have fixed it up, and if we now import into that section another row about state practice, somebody will jump at us and say, "I don't like the section anyway because of this state business." We will get a double argument against (h). Let's not mix up (h).

MR. LEMANN: I think you are exactly right.

CHAIRMAN MITCHELL: Let's do what we want to in (k) and let (h) alone. It is confusion of that kind that is going to cause us trouble. I think as a matter of policy, not draftsmanship, we had better not stick any more trouble in (h) than we have there already.

MR. PRYOR: I think you are right. I would put a period after the word "followed" in (k). "If the action involves the exercise of the power of eminent domain under the law of a state,

the practice herein prescribed shall be followed."

CHAIRMAN MITCHELL: Your idea would be that if it turned out that there was any condition that the court was bound to follow, he would have authority to do so even under that rule as a matter of law.

PROFESSOR SUNDERLAND: That would take care of the question of the jury trial or commission trial, but it might not take care of every possibility. There might be some condition under state law which would come under some of our other rules here.

CHAIRMAN MITCHELL: But the practice prescribed isn't limited to the tribunal to try the case. As Mr. Pryor put it, that would mean every provision in these rules shall apply.

MR. LEMANN: Professor Sunderland says that might make some trouble because there may be some other condition imposed by state law that you ought not to ignore. That is your point?

PROFESSOR SUNDERLAND: Yes.

CHAIRMAN MITCHELL: What could it be? A provision that you have to pay in advance or deposit the money or something like that?

PROFESSOR MOORE: Subdivision (j) would cover that now, Mr. Mitchell.

CHAIRMAN MITCHELL: "The plaintiff shall deposit with the court any money required by law as a condition to the exercise of the power of eminent domain * * *" That is true under either

federal or state.

MR. PRYOR: That is right.

CHAIRMAN MITCHELL: I didn't quite get Edson's point, then.

PROFESSOR SUNDERLAND: I can't point to any particular thing, but there might very likely be some provision that we have here which would be inconsistent with the interpretation of the state law so far as the conditions to jurisdiction are concerned.

JUDGE DOBIE: Apart from the method of trial?

PROFESSOR SUNDERLAND: Apart from the method of trial.

MR. LEMANN: What is the objection to going to the other extreme and leaving them all out and say, "This section shall not apply to any proceedings instituted under state law." There aren't many of them. There may be conditions of one sort or the other that would have to be struggled with even if we followed Mr. Pryor's suggestion.

JUDGE CLARK: You had better look back, Monte, to the second alternative, the preliminary alternative.

CHAIRMAN MITCHELL: You would not want one practice for removed cases and another practice for original cases or anything like that.

MR. PRYOR: I don't think that is desirable.

CHAIRMAN MITCHELL: I think Mr. Pryor has put his finger on it. The reason we are in trouble about (k) is that we have a definition about conditions affecting substantial rights, and

there is difficulty in saying whether it is a condition and whether it isn't. He abolishes that trouble as far as the rule is concerned by simply saying, "If the action involves the exercise of the power of eminent domain under the law of a state, the practice herein prescribed--" and that means the whole rule, not the trial rule especially, "--shall be followed."

If it turns out in a peculiar case that there is a condition that the state courts have held to be a condition, and the judge finds that he has a power in capite, under those circumstances I think the judge in the first place would have to throw the case out of court and say, "I haven't power under the rule to handle it because I have to follow the practice or violate the state law," or he could say that it is necessarily implied that if you have the power, you have to conform to the conditions attached to it, whatever the rules say.

MR. LEMANN: You are really now arguing quite the opposite of what you argued a while ago, because I made in effect the same suggestion when I wanted to cut out the condition in (h), and you said to me, "Why get a rule that will be invalid?" I asked, "Why would it be invalid?" and you said, "Because there may be conditions attached by state law that you have to observe." Now if you adopt the last suggestion, I think it comes to the same result as I proposed, except you leave (k) in and you don't put it in (h).

CHAIRMAN MITCHELL: I don't know whether I am consistent

or not, but I am perfectly willing to admit it if you will take my present suggestion.

JUDGE CLARK: I think perhaps most of you don't agree with me, but may I suggest again that I should think the Supreme Court in state's rights and diversity cases would hesitate a great deal about such a rule. I think a better form of expression would be something like this:

"These rules shall also apply to an action involving the power of eminent domain under the state."

CHAIRMAN MITCHELL: That is his proposal.

JUDGE CLARK: Yes, that is Mr. Pryor's proposal, except that I have stated it differently. It is the same thing. I was just trying to rephrase it a little more directly. In diversity cases, in matters of substantial importance, notwithstanding the federal rules, state procedure applies.

PROFESSOR MORGAN: Is there any number of cases where the United States Government brings an action originally in the federal court under a state law?

MR. LEMANN: No. The United States never proceeds under state law.

MR. PRYOR: This is aimed at cases where a state agency or a corporation under state law is bringing the action.

PROFESSOR MORGAN: I wanted to know if there are cases where the United States condemns under a state law, where they want a post office building or something of that sort.

JUDGE CLARK: Tell us what you mean by a state law.

PROFESSOR MORGAN: All this applies to is removed cases?

JUDGE CLARK: Substantially.

PROFESSOR MORGAN: The only time they can remove it, then, I suppose, is that a defendant can remove it if there is a federal question involved or if there is diversity of citizenship. If it is diversity, then God knows what substantial rights are. Whatever they are, it will have to be followed in diversity cases, and if you put anything to the contrary in, then you have to go back and find out whether Mr. Justice Brandeis was right or not in saying that it was unconstitutional to do otherwise.

CHAIRMAN MITCHELL: Does your argument lead to the conclusion that we could accept Mr. Pryor's suggestion?

PROFESSOR MORGAN: I will take his statement, surely.

JUDGE DOBIE: Just say that they do apply, and I don't think any question will arise.

PROFESSOR MORGAN: We can't tell in advance what they are going to say.

MR. PRYOR: I think your phraseology is perhaps a little better.

JUDGE CLARK: I was only suggesting that, stating it directly. I still think that the way the Justices are thinking now, they will look along in (h) and be worried, and finally they will get down to (k) and say, "Here they are knocking out Erie v. Tompkins in this regard," and away with the whole thing.

MR. LEMANN: I think I would vote to leave them out of the operation of the rule.

MR. PRYOR: Then you would have this proceeding simply a condemnation proceeding provided for any Federal Government agency. That is what you would have.

MR. LEMANN: That is right. I think there are not many of the other sort, Mr. Pryor. I may be influenced by the way this developed before the Committee. We started it, I think, with a view of a federal rule and at the instance of the Department of Justice to relieve them of a whole lot of different methods in different states, but when you have a thing that really belongs to the state, it stems from the state law entirely. You only get your condemnation power from the state. The suit would normally be brought in the state court.

CHAIRMAN MITCHELL: And rarely reaches the federal court.

MR. LEMANN: In that situation why open up another Pandora's box in addition to all the troubles we have here by trying to cover the universe to reach theoretical perfection?

MR. PRYOR: I think, Mr. Lemann, if you had this rule as it is proposed here now, uniformity, in any of those twenty states that have the dual system of commissions and court procedure, the private corporation that undertook to condemn under state law would be very glad to take advantage of the situation presented where it could avoid that dual procedure.

MR. LEMANN: They might. I am not saying I wouldn't have some client down in Louisiana, perhaps, who would like this rule to apply under a state statute, but I think I would say: "You have to do without it, and if you try to go in the federal court, under the federal system you are going to be met with a big argument as to whether you have a right to apply the federal rule under the state statute. If you go into the federal court proceeding, instead of getting your issues settled promptly, you may head to the Supreme Court of the United States to find out whether you had a right to use the federal system. I think you had better stay in the state court." I should think, if I were a private litigant, I might prefer to stay in the state court.

If you could guarantee, Mr. Mitchell, the advantages of this system in a removed case, I can see, as Mr. Pryor suggests, that they would like to remove the case and get the benefit of the better federal system, but you can't guarantee it to them. Even if you could get over the hurdle of the Supreme Court objections to the rule or the Bar Association objections to the rule, you still would have open the question of whether there was a substantial right even if you leave out that language here, because we can't legislate it away. As you pointed out a while ago, Mr. Mitchell, that limitation on us remains, doesn't it? The Supreme Court can come in at any time and say, "Under Erie v. Tompkins your rules must bow to the local rule."

MR. PRYOR: I am willing to concede that the rule that

I have been advocating will probably meet very vigorous opposition among some members of Congress.

MR. LEMANN: I think maybe in the Court, too.

MR. PRYOR: And maybe in the Court.

MR. LEMANN: I have argued both sides of this question, so I am open minded about it.

MR. PRYOR: As far as I am concerned, I would rather submit this rule without any application to state condemnations than I would the one proposed here.

JUDGE CLARK: I don't want to throw too many monkey wrenches in it, but I don't believe you can avoid the problem by turning your back on it. I take it there is a right in the litigant where there is diversity of citizenship to remove to the federal court. We can't touch that and don't want to. If he removes and we have said nothing about it, what then applies?

PROFESSOR SUNDERLAND: We have said something about it in Rule 81.

CHAIRMAN MITCHELL: Nobody suggests that you say nothing about it.

PROFESSOR SUNDERLAND: "These rules apply to civil actions removed to the district courts of the United States from the state courts and govern all procedure after removal."

JUDGE DOBIE: If you said nothing about it, under that rule, the rules would govern.

PROFESSOR SUNDERLAND: Yes.

CHAIRMAN MITCHELL: You would have to do something about (k).

MR. LEMANN: Both of them.

CHAIRMAN MITCHELL: Not necessarily. You would have to say, "If the action involves the exercise of the power of eminent domain under the law of a state," either "the practice herein prescribed does apply" or "the practice herein prescribed does not apply."

MR. LEMANN: Or does apply under these conditions we have here.

CHAIRMAN MITCHELL: Yes.

MR. LEMANN: I think, Charlie, you would not be silent. You would say that it does not apply.

JUDGE CLARK: Of course, you may spell it around. You may go to Rule 81 and back to Rules 1 and 2. I want to suggest that the Conformity Act is now gone. It is not only superseded by the rules; it is even left out of the Code. There isn't any Conformity Act any more.

