

uments or to perform any other specific act and the party fails to comply within the time specified, the court may direct the act to be done at the cost of the disobedient party by some other person appointed by the court and the act when so done has like effect as if done by the party. On application of the party entitled to performance, the clerk shall issue a writ of attachment or sequestration against the property of the disobedient party to compel obedience to the judgment. The court may also in proper cases adjudge the party in contempt. If real or personal property is within the district, the court in lieu of directing a conveyance thereof may enter a judgment divesting the title of any party and vesting it in others and such judgment has the effect of a conveyance executed in due form of law. When any order or judgment is for the delivery of possession, the party in whose favor it is entered is entitled to a writ of execution or assistance upon application to the clerk.

NOTES OF ADVISORY COMMITTEE ON RULES—1937

Compare [former] Equity Rules 7 (Process, Mesne and Final), 8 (Enforcement of Final Decrees), and 9 (Writ of Assistance). To avoid possible confusion, both old and new denominations for attachment (sequestration) and execution (assistance) are used in this rule. Compare with the provision in this rule that the judgment may itself vest title, 6 Tenn. Ann. Code (Williams, 1934), §10594; 2 Conn. Gen. Stat. (1930), §5455; N.M. Stat. Ann. (Courtright, 1929), §117-117; 2 Ohio Gen. Code Ann. (Page, 1926), §11590; and England, Supreme Court of Judicature Act (1925), §47.

Rule 71. Process in Behalf of and Against Persons Not Parties

When an order is made in favor of a person who is not a party to the action, that person may enforce obedience to the order by the same process as if a party; and, when obedience to an order may be lawfully enforced against a person who is not a party, that person is liable to the same process for enforcing obedience to the order as if a party.

(As amended Mar. 2, 1987, eff. Aug. 1, 1987.)

NOTES OF ADVISORY COMMITTEE ON RULES—1937

Compare [former] Equity Rule 11 (Process in Behalf of and Against Persons Not Parties). Compare also *Terrell v. Allison*, 21 Wall. 289, 22 L. Ed. 634 (U.C., 1875); *Farmers' Loan and Trust Co. v. Chicago and A. Ry. Co.*, 44 Fed. 653 (C.C. Ind., 1890); *Robert Findlay Mfg. Co. v. Hygrade Lighting Fixture Corp.*, 288 Fed. 80 (E.D. N.Y., 1923); *Thompson v. Smith*, Fed. Cas. No. 13,977 (C.C. Minn., 1870).

NOTES OF ADVISORY COMMITTEE ON RULES—1987 AMENDMENT

The amendments are technical. No substantive change is intended.

IX. SPECIAL PROCEEDINGS

Rule 71A. Condemnation of Property

(a) **APPLICABILITY OF OTHER RULES.** The Rules of Civil Procedure for the United States District Courts govern the procedure for the condemnation of real and personal property under the power of eminent domain, except as otherwise provided in this rule.

(b) **JOINDER OF PROPERTIES.** The plaintiff may join in the same action one or more separate

pieces of property, whether in the same or different ownership and whether or not sought for the same use.

(c) COMPLAINT.

(1) **Caption.** The complaint shall contain a caption as provided in Rule 10(a), except that the plaintiff shall name as defendants the property, designated generally by kind, quantity, and location, and at least one of the owners of some part of or interest in the property.

(2) **Contents.** The complaint shall contain a short and plain statement of the authority for the taking, the use for which the property is to be taken, a description of the property sufficient for its identification, the interests to be acquired, and as to each separate piece of property a designation of the defendants who have been joined as owners thereof or of some interest therein. Upon the commencement of the action, the plaintiff need join as defendants only the persons having or claiming an interest in the property whose names are then known, but prior to any hearing involving the compensation to be paid for a piece of property, the plaintiff shall add as defendants all persons having or claiming an interest in that property whose names can be ascertained by a reasonably diligent search of the records, considering the character and value of the property involved and the interests to be acquired, and also those whose names have otherwise been learned. All others may be made defendants under the designation "Unknown Owners." Process shall be served as provided in subdivision (d) of this rule upon all defendants, whether named as defendants at the time of the commencement of the action or subsequently added, and a defendant may answer as provided in subdivision (e) of this rule. The court meanwhile may order such distribution of a deposit as the facts warrant.

(3) **Filing.** In addition to filing the complaint with the court, the plaintiff shall furnish to the clerk at least one copy thereof for the use of the defendants and additional copies at the request of the clerk or of a defendant.

(d) PROCESS.

(1) **Notice; Delivery.** Upon the filing of the complaint the plaintiff shall forthwith deliver to the clerk joint or several notices directed to the defendants named or designated in the complaint. Additional notices directed to defendants subsequently added shall be so delivered. The delivery of the notice and its service have the same effect as the delivery and service of the summons under Rule 4.