MR. LEMANN: You could spell it out even more explicitly than you have in this alternative in the draft here. You had there as an alternative:

"If the plaintiff is proceeding under the power of eminent domain of a state, the tribunal to try the issue of just compensation shall be as specified by the Constitution or the statutes of the state in which the property is situated."

You might even go beyond that and say, "If the plaintiff is proceeding under the power of eminent domain of a state, the state law shall be applicable in all respects, including the tribunal," in appropriate language.

PROFESSOR MORGAN: You don't want to leave it that way, where you have first a commission and then a jury trial de novo, do you?

MR. LEMANN: I don't like it, Eddie, but I don't like any of the other alternatives any better or as well.

PROFESSOR MORGAN: If you wish, you could make a special reference to trial by jury, if that is the only thing that is bothering you.

MR. LEMANN: If you do, Eddie, suppose you have this mixed system and suppose the Supreme Court of the United States thinks it is a substantial right to have that mixed system, how are you going to legislate it away? As Mr. Mitchell said to me a while ago, how are we going to rule it away?

JUDGE DOBIE: Monte, there is one instance in which the state rules do apply, that you are probably familiar with, and that is where a criminal charge is brought against a revenue agent for an act committed within the scope of his duty and the case is removed to the United States court. There it must be tried according to the state law. We decided that in a case in Virginia where Judge Parker wrote the opinion and held that the jury must fix the punishment. Although you try the man in the federal

court, you still have to try him under state law.

MR. LEMANN: The statute says that if a federal official is charged under the state law, in order to give him a fair trial you remove it to the federal court, but then the federal court must try him in the way that the state law prescribes.

JUDGE DOBIE: That is right.

MR. LEMANN: That is a very interesting analogy, I think.

JUDGE DOBIE: In that particular case they did try this man in the federal court. The federal judge sentenced him, and we reversed it, saying that he had to try him under the Virginia law which gave to the jury the power to fix the punishment. I just cite that as an instance.

MR. LEMANN: That is a very interesting analogy, I think.

JUDGE DOBIE: I don't have any very strong opinions either way. I think possibly we ought to make it clear, and I am perfectly satisfied in my own mind that it will very rarely arise.

MR. LEMANN: That is why I don't torture myself about the bad results of this double system. It exists today, and the states are going to persist in it. I assume that in the majority of their own cases they are not going to yield to this unless they see fit to change their statute. That abomination is the state's product. I don't know why we should relieve the states of its operation in removed cases, which are just a handful

of cases.

JUDGE DOBIE: It might very well be safer to say it does not apply to the state case. I think you will s tand a better chance of getting it through Congress and the Supreme Court that way. Frankly, if we could do it without any difficulty, I would rather have it the other way, but I don't think it is of sufficient importance. I don't believe it will arise once a year.

CHAIRMAN MITCHELL: I think we were told a few years ago that there were several quite large cases out in Washington and Oregon where condemnations which were started under state law had been removed and were being conducted in the federal courts.

JUDGE DRIVER: The only ones I have had and the only ones, so far as I know, that my predecessor had are these Public Utility District cases, and they are a passing phase, I think, out in our state, where under state law a Public Utility District is given the power to condemn the properties and facilities of a private power company within the county. There the companies are usually non-resident corporations, and those cases have been removed by the defendant. I have had three of them. I think my predecessor had some. Other than that, I have never had a removed case. I have never had one involving the condemnation of a highway or any ordinary case such as a county or state would bring under eminent domain. We did have those PUD cases, but they are rather rare, I think. I haven't had any in the last two years.

It seems to me that we have weight enough to carry here

in getting this proposed rule accepted by the Supreme Court and the Congress, without adding to it. I agree with Judge Dobie that I think it is not of sufficient importance to take on that added burden. You might very well get some opposition from the state attorneys general or state people who think you are trying to come in and interfere with their state condemnation proceedings and methods. I prefer just to leave it out. I think procedurally it would be better to leave it in. Tactically, I think it would be preferable to leave it out. That is my position.

JUDGE DOBIE: That is mine.

CHAIRMAN MITCHELL: We can leave it out and say that we have stricken it out because these cases are rare.

JUDGE DOBIE: You say leave it out. I think we ought to say something.

JUDGE DRIVER: I mean to say expressly that we are excluding cases brought under the state's power of eminent domain.

JUDGE DOBIE: I think it is practical to do that, and I don't think it is of very great importance. Like you, Judge, I agree that I am strong for uniformity. I always have been. I fought for that Uniformity Act for years and years. If we could do it and there would be no difficulty about it, I would rather have the one procedure always. If in the minds of any of you there is going to be any difficulty getting this through the Supreme Court and the Congress, that would be a bad concession to make.

CHAIRMAN MITCHELL: We can strike it out and provide, instead of this, that it is under state power and the state procedure shall be followed.

MR. LEMANN: Say, "These rules do not apply to proceedings under the power of eminent domain of a state."

CHAIRMAN MITCHELL: The removal does it already, so we would have to say "expressly".

MR. LEMANN: "Nothing in these rules--"

PROFESSOR SUNDERLAND: "Nothing in this rule--"

PROFESSOR MORGAN: You don't have to do that. If your subdivision (h) is limited to condemnations by the United States, you don't have to bother with that.

CHAIRMAN MITCHELL: We are getting from the merits down to the form. Let us settle the question of what our principle shall be. We are up against the question of whether or not we shall leave these rules to some extent applicable to removed cases. When I say "removed," I mean cases arising under the state power. You will find there are all kinds of difficulties about making the rules apply to cases arising under the state power. You don't know what the condition attached is, and you have other trouble. Although it is inconsistent to have one practice in a state case and another practice in the federal courts under federal power, still they are very rare and arise only very occasionally. In case we try to make rules to apply to them, we are met with all kinds of difficulty. So we could, in any form that you wish,

make clear in the rule that if it is under state power, the state practice as near as may be shall be followed by the federal court, and then in a note we will have to explain our switch on this thing. Just tell the Court frankly all the trouble that would arise if you tried to make it applicable in state cases, including this difficulty about a condition attached to the right and all the other things. Another difficulty is that it starts in the state court under one practice, and you switch to an entirely different practice after you are partly through your case, after you have brought the action, served the summons, and all that sort of thing. You can leave it to the discretion of the court how to jump from one practice to another in a removed case.

We can make a note to belittle this thing and show how rarely it would occur, those rare instances where a state power case gets into a federal court, let it drift along under the state rule and get rid of all this question about the condition attached. Even if the purists who always want uniform rules, like Armstrong, raise a roar, still we could minimize that argument by showing how unimportant and rare case it is that we are talking about. Maybe that is the best solution.

PROFESSOR MORGAN: If I were doing it personally, my feeling is that the only question that you are going to have with reference to substance is the right to trial by jury. Otherwise, I don't think you are going to have any trouble following the federal practice any more than when you remove any other case to

the federal court. I don't know enough about these practical arguments, but if I were doing it myself I should say that it shall be followed, "except that it may be altered so as to comply with any state law imposing trial by jury as a condition to the right to exercise the state's right of eminent domain."

CHAIRMAN MITCHELL: Is it a condition or isn't it?

PROFESSOR MORGAN: That is the only condition that I would insist upon. If the state had imposed jury trial as a condition, then they could have jury trial, but certainly no state constitution is going to impose a condition of a commission followed by trial de novo.

CHAIRMAN MITCHELL: If you are going to follow that idea out, I would leave out the clause about the state imposing it as a condition. I would say absolutely if the state law provides for jury trial, whether it is a condition or not, it shall be followed, because this question of whether or not it is a condition is one of the things that is bothering us.

PROFESSOR MORGAN: That will give the judges something to chew over. I don't want to take away from my friends here a really tough law question. That is all right.

MR. LEMANN: Suppose the state law provides for trial by commission.

PROFESSOR MORGAN: Suppose it provides by law for commission, it wouldn't make a bit of difference to me.

MR. LEMANN: Or suppose it provides for that obnoxious

double-barreled system.

PROFESSOR MORGAN: Suppose it did, I would take it away from them.

MR. LEMANN: You don't want to take away a trial by jury, but you would take away the other thing.

PROFESSOR MORGAN: Trial by jury is the one thing, it seems to me, that a court is going to say is a really substantial right and does not go just to practice. You are not going to get any right to trial by these other methods, by commissions plus, and so forth. No court is going to say that that is a condition to the right to exercise the power of eminent domain.

The thing we want to take care of is this group of cases that Judge Donworth has been worried about. That is trial by jury. That is the thing that they fight about. Nobody is going to fight for this double-barreled proposition. It seems to me it would be absurd to have it in the federal courts. We have twenty states that do it, and it seems to me that we ought not to stultify ourselves by saying, "Go ahead, we will give you that kind of thing in the federal court if you remove." That is the way I feel about it, but of course I am a voice crying in the wilderness, as I usually am.

CHAIRMAN MITCHELL: No, you are not.

MR. PRYOR: I agree with you.

MR. LEMANN: Of course, it never would have occurred to me that posting a bond in a court was affecting substantial

rights, but the Supreme Court says it does, and when they say it does, that is what shakes my confidence so much in Professor Morgan's argument that nobody can say that right to trial by commission is a substantial right. It never would have occurred to me that whether you had to put up a bond to be permitted to proceed with your case affected your substantial rights.

PROFESSOR MORGAN: It never would have occurred to you that an Alabama court couldn't construe its own pleadings according to its own rules, either, would it? Justice Black said so in an opinion which showed he didn't understand any of the previous precedents.

JUDGE CLARK: That is where Erie has come from.

PROFESSOR MORGAN: I have said my say, and I am going to keep quiet now for a change.

JUDGE CLARK: John the Baptist.

CHAIRMAN MITCHELL: Suppose we put it this way:

"If the action involves the exercise of the power of eminent domain under the law of a state, the practice herein prescribed shall be followed, except that if the state law provides for trial by jury, such trial shall in any case be allowed to the party demanding it."

PROFESSOR MORGAN: That is all right with me.

MR. LEMANN: Suppose the state law requires trial by a jury of freeholders, as I believe my state requires, which I believe means people who own property, how would that fit into

this exception?

CHAIRMAN MITCHELL: Own real estate, you mean?

MR. LEMANN: Our state I think requires trial by a jury of freeholders, that is, of property owners.

CHAIRMAN MITCHELL: You mean the qualifications of the jury?

MR. LEMANN: You don't think that is substantial? I can just see myself howling my head off that that is substantial if I were the fellow whose property was being taken. You would never convince me that that wasn't substantial.

CHAIRMAN MITCHELL: In some states they don't allow women on their juries.

JUDGE CLARK: That is so in New Hamshire, isn't it?

PROFESSOR MOORE: Some of the southern states do not allow women.

PROFESSOR MORGAN: Mr. Chairman, in order to bring it to a head, I move that it be amended according to your last suggestion.

PROFESSOR SUNDERLAND: Will you state that again?

CHAIRMAN MITCHELL: I don't think I can. Will you read that, Mr. Reporter?

(The draft appearing in lines 17 - 21, page 135, was read by the reporter.)

JUDGE DOBIE: I don't object to that if you think you can get it through, and I think you can. I believe that is the

only thing they are really fighting for, and I am inclined to believe they are right about that.

CHAIRMAN MITCHELL: That eliminates all talk about the condition to the right. It gets rid of that as far as we can.

JUDGE DOBIE: I don't want the words "substantial rights," because I think that will result in a great deal of confusion.

CHAIRMAN MITCHELL: That practically presumes that where the state law does provide for trial by jury, whether or not it is a condition to the exercise of the power, the parties still ought to have it if they get into the federal court, and the judge hasn't the right to force a commission on them. It obliterates the double trial; trial by jury, not commission and jury. It allows a jury trial in any state case if the state law allows it.

MR. PRYOR: I will second that motion.

JUDGE CLARK: I think this is a better way to do it. I think I would approve of it, although it is a little against some of the points I have raised. I think it covers it pretty well. How would it be to state it without the "If" clause the way I suggested?

CHAIRMAN MITCHELL: This is badly worded, I will admit. I got tangled up toward the end a little bit. You can recast it in better form before we vote on it.

JUDGE CLARK: I would eliminate the "If" clause. "The practice herein prescribed shall be followed in an action

involving the exercise of the power of eminent domain under the law of a state, except . . ."

CHAIRMAN MITCHELL: And the exception is the same as I had it.

JUDGE DOBIE: They could waive the jury under that, couldn't they?

CHAIRMAN MITCHELL: I would use "provided" instead of "except" because under our own rule it would already be entitled to a jury trial.

JUDGE CLARK: How does that read? What is the word that is used, shall be accorded or allowed?

CHAIRMAN MITCHELL: I said "allowed." I don't care whether you say "accorded" or "allowed."

Now, Professor Moore, do you have it all down there? We would like to hear what you think about it, if you have it all down. If there is a hole in it, we will put the burden on you. That wipes out all the fuss about whether the state law allows it with a condition or not. That is the thing I had trouble about.

(Brief recess.)

CHAIRMAN MITCHELL: Here is our proposal for (k):

"The practice herein prescribed shall be followed in actions involving the exercise of the power of eminent domain under the law of a state, provided that if the state law provides for trial by jury, such trial shall in any case be allowed to the party demanding it."

PROFESSOR SUNDERLAND: You could say "makes provision" instead of "providing".

CHAIRMAN MITCHELL: How about "allows"?

JUDGE CLARK: Yes, "allows". And earlier where it says "shall be followed", shouldn't that be "governed", "the practice prescribed herein shall be governed"?

CHAIRMAN MITCHELL: Right. Take out "shall govern" and say "governs". We have a stylist here now.

"The practice herein prescribed governs in actions involving the exercise of the power of eminent domain under the law of a state, provided that if the state law allows . . ."

MR. LEMANN: Wouldn't "gives a right to" be better? What does "allow" mean?

PROFESSOR MORGAN: Why don't we just use "except that" instead of "provided"; "except that when the state law provides"?

CHAIRMAN MITCHELL: I changed that word for the reason that "except" involves a departure from the practice that we already have.

PROFESSOR MORGAN: That is right.

CHAIRMAN MITCHELL: "provided that if the state law . ."

PROFESSOR MORGAN: "requires trial by jury"?

CHAIRMAN MITCHELL: No; "allows trial by jury".

JUDGE DOBIE: That follows, doesn't it?

CHAIRMAN MITCHELL: Would you say "trial by jury of the question of compensation"?

PROFESSOR MORGAN: That is right, yes.

MR. LEMANN: Why compensation? If they gave the right to trial by jury under necessity, you wouldn't require that they go to the jury on that.

PROFESSOR SUNDERLAND: In Michigan the jury determines the necessity.

MR. LEMANN: It does with us, too. The one case I ever tried before a jury was largely on the question of necessity.

JUDGE DOBIE: If you are going to give it, General, I would give it outright for everything.

MR. LEMANN: I don't know what "allows" means.

JUDGE DRIVER: Allows jury trial.

CHAIRMAN MITCHELL: I have "provides for trial by jury".

MR. LEMANN: I think "gives the right to" is better.

CHAIRMAN MITCHELL: Should it be "the right" or "a right"?

MR. LEMANN: "a right".

CHAIRMAN MITCHELL: Let's go over it again.

"The practice herein prescribed governs actions involving the exercise of the power of eminent domain under the law of a state, provided that if the state law gives a right to a trial by jury, such a trial shall in any case be allowed to the party demanding it."

Is that all right? If we adopt this, let's do it with the understanding that our staff here can polish it up.

PROFESSOR MORGAN: Yes.

CHAIRMAN MITCHELL: Let us distribute copies of it before it is put in. Some of you may think of something additional.

JUDGE DOBIE: With that qualification, General, I move that we adopt it.

PROFESSOR MORGAN: I will second the motion.

CHAIRMAN MITCHELL: All in favor say "aye"; those opposed.

MR. LEMANN: I think I would prefer to omit it entirely.

CHAIRMAN MITCHELL: We are all "ayes" except Mr. Lemann, who wishes to omit any reference to it.

We are now through with this for the time being.

JUDGE CLARK: I want to raise one question more on something else.

CHAIRMAN MITCHELL: On this rule?

JUDGE CLARK: Yes, this rule. This is just a question of wording, and it goes back to the matter on the first page of Professor Moore's letter, (c)(2) Contents. If you read down in that paragraph you find, "in light of the type and value of the property involved", and so forth. It has been suggested that there be added, "and the interest to be taken". The point is that you wouldn't have a search if you were going to take, say, only a two-year lease or something like that. You wouldn't want to search back to the Indians. That is the thought involved.

I am not sure but that that is inherent in the way we have it now, but nevertheless I bring that up as to whether you want to polish that a little more.

CHAIRMAN MITCHELL: "in light of the type". Maybe that word "type" isn't good. That isn't a very good word. "the type and value of the property involved and the interest to be taken". You suggested including that.

MR. PRYOR: Would "kind" be better than "type"?

PROFESSOR SUNDERLAND: "the kind and character"?

CHAIRMAN MITCHELL: Either one is what we mean. "Type" is a bad word to describe property.

MR. LEMANN: What line will this be in?

JUDGE CLARK: Do you have the first page of Mr. Moore's letter?

CHAIRMAN MITCHELL: At the bottom of the page, referring to (c)(2) Contents (of Complaint): "the plaintiff shall add as defendants all persons having or claiming an interest in that property whose names can be ascertained by a search of the records to the extent commonly made by competent searchers of title in the vicinity in light . . ."

Ought not the word "the" to be in front of "light"?

". . . of the type and value of the property involved and also those whose names have otherwise been learned."

PROFESSOR SUNDERLAND: It is the ordinary expression to put "the" in.

JUDGE DOBIE: I think it would be better to include "in the light".

CHAIRMAN MITCHELL: "Type" doesn't seem to be such a good word, either, does it?

PROFESSOR MOORE: We have the word "character" in the other section.

JUDGE DRIVER: You have the word "character" in the other proposed amendment here.

MR. LEMANN: Are these the only changes that you are going to make?

JUDGE CLARK: I guess so.

CHAIRMAN MITCHELL: We are just suggesting these now. I will read it over, and you can make any changes you like.

MR. LEMANN: I am just wondering if these are worth publishing special correcting sheets about. I wonder if these are substantial enough to bother laboring with.

CHAIRMAN MITCHELL: You mean not make them?

MR. LEMANN: Yes. Unless you are going to make other more far-reaching changes, as far as polishing words are concerned, as a matter of policy is it worth while to emphasize that? You are not changing the meaning any.

CHAIRMAN MITCHELL: Your suggestion was what?

JUDGE CLARK: "the type and value of the property involved and the interest to be taken".

CHAIRMAN MITCHELL: That is really a point.

JUDGE DRIVER: I think what Judge Clark had in mind is that very often they take a year leasehold in the property rather than the fee.

MR. PRYOR: That is a matter of substance. I agree with that.

JUDGE CLARK: Mr. Moore suggests that we include the words "to be acquired otherwise". Where are you getting that?

PROFESSOR MOORE: Line 25.

JUDGE CLARK: In line 25 we use "the interests to be acquired". He suggests that as better than "to be taken".

CHAIRMAN MITCHELL: Let me read this now. This is the clause:

"the plaintiff shall add as defendants all persons having or claiming an interest in that property whose names can be ascertained by a search of the records to the extent commonly made by competent searchers of title in the vicinity in light of the character and value of the property involved and the interest to be acquired . . ."

That would polish it up a little bit. Is that agreeable?

Is there anything else, Charlie?

JUDGE CLARK: I don't think I have anything more. Do you have anything more, Mr. Moore?

PROFESSOR MOORE: No.

JUDGE CLARK: I mean on any of the condemnation rule. That would mean that the other things stand.

PROFESSOR MORGAN: Yes.

CHAIRMAN MITCHELL: Yes, except that we will change the name of the court right through.

PROFESSOR MORGAN: Yes.