(2) **Same; Form.** Each notice shall state the court, the title of the action, the name of the defendant to whom it is directed, that the action is to condemn property, a description of the defendant's property sufficient for its identification, the interest to be taken, the authority for the taking, the uses for which the property is to be taken, that the defendant may serve upon the plaintiff's attorney an answer within 20 days after service of the notice, and that the failure so to serve an answer constitutes a consent to the taking and to the authority of the court to proceed to hear the action and to fix the compensation. The notice shall conclude with the name of the plaintiff's

attorney and an address within the district in which action is brought where the attorney may be served. The notice need contain a description of no other property than that to be taken from the defendants to whom it is directed.

(3) *Service of Notice.*

(A) *Personal Service.* Personal service of the notice (but without copies of the complaint) shall be made in accordance with Rule 4 upon a defendant whose residence is known and who resides within the United States or a territory subject to the administrative or judicial jurisdiction of the United States.

(B) *Service by Publication.* Upon the filing of a certificate of the plaintiff's attorney stating that the attorney believes a defendant cannot be personally served, because after diligent inquiry within the state in which the complaint is filed the defendant's 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, service of the notice shall be made on this defendant by publication in a newspaper published in the county where the property is located, or if there is no such newspaper, then in a newspaper having a general circulation where the property is located, once a week for not less than three successive weeks. Prior to the last publication, a copy of the notice shall also be mailed to a defendant who cannot be personally served as provided in this rule but whose place of residence is then known. Unknown owners may be served by publication in like manner by a notice addressed to "Unknown Owners."

Service by publication is complete upon the date of the last publication. Proof of publication and mailing shall be made by certificate of the plaintiff's attorney, to which shall be attached a printed copy of the published notice with the name and dates of the newspaper marked thereon.

(4) *Return; Amendment.* Proof of service of the notice shall be made and amendment of the notice or proof of its service allowed in the manner provided for the return and amendment of the summons under Rule 4.

(e) *APPEARANCE OR ANSWER.* If a defendant has no objection or defense to the taking of the defendant's property, the defendant may serve a notice of appearance designating the property in which the defendant claims to be interested. Thereafter, the defendant shall receive notice of all proceedings affecting it. If a defendant has any objection or defense to the taking of the property, the defendant shall serve an answer within 20 days after the service of notice upon the defendant. The answer shall identify the property in which the defendant claims to have an interest, state the nature and extent of the interest claimed, and state all the defendant's objections and defenses to the taking of the property. A defendant waives all defenses and objections not so presented, but at the trial of the issue of just compensation, whether or not the defendant has previously appeared or an-

swered, the defendant may present evidence as to the amount of the compensation to be paid for the property, and the defendant may share in the distribution of the award. No other pleading or motion asserting any additional defense or objection shall be allowed.

(f) *AMENDMENT OF PLEADINGS.* Without leave of court, the plaintiff may amend the complaint at any time before the trial of the issue of compensation and as many times as desired, but no amendment shall be made which will result in a dismissal forbidden by subdivision (i) of this rule. The plaintiff need not serve a copy of an amendment, but shall serve notice of the filing, as provided in Rule 5(b), upon any party affected thereby who has appeared and, in the manner provided in subdivision (d) of this rule, upon any party affected thereby who has not appeared. The plaintiff shall furnish to the clerk of the court for the use of the defendants at least one copy of each amendment and shall furnish additional copies on the request of the clerk or of a defendant. Within the time allowed by subdivision (e) of this rule a defendant may serve an answer to the amended pleading, in the form and manner and with the same effect as there provided.

(g) *SUBSTITUTION OF PARTIES.* If a defendant dies or becomes incompetent or transfers an interest after the defendant's joinder, the court may order substitution of the proper party upon motion and notice of hearing. If the motion and notice of hearing are to be served upon a person not already a party, service shall be made as provided in subdivision (d)(3) of this rule.

(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; 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, unless the court in its discretion orders that, because of the character, location, or quantity of the property 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.

In the event that a commission is appointed the court may direct that not more than two additional persons serve as alternate commissioners to hear the case and replace commissioners who, prior to the time when a decision is filed, are found by the court to be unable or disqualified to perform their duties. An alternate who does not replace a regular commissioner shall be discharged after the commission renders its final decision. Before appointing the members of the commission and alternates the court shall advise the parties of the identity and qualifications of each prospective commissioner and alternate and may permit the parties to examine each such designee. The parties shall not be permitted or required by the court to suggest nominees. Each party shall have the right to object for valid cause to the appointment of any person as a commissioner or alternate. If a com-

mission 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.

(i) DISMISSAL OF ACTION.

(1) *As of Right.* If no hearing has begun to determine the compensation to be paid for a piece of property and the plaintiff has not acquired the title or a lesser interest in or taken possession, the plaintiff may dismiss the action as to that property, without an order of the court, by filing a notice of dismissal setting forth a brief description of the property as to which the action is dismissed.