CHAIRMAN MITCHELL: Now let's pass on to the other problem that we have before us presented by the Reporter. You have read his two memorandums concerning the question of whether the Committee ought to set in motion a proceeding to review some of the rules, especially the deposition and discovery rules, about which there has been some complaint, including the complaints made in Professor Whitney North Seymour's article.

I want to add what I think I have said before, that all we can do in this meeting is to decide whether we want to recommend to the Court that we undertake something like that. All we can do, if you want to go into it, is to tell the Court so and see if it approves and is willing to authorize it and set about obtaining the necessary appropriation for it. I don't think they would move very fast about it if you did recommend it, because they want to get this thing out of the way. I should think we would want that, too, before we go to the Congress with any more demands for money.

MR. PRYOR: You mean the condemnation rule.

CHAIRMAN MITCHELL: Yes, the condemnation rule. That is going to take the rest of the season. I think it would be the next appropriation year, the budget for 1951, that they would go

before the Congress for money; but while we are here it is the proper time to consider whether we want to go ahead with it. What is your pleasure about that? Certainly we ought to discuss it at this meeting. You have had the memoranda. We should at least say something about it.

JUDGE DOBIE: You mean whether we ought to proceed to make some further amendments and changes in the rules?

CHAIRMAN MITCHELL: Yes, to recommend some with particular reference to the points that the Reporter has made in this memorandum of his, copy of which went out to all the members a month or two ago.

MR. PRYOR: I suppose the Reporter's comments cover all of those instances where the rules have given difficulty in the courts, generally speaking. Is that right?

JUDGE CLARK: We tried to make them complete. Of course, after all, I am not sure we have in the time that we had. I suppose other things may turn up. I think we can probably say that we pretty surely hit the important things, at least. We tried to make it really complete. The most important, I think, in the widest sense, are the discovery rules, and from the technical standpoint perhaps Rule 25, which is the rule for substitution of parties, which isn't very workable but isn't a very far-reaching rule.

CHAIRMAN MITCHELL: You know, that is a statute of limitations, and I suppose I ought to go to the Court to find

out why they struck that out. We tried to qualify it, and they wouldn't accept our amendment. I have never asked them why they struck it out.

MR. LEMANN: They had a case pending at the time, you know, involving one portion of that substitution rule. They had the case of the Anderson National Bank, the National Bank of Kentucky. Wasn't that pending before them? It was a case where they were trying to reach a lot of the heirs of deceased stockholders. I think that had something to do with their not passing it at that time.

MR. PRYOR: I don't see why there should be a limitation. There isn't any in our state rules.

CHAIRMAN MITCHELL: The federal statutes have always provided a limitation, and the rule recited or copied the statutes. I think at the time we had the view that we couldn't tamper with the statute of limitations, that that was substantive law rather than procedure. So, that is one thing we didn't tamper with in the beginning.

MR. PRYOR: We tried to provide in the rules the same as it was in the statutes.

MR. LEMANN: The note to Rule 25 shows as its basis the U. S. Code, Title 28, Section 778, and Equity Rule 45.

CHAIRMAN MITCHELL: We got our courage up to make this proposed amendment to it, and then the Court didn't accept it because it felt it should not because of the case it had before

it.

MR. LEHMANN: Two years had elapsed, and they were hearing argument on it. The plaintiff in that case was contending that it ought to be excused from the operation of the two-year statute. He didn't even know that the defendants had died.

CHAIRMAN MITCHELL: Are you speaking now of the proposal to try them again, the clause:

"If the application is made after two years the court may order substitution but only upon the showing of a reasonable excuse for failure to apply within that period."

Is that what you want to put back?

JUDGE CLARK: That is part of it. Do you have my first statement, the longer statement? I refer to the one sent out under date of March 17. We are talking now about Rule 25.

PROFESSOR SUNDERLAND: Is that the 22-page one?

JUDGE CLARK: Yes. Beginning on page 6, the first point is the one we are discussing now, the question of this arbitrary limit and the question whether under the new disposition of Erie, this would control in a diversity action where state law permits substitution after a two-year period. There is a case pending in the federal court in Connecticut. That isn't the only question. You will see down at the foot of page 7 that in the case of public officers it is applied pretty strictly.

CHAIRMAN MITCHELL: In 1947 in the very case they had under advisement when we proposed this liberality, didn't the

Court say that this rule operates both as a statute of limitations upon revivor and as a mandate to the court?

JUDGE CLARK: Yes. That is quoted above there.

CHAIRMAN MITCHELL: So what they think is that this is a statute of limitations. We have always proceeded on the theory that a statute of limitations was a matter of substantive right and we couldn't tamper with it. If there is a federal statute of limitations on revivor, we couldn't monkey with that and extend it any more than we could monkey with the statute of limitations about the time for the institution of a suit. If in the Yungkau case they have made it evident that we tried to tamper with this rule about giving the man a right to come in on the showing of an excuse after two years, how can we justify bringing that up again?

JUDGE CLARK: It isn't quite clear that the reason they struck out the provision was that it affected the pending action, I think. To be quite correct about it, I don't think that is wholly clear. We have the additional problem developed now by the later cases, particularly in the diversity cases, as to how far this will apply as against the state rule. I don't know that we have it so finally settled from our own standpoint that we want to do something about statutes of limitations. Of course, our amendment rule, 15(c) or 15(d), redefining, so to speak, what is the same cause of action, had some bearing on that already. The issue is of course along the line you have suggested.

CHAIRMAN MITCHELL: What is the second point about Rule

25? The first one is whether it isn't, as they described it in the Yungkau case in 1947, a statute of limitations and we can't monkey with that. That is one point. What is the other one?

JUDGE CLARK: Rule 25(d) is a provision that provides that substitution must be made in the case of a public officer within six months after the successor takes office.

CHAIRMAN MITCHELL: Has that been a statute?

JUDGE CLARK: That is a statute.

PROFESSOR MOORE: It is based on a statute. That statute has now been repealed.

CHAIRMAN MITCHELL: Repealed because the rule isn't clear.

PROFESSOR MOORE: Yes.

CHAIRMAN MITCHELL: We reiterated the statute of limitations on the theory that we couldn't change it, and now they knock the statute out and leave the rule in. We are the only authorities for it now. Is that the situation?

PROFESSOR MOORE: I think so.

JUDGE CLARK: This comes up in connection with something like the Wage and Hour cases and matters of that kind. Some of those cases have been abated.

MR. LEMANN: When was the statute repealed, Professor Moore?

PROFESSOR MOORE: It was repealed by the Judicial Code of 1948, if I recall correctly.

MR. PRYOR: The revision?

PROFESSOR MOORE: Yes.

MR. PRYOR: Is there anything to prevent our revising this rule and doing away with the limitation?

PROFESSOR MOORE: Are you asking me?

MR. PRYOR: Yes.

PROFESSOR MOORE: Relative to (a), if you adopt the Supreme Court's theory that the statutes of limitations are substantive, at least in diversity cases, I suppose we couldn't have any definite time period and we could just leave it dismissal for want of prosecution.

MR. PRYOR: That is right.

PROFESSOR MOORE: On subdivision (d), where at least it is a case of substituting a successor officer as the plaintiff, that is usually a sheer formality.

MR. PRYOR: That part of it is repealed, too?

PROFESSOR MOORE: Yes.

MR. PRYOR: Then there isn't any statute at the present time in the way of fixing a limitation on revivor.

PROFESSOR MOORE: It is all in the rule.

MR. LEMANN: That applies to both paragraphs, both (d) and (a)?

PROFESSOR MOORE: That is my recollection.

MR. LEMANN: Are there two separate statutes?

MR. PRYOR: I don't see why we can't do away with the

limitation.

CHAIRMAN MITCHELL: I am not so sure about that, if we can't tamper with the statute of limitations, and we didn't tamper with it before because we just copied the statute.

MR. PRYOR: There isn't any statute.

CHAIRMAN MITCHELL: Yes, I know. If we establish a statute of limitations as a new proposition, whether there is a statute or not, as a matter of substantive right--

MR. PRYOR: If your rule is based on the statute and the statute is repealed, your rule falls, doesn't it?

CHAIRMAN MITCHELL: I think what happened here is that the Commission which revised the Judicial Code tried to cut out of the Code everything they thought was already covered by rule and they didn't need any statute, so they likely said, "That is in the rule, so let's cut it out," and didn't stop to think that the statute of limitations was a matter of substantive right and that we were only copying the statute into the rules so the lawyers would remember it. That is really what we were doing. If we now say, "You abolished the statute, so we can abolish the rule," we are taking advantage of a slip, and the Court may come back at us and say, "What are you monkeying with the statute of limitations for, anyway?" They can still do that because they said in the Yungkau case that on death substitution there is a statute of limitation.

JUDGE CLARK: Whatever they may do in that case, I

shouldn't think anyone would deny that in the case of public officers dealing with important Congressional or legislative matters, so to speak, the United States is the real party in interest. The courts have been saying that. I don't believe they would object to a change there.

CHAIRMAN MITCHELL: You have raised your point about that. What we are really trying to get at is the nature of the things we want to deal with, and not what the answers ought to be. Let us pass on to other things that you wish to take up.

JUDGE CLARK: Let us go back to the discovery rule, because I think in the sense of public policy and general interest, the discovery rule is probably the more interesting and more important.

I might say that I really have been a good deal worried about the committee which was being discussed by the Chief Justice. The Chief Justice said he would see to it that they didn't make any changes unless we were notified. That was very helpful. I should suppose that is a very important question. I think you ought to have in mind the background of the committee, and if I am not stating it correctly, you may correct me.

As I understand it, this grew out of a proposal for legislation and hearings before the Judiciary Committee of the House. Leland transmitted to me some testimony of various lawyers who want legislation, and am I not correct, Leland, in saying that that legislation almost necessarily would limit

discovery in anti-trust cases? In fact, from what I could gather from the testimony of the lawyers, that would be the major point of the legislation, would it not?

MR. TOLMAN: That would be the main purpose.

CHAIRMAN MITCHELL: Do you mean limit the length of depositions, or something like that, and limit the discovery? You don't mean to wipe out the principle.

MR. TOLMAN: Limit the scope of discovery, probably.

JUDGE CLARK: The scope. Leland, was that testimony before the committee directed to a specific bill?

MR. TOLMAN: No. The background of the committee is this: Congressman Celler has been interested for a long time in the anti-trust laws, and since he became Chairman of the House District Committee, he has established a subcommittee, of which he is the chairman, on monopoly power. That is the name of the committee. The subcommittee wanted to look into all aspects of the enforcement of the antitrust laws. One of the aspects they wanted to consider was procedure. They had a hearing on the procedural aspects of the conduct of anti-trust cases. It was at that hearing that the testimony that I sent you, Judge Clark, was given. There was no bill before them. It was an investigation that they were making. Some of the witnesses recommended that legislation be drafted to limit, as I understand it, the scope of discovery. It was a very general sort of discussion. There weren't any specific suggestions made as to what should be done.

There was a general complaint about the way the cases were being handled.

Following that hearing, Congressman Celler wrote a letter to the Chief Justice asking that the Judicial Conference assist the committee and make recommendations to it with reference to the procedure in anti-trust cases. The material that I sent to Judge Clark was before the Judicial Conference at its meeting following receipt of Congressman Celler's letter, and the appointment of Judge Prettyman's committee followed from the Judicial Conference consideration of that material.

That is about all I can tell you about it.

JUDGE DOBIE: What is the idea, to keep these cases from taking so long?

MR. TOLMAN: That seems to be it. When we were talking to the Chief Justice, he emphasized the judicial time-table. I think in the hearing before the Judiciary Committee the emphasis by the lawyers was on the time it was taking them, particularly on discovery.

MR. LEMANN: Lawyers for plaintiffs?

MR. TOLMAN: Lawyers for both plaintiffs and defendants, and lawyers for private litigants and for the Department of Justice.

MR. LEMANN: They were all agreed on both sides?

MR. TOLMAN: They all seemed to have a complaint about it. Isn't that what you gathered from the testimony?

JUDGE CLARK: Yes.

CHAIRMAN MITCHELL: I am told that the Department of Justice now in some cases have been trying some anti-trust cases from the government standpoint on depositions. You remember that the Court claimed down on the use of masters in some cases a few years ago on the ground that the practice of appointing a master and letting him wander off and take testimony for years and years and years ought to be stopped, that the judge ought to try the case himself instead of having a master do it. Now the government is getting around that by using the power to take depositions to put their whole case down in a transcript that even a master hasn't looked at and then dump it on the court, even without any rulings of the court as to the admissibility of a mass of stuff.

As near as I can find out, there is nothing in our rules that can be accused of opening up that practice, because before our rules were adopted we had the same limitations then that we have now about a witness being personally present if he lives within 100 miles of the trial. We kept that rule.

The idea seems to be that if there is any misuse of depositions now in the way of spending weeks and months at it, at the expense of one side to get a transcript, running up the cost, it has been stimulated by the provision widening the scope of examination through the discovery approach, to get stuff that really isn't admissible but which may lead to admissible evidence. I can't think of anything in our rules that is responsible for

this new use of depositions interminably that wasn't there before, except the fishing part of it, getting a lead.

JUDGE CLARK: I might add a little more on that. In studying procedure for many years, it has been my thought that you can't get too excited about it. Procedure is made to be used, and lawyers will use it. What may be a good procedure to start with may be pushed to limits that are improper, and the function of a continuing rules committee is to try to keep up with that. I am not suggesting to the Court that these complaints may not be just or that there perhaps should not be some limitation. I think it would be very upsetting indeed if Congress should start doing it over our heads, so to speak. I think it would be rather upsetting to have a committee of the Conference do it. I think worst of all would be to have Congress do it. If there are these questions and if it gets to be, as I rather think it is, a pressing issue, it is our job to be in there and to be on top of the game, so to speak, if not ahead of it. That is why it seemed to me that we ought to be doing something about it. I state as perhaps the more striking aspect of the problem the possibility that it might be done by Congress.

CHAIRMAN MITCHELL: I think your point is good about that, and when we were visiting with the Chief Justice today I opened the door on that with him and told him that we were dealing with practice and procedure and we ought to be in on the picture, with which he agreed. My idea is that as far as that

aspect is concerned, it bears on whether we ought to pitch in and get money and go to work on it because somebody else has started it. Why not leave it that I will go back and write him a letter and remind him of our discussion. We don't know what this committee is going to do, whether it is going to consider changing any practice rules or not, but if they reach the point at any time that they are considering it, then steps ought to be taken to get this Committee into the picture so that they won't go ahead. He said he would do that. As far as somebody else butting in on us is concerned and heading that off, don't you think that we can rest with that for the time being, keeping a watch on the thing? We can do it ourselves, and Leland knows what is going on.

We can write that letter to the Chief Justice and get an answer from him, and maybe send a copy of it to Judge Prettyman. I wouldn't be afraid to do that. Let Prettyman know, in case the Chief Justice forgets to tell him, that we are standing around waiting to see whether he is going to muddle up our rules.

The other question is whether, independent of this investigation by Congress, for reasons some of which are developed in this article in the Yale Law Journal by Whitney North Seymour, regardless of whether anyone else is tinkering with it or not, our committee thinks there is a serious question about some of these rules which requires that we start in a review of them the way we did with the amendments of 1946. I think we ought

to keep those things a little bit separate.

I have the feeling that I am not scared about this committee as long as we have started in motion the necessary steps to insure that they are not going to start in on the rules without our joining in the picture. When they find they are up against that, they will get us in right away before they have a report.

The other question of whether there are things here that we ought to take up, whether somebody else is tinkering with them or not, is another thing. What do you think about that, Charlie?

JUDGE CLARK: We summarized that beginning particularly on page 2 of this memorandum. Notice the conclusions that we urge as to some of the abuses.

"The deposition provisions of the Federal Rules have proved their worth in promoting just settlements and informed preparation for trial. This success, however, has been marred by abuses: unnecessary expense, delaying tactics, unfair advantage in taking depositions, and malicious questioning.

"Changes should not be advocated without cautious consideration. But the following corrective measures should eliminate much of the present abuse of the deposition procedure without defeating its basic purposes:

"1. The inclusion of 'expense' as a basis for protective orders under Rules 30(b) and (d);

"2. An amendment to Rule 30 requiring leave of court

for depositions lasting more than five days, and permitting the court at its discretion to limit the scope and/or the length of the deposition, or to appoint a master to supervise the deposition;

"3. Determining the order of taking depositions on grounds other than the diligence of counsel in serving notice;

"4. A greater inclination on the part of courts to sustain deponents under Rule 37 who in good faith refuse to answer questions deemed improper, referring long transcripts to standing masters."

The Supreme Court didn't take our suggestion of a direct provision for meeting the issue as to lawyers' files, and instead the Hickman case came in and the expense item we had in didn't survive.

CHAIRMAN MITCHELL: It was dropped just accidentally. I don't think the Court had the slightest idea of objecting to our putting in the expense item as a consideration for control by the judge over a deposition, but it happened to be in the same rule that we were going to take up about investigation. They set that aside. I have always thought that if we put back into the rule a provision about expense, there wouldn't be any question about the Court's being quite willing to allow a district judge to consider expense as well as other questions in interfering and issuing controlling orders about a deposition.

MR. LEMANN: Do you think he could do it today, if he

felt like doing it, under the existing rule?

CHAIRMAN MITCHELL: When they struck it out of the rule as a ground for objection--

MR. LEMANN: They struck a lot more out, didn't they?

JUDGE CLARK: There was a lot more.

MR. LEMANN: If they had stricken out merely expense and taken the rest of it, that would have been one thing.

CHAIRMAN MITCHELL: They dropped the whole rule, because the main amendment to it was about investigation files. It just happened that in that same rule in another part we had inserted in italics the word "expense," and that is why it fell to the ground.

JUDGE CLARK: There were other parts to it. Our suggestion was broader than they could establish as a court rule in Hickman v. Taylor. Our rule applied to agents, experts, and so on. The rule as discussed in Hickman v. Taylor is a rule only as to attorneys. When you spoke of striking it out, of course I think what you had in mind, which was the fact, was that it was only in an amendment. They didn't strike anything out of the rule itself. They just did not accept our added amendment. It is possible, I suppose, to say that our original rule would have covered expense.

MR. LEMANN: It might very well be that the real reason they struck it out is because we had a great deal more proposed in the amendment to Rule 30. Theoretically, they could have said

when they had our amendment before them, "We will put in the word 'expense.' We will accept that much of the change, but we will strike out the rest of the change." But then they would have had to say that, and it would take a little more work. It was easier and simpler to say, "We just pass up Rule 30." Also I think you might very well argue that they didn't think you had to put in expense, that there was already enough provision in the rule to permit a court to take that into account.

CHAIRMAN MITCHELL: Has any federal judge accepted the interpretation of the rule that in relieving a man from discovery, he cannot take into account expense as well as annoyance, embarrassment, and oppression?

MR. LEMANN: Has any judge declined to do it because the rule doesn't permit him to do it? That would be even more persuasive.

PROFESSOR MOORE: Not that I know of. Seymour's complaint is that the judges don't take sufficient consideration of the expense item.

CHAIRMAN MITCHELL: If they do it at all, he hasn't any point as far as putting the word "expense" back in. If they now construe the rule giving them power to relieve against annoyance, embarrassment, and oppression, to include oppression by undue expense, what is the trouble with the rule? I don't think his point is very good then.

JUDGE CLARK: I think it is a question not merely of

the formal rules. It is a question of what the practice is. He found the practice to be fairly burdensome in a series of cases.

I might say in passing that that rule of ours, that amendment of ours to Rule 30(b) which was not taken by the Supreme Court, was adopted in New Jersey, and now just recently in Utah. It is rather interesting that New Jersey and Utah have a provision that the Supreme Court didn't take.

CHAIRMAN MITCHELL: Those states, when they adopted our rule, agreed that Hickman v. Taylor was built on principles that we laid down in that amendment. It applies only to lawyers, but I have always thought that they took our memorandum about this thing and wrote their opinion around it. There is no question about that. You remember that printed memorandum we filed with the Court. The whole opinion circles around that. I never could find a thing in that opinion that differed in its effect from what we were trying to do by the amendment. We all thought so. We just quit. We didn't need to bother with the amendment after that. Hickman v. Taylor did it, limited of course to lawyers, it is true.

On this five-day suggestion, I don't see how you can put in an amendment limiting a deposition to five days.

MR. LEMANN: You would get the leave all the time in one of these cases where abuses were practiced. You would go and say, "This thing will take more than five days," and the judge

would give you an extension beyond five days. Is it contemplated that you put in a new limit? If so, you go to the judge each time you want a new limit. I should think that in these difficult cases you could very easily get an order extending it beyond five days.

CHAIRMAN MITCHELL: If you had any justification for taking the deposition at all, and it was a complicated case, and there were a lot of facts to assemble--

MR. LEMANN: These things that Seymour complains of must largely rest with administration by the judges, and I don't think you can get any foolproof set of rules that will keep judges from failing to do what they ought to do or make them do what they should do. One district judge said to me years ago when I first talked to him, "Any set of rules will work all right with the right judge, and no set of rules will work all right without the right judge." While that was an over-simplification and overstatement, I thought over the years there was considerable force in his statement that it takes the guy to work them. As I read this article, which I thought was a very good job, it made me feel that if the judge wanted to handle them, he could handle right now most of the things he is complaining about.

CHAIRMAN MITCHELL: It is the quality of the bench and bar that he is really putting on the grid, isn't it?

JUDGE DRIVER: I was going to say that I agree with everything Mr. Lemann said, except I would supplement it by

saying it is also very important that the bar be educated to the use of the new procedures in order to make them effective.

MR. LEMANN: I agree. I accept that.

JUDGE DRIVER: The judges can't do it all.

MR. LEMANN: I was thinking of a footnote of his where he quotes a district judge.

"The district judge insisted the plaintiff's interrogatories be answered even though the defendant had already spent 90 days and $10,000 computing the statistics requested. Said the judge, 'I am not at all interested in what it costs. If it costs $100,000, that doesn't make the slightest difference to me. I don't want to see you waste your money, but I said I thought they were entitled to certain information in order to prepare their case for trial.'"

No matter what you put in this rule, that same judge would say the same thing. I don't see how you are going to stop him from saying it if he thinks that is the thing to say. He didn't think he had no power to protect against expense. He just said he wasn't going to do it because he thought the fellow was entitled to the information, he didn't care what it cost. What can you put in the rule to stop that, Mr. Moore?

PROFESSOR MOORE: I am not advocating Seymour's stuff.

MR. LEMANN: I am addressing myself to you as an authority.

CHAIRMAN MITCHELL: He picked the worst jurisdiction in

the country, the Southern District of New York.

MR. LEMANN: The Reporter, I judge with the approval of Mr. Moore, himself remarked about this that the most we could do, I take it, would be to conduct some investigation outside of the Southern District of New York to see whether abuses were going on in a way that we could correct or help to limit. You say the Southern District is probably the worst. I guess it is.

CHAIRMAN MITCHELL: There are more crooked lawyers per square foot in New York than any other place in the country. I know that. I have practiced law in the West for a great many years and very considerably in Minnesota, North and South Dakota, and Wisconsin, and even east as far as Indiana. I know how the bar and bench act out there, especially in the towns and small cities out there. Even in a place like St. Paul every lawyer knows every other lawyer. In New York it is just a rookery. There are 17,000 lawyers, according to the last count I know of. There are packs and swarms around in these offices. You see your best friend in New York not more than once a year. Nobody knows what these fellows are doing. The economic pressure is very strong on many lawyers scrambling for a living. As I said, there are more lawyers of low professional standards there than any other place that I know of, and it is bound to be so in a place that size. I think that is a very poor place to use as a guinea pig to find out what the rules ought to be, because you just can't make that bar over.

You all know what the result in England is. I think it is fair to say that their discovery rule and all their stuff along these lines are just as liberal as ours, but they don't have any trouble. If the barristers started running up a bill just to run up a bill on a fellow and wear him out, they would see their finish pretty quickly. They don't want to do it. They are not built that way. The judges are better. It proves your point that you have to have somebody to administer the rules who are people of high standing.

JUDGE CLARK: I would like to make one comment along this line. I wouldn't accept all that has been said. I think it is quite so, but I am not sure that that ends our responsibility, so to speak. We know that we are not going to get barristers and solicitors in this country. These are the conditions. We are a continuing Advisory Committee, and I just feel that it is our function to be up with these conditions as much as we can and if we can do anything about them, we should. I am not sure that we can turn our backs on it. I must say that I was perhaps more impressed by what Seymour wrote because I felt that way myself. I have been worried about this.

MR. LEMANN: You are like a sinner, because you say somewhere here that you sometimes wonder whether we should not have made some limitations on this right of discovery. As I recall it, we went beyond the English law, and I am sure if any practitioner had advocated limitations originally, you would have

thought we were servants of the devil. Now you say you are not so sure but that there ought to be some limitation.

JUDGE CLARK: I said that more particularly about summary judgment. I said that just because the courts shy away from it. It is much the same fundamental proposition. I think we are looking for a workable procedure. If you go too far so you scare people off, then come back a little and give them something that will work.

There was a study conducted by an organization of the younger lawyers of the New York Law Society, by Mr. Abram Stockman, back in 1941. He worked a great deal on it. That was perhaps the most intensive study that has been made so far.

I am concerned as to whether this isn't a system which is not by any means foolproof. It isn't entirely or perhaps even primarily a matter of the judges. If you can now saddle parties with extreme expense through the discovery process, I think we ought to know about it, and I think very likely we need to do something about it.

I don't want to center too much on these specific things that Seymour has recommended. He is a bright young fellow, but after all he is only a young fellow who hasn't been in practice yet. It is more whether he is referring to a condition that other people have seen, too, and that we ought to study. That is the only proposition now.

MR. LEMANN: How would we study it? I sympathize

generally with the idea that we ought to keep in touch with how these rules are going. Talking to the Chairman this morning, he suggested that maybe we could address a letter to the district judges and circuit judges asking them how the rules are working, what instances of abuse have come to their attention, and what ideas they might have for important changes. We could carry that further and address ourselves to the president of every state bar association and ask him to take it up with his appropriate committee on jurisprudence, law reform, or whatever they call it, and let us know what they think about it. In every one of the ten or eleven circuits there is an annual local conference. Maybe the senior circuit judge in each of those circuits could be asked to bring it up for discussion, and we could get a picture of the composite reaction as to how the things are doing.

I am sure there are abuses. The question would be, What could we usefully do about the abuses by improvement of the rules? I would agree that we ought not just to sit by and say that there is no use asking. Would that meet your thought, Charlie?

CHAIRMAN MITCHELL: As a preliminary step to decision about what we are going to do about it.

MR. PRYOR: Isn't there a fundamental question about what is the proper function of this Committee? I haven't been on it very long and maybe don't know very much about it, but it seems to me there is a question as to whether it is a part of the

function of this Committee properly to police this thing and say how these rules are working and from time to time make recommendations, or if we should take those suggestions and recommendations from somebody like the Judicial Conferences and pursuant to their suggestions and recommendations, prepare rules.

JUDGE DOBIE: Mr. Tolman just suggested that same thing to me, that possibly that might be a very admirable way of getting information.

MR. PRYOR: I should think it would be.

JUDGE DOBIE: Just ask the Judicial Conferences, all eleven of them, to bring it up and get, say, a brief report. I have heard of very few abuses, for example, in the Fourth Circuit.

MR. PRYOR: They should have first-hand information.

JUDGE DOBIE: In a moving picture case I had 287 interrogatories submitted to me, and I ruled that all of them were good except 217.

MR. LEMANN: Should we wait until they come to us, or should we go to them? I think that is the fundamental question that we ought to settle. Should we wait until they bring it to us, or should we go forward and say that we are trying to keep up with things?

MR. PRYOR: Or whether we should hunt trouble.

CHAIRMAN MITCHELL: It is whether our function is to watch it ourselves. If we see bad results, whether someone is

complaining to us or not, it is our business to know about it and bring it up to the Court. I have always felt that way about it. I have always felt that we ought not to be tinkering too often, that we ought to give everything we have a considerable time to be tested out and should not be changing the rules every month or two. We would get a kick-back on that from the publishers, the bar, and everybody, and it would put an end to state actions in adopting this system. They would say, "Oh, well, if the federal rules are going to be changed every year, we can't keep up with them and we won't try to copy them."

I think we ought to proceed on the theory that it is our business not to wait until somebody hits us with a complaint, but I have the feeling personally that I haven't got quite enough information about the operation of these rules generally to form a judgment as to whether we ought to pitch in on this thing right now. I know that they are working badly in some particulars because some people have been spending too much time taking depositions, building up bills, and wearing the other fellow out, but I haven't been able to find that our rules are responsible for that. They could have done it before, but they are just learning how. Maybe our rules reminded them that they have that weapon.

JUDGE DOBIE: I don't think there is any question about the truth of what somebody said over on that side, that it is more up to the judge than it is to the rule. If you have a good

judge, he is likely to hold them down pretty well. I remember that in one or two cases they submitted a huge mass of material to Judge Chesnut, and he went through it and cut out about nine-tenths of it. He said it had nothing to do with the case, and out they went. In our circuit we had another case which I am glad to say was settled and never got to us, illustrating that anti-trust suits are the greatest offenders under the subpoena duces tecum. The parties didn't know how much was required of them, and they brought in ten tons of books.

PROFESSOR MORGAN: Have you found many instances where a deposition took more than five days?

PROFESSOR MOORE: Oh, yes.

PROFESSOR MORGAN: Were they all in New York County?

PROFESSOR MOORE: Seymour's investigation was limited almost solely to the Southern District of New York.

PROFESSOR MORGAN: What kind of cases were they, Bill?

PROFESSOR MOORE: Anti-trust suits; stockholders suits, too.

PROFESSOR MORGAN: Then did he follow up to see how much time that saved at the trial? If he didn't, then his stuff isn't worth much.

CHAIRMAN MITCHELL: I have this feeling about it. How would it do if we stick to our proposal to hang close to this committee the Chief Justice appointed and make sure they are not going to get to the point of considering rule amendments without

getting us into the picture. That is one thing we certainly ought to do. Charlie is right about that. We should not sit around and let somebody else run off with the ball here and break up this system.

How about the added suggestion that Monte made that we have the Reporter and the staff get up a questionnaire with a view to sending it around to all the Judicial Conferences, to the individual judges on the Judicial Conferences, with the idea of asking them to give us information concerning their local conditions and operations and things that they think should be changed in the rules, collecting that data during the rest of the year while we are getting this thing out of the way? You see, we have to go to the Court with a case in order to get them to authorize this and get money for it. If we ask the Judicial Conference for it, and you might suggest somebody else we ought to ask to review it, certainly the committees of the bar associations or the presidents of the bar associations, we might get a picture that way that would be very helpful to us, either helpful in postponing action or helpful in going ahead and making a case with the Court.

JUDGE CLARK: I wonder if the Administrative Office would be able to do something of that kind. After all, though, they have some set activities to conduct, and I should suppose that if they would do anything more, they would have to set up a special study. All of these things mean appropriations. I think

one great source of information on discovery should be the federal judges, but suppose we were to plan to go ahead, the only way we could do it would be to get some sort of appropriation. That would mean that we would be starting in perhaps a minor way say next fall. The last work on the rules as a whole would then be about five years old, and by the time it got under way really, by the time we did much of anything, they would be quite a little older. The end of our polishing off of the amendments was in 1946, and that was a little behind. It always is a little behind. We were polishing up things that we started in 1943. In other words, there always is, quite properly, a lag. By the time we got to doing very much there would be a substantial lag.

Supplementing what the Chairman has said, and perhaps a little more emphatically, I want to say that I think the whole function of a continuing Advisory Committee is to be ahead of the game, not to wait until you are pushed with what might really be termed a crisis. I would agree that we could do it too much or too often, but both Mr. Moore and I are making the suggestion that some time has passed and there will be more when we get under way. He and I have tried to suggest things that perhaps would make us, him and me, more concerned. I don't think it ought to be limited to that. We have picked out and have emphasized things that seemed to us to be most important.

I also would remind you that various scholars have picked up other things that we were not wholly convinced about.

You have these long monographic articles that are directed really to the work of the Committee when you get down to it, recommending various changes in the rules that we have spoken of. There has been a wealth of things on the class suits, for example. Moore and I have hesitated a little because we are not so sure that they can do all the things they think they can do, but I don't think we ought to give you the impression that because we haven't yet been convinced, there isn't anything to it. When scholars working in the field write these monographic articles which are a call to action to us, can we properly sit back and say, even though we are a continuing Advisory Committee, that there is no crisis as yet and we won't do much about it?

So, it is not merely the things that Moore and I have picked out and say interest us. There is also that other angle of things that have interested the procedural profession, if I may use that term. We have collected those, too. I should suppose that carefully thought out, investigated proposals of that kind deserve attention. I do not mean to say that every time a law professor writes an article, this Committee should immediately go into session and consider it up or down. I do mean that when you have had time enough elapse so that there has been a series of suggestions of that kind, one function of this Committee is to receive them and consider them.

I suppose that really what I am saying comes down to this: That quite a period has elapsed already, and by the time

we really get under way, get an appropriation and one thing and another and really get to doing anything, because all that takes time, there will have been a very substantial period.

CHAIRMAN MITCHELL: Of course, it is a question of judgment as to how long you ought to leave the rules under the test of experience before you undertake to change them. I will admit that I have always taken the view that you ought to give them a very full test. They went into effect in 1938, and before we started in on the amendments I think five or six years elapsed. I think that is not too long a time to test out a set of rules. Then we went to work and got out all we could think of as late as 1946, four years ago. That is not an awfully long time to be sure you are right before you go ahead.

I agree with Charlie's attitude entirely, but I have the feeling personally that it would help me to know just how to go at this thing and how to advise the Court about it if you could do something along the lines that Monte spoke about, get up some kind of questionnaire and send it out to the Circuit Conferences, the 200 or 300 district judges around the country, and the 48 or 50 state bar associations. As far as an appropriation for that inquiry is concerned, we may have some money lying around now.

MR. TOLMAN: I should think the preparation and distribution of the questionnaire could certainly be taken care of by our office without any expense to the Committee's appropriation.

CHAIRMAN MITCHELL: I feel that we can work out

something.

MR. TOLMAN: I am sure we can.

CHAIRMAN MITCHELL: In a pinch, the Court may have some fund for that. As far as our own appropriation that we are working under now, while the Act of Congress doesn't say condemnation rule, our explanation to the Appropriations Committee limited it to that, and I would not feel we were playing ball or doing the wise thing if we tried to use it for something else without the Congress' permission. I think we can rake up enough money or get it to make an inquiry of our own nationwide.

MR. LEMANN: If his office would do it for us--

MR. TOLMAN: We can do it for you. Mr. Chandler has always been glad to do that.

CHAIRMAN MITCHELL: It is a matter that bears right on your own administration.

MR. TOLMAN: Yes, sir.

MR. PRYOR: I was going to say, I wonder if that is not a part of the function of his office, anyway, to find out about that.

MR. TOLMAN: I think we would rather do it in your name.

MR. LEMANN: It would be better for us if he did it in our name, because then it would prevent any impression that our functions were likely to be usurped by the Administrative Office or that they were checking on us. I should think that we could take advantage of your suggestion and get them to do it. Then,

Mr. Mitchell, I believe you ought to sign the letter and, if I were doing it, I think I would say to these people, "You realize that we want to keep up with how these rules are working. We don't want to tinker with them too often. We realize that is not desirable. We do want to meet any real difficulties, any real objections and evils that exist in practice to any substantial extent. We want your judgment and the benefit of your experience."

Then, if the Reporter likes, we could annex to that a mimeographed copy of the points to which he directs attention and ask, "How serious do you think these are?" There is nothing like giving a fellow something to think about instead of just putting to him a question in vacuo, particularly as far as bar associations and lawyers are concerned. You could send them these suggestions even in their present form or perhaps somewhat condensed and say, "The Reporter has called our attention to these things. How serious do you think they are? How important do you think it would be to make amendments? What do you think should be done?"

Tell them, "After we get all the answers in, we are going to consider them and take counsel as to whether we ought to do anything about it."

That would be my idea of how to put it up to them.

MR. PRYOR: Then ask them to express their sentiments about any other rule.

MR. LEMANN: Yes. I would include not only the state associations, but the local associations in large cities where

there are active bar associations. The Association of the Bar of New York has a very active committee on federal matters, these rules, and so on. There must be similar ones in Philadelphia, Chicago, Los Angeles, and many other places. We could easily get a list. We probably have a list from the old days, because many of them did work on these.

JUDGE CLARK: Of course, this red book of the American Bar Association has a list of state bar associations and local bar associations.

MR. LEMANN: Is that distributed to all members? Is that something new?

CHAIRMAN MITCHELL: It is up to date.

JUDGE DRIVER: It seems to me the people who are more likely to know of defects in the rules or abuses of them would be the ones who are working with them directly, that is, the district judges and the lawyers who practice in the district courts. So I think you would get more helpful information as a rule -- you should, at any rate -- from the district judges and the local bar associations than from the courts of appeal or the conferences or the state associations, because they are not likely to know of abuses until they happen to make a special study of the rules, which most of them have not done.

PROFESSOR SUNDERLAND: Could we get the names of lawyers who have a considerable practice before the federal courts from the federal judges?

JUDGE DRIVER: I think you could, yes, but that would be rather a difficult process all over the country. It would be quite an undertaking.

PROFESSOR MORGAN: That would be quite a job. Don't you remember, we tried to do that on the Commonwealth Fund in 1944.

PROFESSOR SUNDERLAND: You would get the names of the right lawyers to consult.

PROFESSOR MORGAN: To get the names we wrote to the clerks of the local courts to find out who were admitted to practice there and who did practice.

CHAIRMAN MITCHELL: That is a big chore.

PROFESSOR MORGAN: Then we sent our questionnaires to them, you remember.

CHAIRMAN MITCHELL: The chespest way to get at them is through the committees of the local bar associations; for instance, the committee on federal practice or the committee on federal legislation. Those are the ones who are interested in it.

MR. LEMANN: Yes. You can't go to every federal practitioner. I don't think it would be worth doing. Many of them wouldn't be there often enough, and their opinions wouldn't be worth much. I think if you go to the committees of the local bar associations and even of the state bar associations, they would be the men who would take an active interest in matters of that sort and they could be trusted to contact, if they wished and

thought it worth while, their colleagues and associates at the bar who were interested in this subject matter.

JUDGE DOBIE: As Leland Tolman just suggested, I happen to be on the Council on Judicial Administration of the American Bar Association. We have committees in all the states, and I am sure they would be more than glad to supply us with information of that kind.

MR. LEMANN: Could you make up a very good list?

JUDGE DOBIE: Leland could make up a superb list. They would take that seriously.

MR. LEMANN: The main job will be then to go through the answers and abstract them as we have done before. That is where you will probably need some more money at that time. That is quite a way ahead of you.

JUDGE CLARK: Leland, were you at the House of Delegates meeting?

MR. TOLMAN: Yes.

JUDGE CLARK: There is a note in the Journal that the Insurance Section are busy about something and that they want to have legislation to do away with, the ABA Journal says, Rule 25(b). I wondered if that probably was a mistake. The Insurance Section is usually interested in 26(b).

MR. TOLMAN: I understood those resolutions were withdrawn before they were considered by the House of Delebates.

JUDGE CLARK: There is a statement that they were

postponed. I don't know that they were withdrawn.

MR. TOLMAN: I know there was a suggestion about something in the rules that was put over. It wasn't acted on at Chicago.

JUDGE CLARK: Wasn't it probably the discovery rule rather than the substitution rule?

MR. TOLMAN: Yes, it was the discovery rule.

JUDGE CLARK: I don't think the Insurance Section is interested in Rule 25.

JUDGE DOBIE: We ought to keep up and keep ahead, if necessary, as you said, but until we get enough raw material changes I think it is rather unfortunate just to keep periodically tinkering with the rules.

MR. PRYOR: I think that would be a big mistake. As somebody suggested a while ago, there are a lot of states that have modeled their state procedure along these federal rules, and I think this is a very wonderful result. I think that is likely to be encouraged by slow and conservative changes rather than periodic and spasmodic changes and amendments.

JUDGE DOBIE: That doesn't imply at all that we should not be getting information and making all the plans we can, but to tinker with them and amend them so it will be binding on the parties I think would be very unfortunate.

CHAIRMAN MITCHELL: If you feel that way about it, it seems to me that we ought to ask our staff to get up the kind of

communication that ought to go out. Considering the purpose of this memorandum that they have brought to us, what it was intended for, they might want to rewrite it and cut it down, maybe drop out some points that they don't take any stock in, and add some that are not in it, and get it in shape so that those who get it won't feel that they want to throw it in the wastebasket.

If we got that going, then I think one way or another we can wangle a way to get it printed and sent out to the profession generally; that is, not to every Tom, Dick, and Harry, but to a selected field that we can work up. We will try to get that material out in the first place so that the lawyers can do something with it and the bar associations can consider it before their summer vacation, figuring on getting their replies in the fall and reviewing it ourselves and making up our minds then, on the basis of that, what kind of action we want to take and whether we wish to go to the Court about it. I feel sure we won't get any money in the current appropriation bill at this time.

MR. TOLMAN: If you want to, Mr. Mitchell, you can make a request for an appropriation in the deficiency bill going in next month.

CHAIRMAN MITCHELL: We are not in shape to do that now. We haven't any estimate at all, no working figures. We couldn't ask the Court even to consider it in the present state of the

material we could give them. They would let it lie around.

MR. TOLMAN: I really think that between the appropriation that our office controls and the appropriations of the Court, and possibly something that we may have in the current year's appropriation, we certainly can take care of the distribution of any kind of questionnaire.

CHAIRMAN MITCHELL: What do you think of that program, Charlie?

JUDGE CLARK: What do you say?

PROFESSOR MOORE: That is all right.

MR. LEMANN: You can bear in mind that some of the things you have discussed here requires statutes. I don't understand it is the function of this Committee to suggest statutes. That is really more the function of the Conference of Senior Circuit Judges. But we could develop that perhaps as part of the questionnaire and ask what they thought ought to be done about it, with a view to taking it up with the Conference if we felt so advised. As far as I know, we have never recommended any statute, have we, Mr. Moore?

PROFESSOR MOORE: No.

JUDGE CLARK: I should feel that we would want to go over this a good deal.

MR. LEMANN: You might point it up, Charlie. I think it would help the bar association if you could reduce it to questions about particular rules. After giving them the material,

ask them, "Do you think this rule should be amended in this way or not?" I think that would help them in answering. Don't you think so, Judge?

JUDGE DRIVER: Yes.

JUDGE CLARK: I should feel that for that sort of purpose we ought to hit the most important things.

MR. LEMANN: Yes.

JUDGE CLARK: Cut it down. In that event I should think that we would want to send out to them probably not more than half of this material, maybe not that much. The questionnaire defeats itself if we have too much. It would be my feeling that that would have to be studied over quite a good deal with the different purpose in mind, with the shift in purpose. A questionnaire is a different thing from my report to you.

MR. LEMANN: Still you want to put in everything that led you and Professor Moore to think it was important enough to justify changing the rules.

CHAIRMAN MITCHELL: You mean important enough if the evil was there.

MR. LEMANN: That is right. If you think the evil is there, direct their attention to it. Of course, they may think of some things you don't think of. If you think it is important enough, put it in. Don't come to us afterwards and say, "I didn't ask anything about it, but I think something should be done about it." My own impression immediately would be that much of it

wasn't that important. You could paint the lily, of course. You could keep on improving everything. It is a matter of degree.

PROFESSOR MOORE: Suppose it is something that we don't believe in, but something some responsible person has raised.

JUDGE CLARK: That is what I had in mind.

MR. LEMANN: I would think you would have to exercise judgment as to how serious it is, how worthy of serious consideration it is, apart from the fact that a decent man has raised the point. If you think there is nothing much to it, I think you should leave it out. If you don't think much of it but feel that maybe somebody would, you might put it in. If in doubt, I would leave it out.

CHAIRMAN MITCHELL: If some fellow is making a squeal and he is going to continue to squeal, and if you think there is some justification for what he has in mind, although you don't like the remedy or don't think much of anything can be done about it, you might put it in and say that this is one of the things that has been complained of, although you have doubt as to whether it would be effective or desirable. Express your doubt about it. If you put in the question and ask, "What about this?" the inference is that you do think something should be done. If you are dead set against it and really think you are right about it, even if you think it is worth while to mention it, you wouldn't want to let it go without a caveat on it. If it looks like a recommendation and if it sounds plausible, the first thing you

know, the bar associations will say, " Surely, we think that is a good idea," and where are you then?

MR. LEMANN: You have something here on Rule 71(a), Real Party Interest, and I would agree with you I don't think it is substantial enough, and I wouldn't say anything about it. The mere fact that somebody teaching the subject who takes an intellectual curiosity interest thinks this might be polished up I don't think ought to be sufficient basis for inclusion. Besides, you can leave the door open, and they can come in with anything they want to.

JUDGE DOBIE: I think the strongest basis is when it gives trouble to a great many district judges. To take one specific example, the difference between a motion to make more definite and certain, and a bill of particulars. Charlie will bear me out that they had a terrific time with that, whether there was any real distinction between the two and whether it wasn't a waste of effort. I think one of the best things we ever did was to abolish the bill of particulars..

I think any information you can get from all sources of course would be helpful. I would not tinker with the rules and prescribe amendments that were binding until we had really a substantial amount on hand that really justified it.

CHAIRMAN MITCHELL: What is your pleasure?

JUDGE DOBIE: Do you want a motion about the questionaire?

CHAIRMAN MITCHELL: If you are ready to give us an answer, yes.

JUDGE DOBIE: I don't know exactly how to frame it, but I think it would be very desirable if we did get out some type of questionnaire. Just what should be in it and how it should be distributed and all like that I think probably the Reporter and the expert and you, possibly, Mr. Chairman, with suggestions from the others, might best determine. I think such a questionnaire might be extremely helpful.

CHAIRMAN MITCHELL: Do you make that as a motion?

JUDGE DOBIE: Yes. It is in pretty crude form.

CHAIRMAN MITCHELL: That is in the way of taking the next step along the lines that the Reporter has in mind.

JUDGE DOBIE: I think so.

PROFESSOR MORGAN: Is that with reference to this discovery rule that we were talking about?

CHAIRMAN MITCHELL: No. It refers to a questionnaire to go out to the district judges and the bar association.

PROFESSOR MORGAN: But what subjects are going to be covered?

CHAIRMAN MITCHELL: Everything in the rules. They are going over the memorandum, and may discard some things and add some things.

PROFESSOR MORGAN: I see. I was just wondering about it because there are certain portions of it about which questionnaires

could be framed very profitably, and there are others where there wouldn't be much experience, some of Charlie's new suggestions, for example.

CHAIRMAN MITCHELL: The idea in getting this thing up is to try to reduce its volume and sift out some things, maybe to add some things and to discard some things.

JUDGE CLARK: I should think it would be very helpful if you, Eddie, and other members of the Committee would just go over that and write on it, "Fine," "Excellent," "Aw, nuts," or something like that. Maybe you could give us some ideas.

CHAIRMAN MITCHELL: That would be helpful in knowing what to throw in the wastebasket.

Are you all in favor of that proposal? All in favor say "aye"; opposed, "no." The motion is carried.

MR. LEMANN: I suspect that when you get through with it, there won't be more than half a dozen points that you yourself think are important enough to send out.

JUDGE CLARK: That is quite possible.

CHAIRMAN MITCHELL: One thing stands out in my mind, and I will say it right now. I think it is true that government lawyers are maybe the worst offenders. A lot of them are trying their cases on depositions, which is all contrary to the theory that the Court adopted to get rid of a master and the expense of taking transcripts, and making the court try the case itself. It seems to me that the two things are not consistent. They are

doing by the deposition system exactly the equivalent of what they used to do under the master system.

MR. LEMANN: You might have to have a special statute for these anti-trust cases, might you not, if they are in a special class to themselves?

Don't you think it would be a good idea for you to write Judge Prettyman and send a copy of it to the Chief Justice, telling him you were down here and talked to the Chief Justice and that you took the liberty of discussing it with the Chief Justice, who agrees it would be good to have us work together.

CHAIRMAN MITCHELL: Yes, that is a good way of going at it, instead of writing a letter to the Chief. I can send him a copy of it.

JUDGE DOBIE: General, the chief suggestion of difficulty is that of trying cases on deposition, which I think is unquestionably an evil when it exists. Speaking for the Fourth Circuit, we have very little of it, with one exception, admiralty cases, and nearly always in admiralty cases there is real justification for it because libel is brought sometimes after the crew has scattered and the officers are all over the civilized world. Apart from that, where there is real necessity for it, we have had very little abuse of that.

CHAIRMAN MITCHELL: I think the Anti-trust Division, from all I hear from gossip in New York, is the one that is guilty of the greatest crime in the use of depositions and running

up records of thousands of pages and dumping in exhibits that haven't any business there.

If we are through and haven't anything else to bring up, we will get these changes in the condemnation rule ready right away. As soon as we can get it ready, I will take it up with the Attorney General myself and see what we can do there. Also I understand that I am to get hold of the proper section chiefs of the American Bar Association and see whether they can give us a hearing ahead of the meeting of the Association so that they will have something for the House of Delegates to act on in September, and try to drum up some professional support for our report in that way before we actually hand it to the Court. The Court doesn't care that we hand it in on any particular date. If we want to go to the Court with the approval of the American Bar Association, I think that is better than submitting it first and having them bruit it about a while and then throwing it to the action of the Bar Association later on. We have plenty of time. As I said, they can't get it to Congress before January 1, anyway.

I will entertain a motion to adjourn.

JUDGE DOBIE: I move we adjourn sine die.

(The motion was regularly seconded, put to a vote and carried, and the meeting adjourned sine die at 5:20 o'clock p.m.)