(2) *By Stipulation.* Before the entry of any judgment vesting the plaintiff with title or a lesser interest in or possession of property, the action may be dismissed in whole or in part, without an order of the court, as to any property by filing a stipulation of dismissal by the plaintiff and the defendant affected thereby; and, if the parties so stipulate, the court may vacate any judgment that has been entered.

(3) *By Order of the Court.* At any time before compensation for a piece of property has been determined and paid and after motion and hearing, the court may dismiss the action as to that property, except that it shall not dismiss the action as to any part of the property of which the plaintiff has taken possession or in which the plaintiff has taken title or a lesser interest, but shall award just compensation for the possession, title or lesser interest so taken. The court at any time may drop a defendant unnecessarily or improperly joined.

(4) *Effect.* Except as otherwise provided in the notice, or stipulation of dismissal, or order of the court, any dismissal is without prejudice.

(j) DEPOSIT AND ITS DISTRIBUTION. The plaintiff shall deposit with the court any money required by law as a condition to the exercise of the power of eminent domain; and, although not so required, may make a deposit when permitted by statute. In such cases the court and attorneys shall expedite the proceedings for the distribution of the money so deposited and for the ascertainment and payment of just compensation. If the compensation finally awarded to any defendant exceeds the amount which has been paid to that defendant on distribution of the deposit, the court shall enter judgment against the plaintiff and in favor of that defendant for the deficiency. If the compensation finally awarded to any defendant is less than the amount which has been paid to that defendant, the court shall enter judgment against that defendant and in favor of the plaintiff for the overpayment.

(k) CONDEMNATION UNDER A STATE'S POWER OF EMINENT DOMAIN. The practice as 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 makes

provision for trial of any issue by jury, or for trial of the issue of compensation by jury or commission or both, that provision shall be followed.

(l) COSTS. Costs are not subject to Rule 54(d).

(As added Apr. 30, 1951, eff. Aug. 1, 1951; amended Jan. 21, 1963, eff. July 1, 1963; Apr. 29, 1985, eff. Aug. 1, 1985; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 25, 1988, eff. Aug. 1, 1988; Pub. L. 100-690, title VII, §7050, Nov. 18, 1988, 102 Stat. 4401; Apr. 22, 1993, eff. Dec. 1, 1993.)

NOTES OF ADVISORY COMMITTEE ON RULES—1951

Supplementary report

The Court will remember that at its conference on December 2, 1948, the discussion was confined to subdivision (h) of the rule (* * *), the particular question being whether the tribunal to award compensation should be a commission or a jury in cases where the Congress has not made specific provision on the subject. The Advisory Committee was agreed from the outset that a rule should not be promulgated which would overturn the decision of the Congress as to the kind of tribunal to fix compensation, provided that the system established by Congress was found to be working well. We found two instances where the Congress had specified the kind of tribunal to fix compensation. One case was the District of Columbia (U.S.C., [former] Title 40, §§361-386) where a rather unique system exists under which the court is required in all cases to order the selection of a "jury" of five from among not less than twenty names drawn from "the special box provided by law." They must have the usual qualifications of jurors and in addition must be freeholders of the District and not in the service of the United States or the District. That system has been in effect for many years, and our inquiry revealed that it works well under the conditions prevailing in the District, and is satisfactory to the courts of the District, the legal profession and to property owners.

The other instance is that of the Tennessee Valley Authority, where the act of Congress (U.S.C., Title 16, §831x) provides that compensation is fixed by three disinterested commissioners appointed by the court, whose award goes before the District Court for confirmation or modification. The Advisory Committee made a thorough inquiry into the practical operation of the TVA commission system. We obtained from counsel for the TVA the results of their experience, which afforded convincing proof that the commission system is preferable under the conditions affecting TVA and that the jury system would not work satisfactorily. We then, under date of February 6, 1947, wrote every Federal judge who had ever sat in a TVA condemnation case, asking his views as to whether the commission system is satisfactory and whether a jury system should be preferred. Of 21 responses from the judges 17 approved the commission system and opposed the substitution of a jury system for the TVA. Many of the judges went further and opposed the use of juries in any condemnation cases. Three of the judges preferred the jury system, and one dealt only with the TVA provision for a three judge district court. The Advisory Committee has not considered abolition of the three judge requirement of the TVA Act, because it seemed to raise a question of jurisdiction, which cannot be altered by rule. Nevertheless the Department of Justice continued its advocacy of the jury system for its asserted expedition and economy; and others favored a uniform procedure. In consequence of these divided counsels the Advisory Committee was itself divided, but in its May 1948 Report to the Court recommended the following rule as approved by a majority (* * *):

(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 deter-

mination 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.

The effect of this was to preserve the existing systems in the District of Columbia and in TVA cases, but to provide for a jury to fix compensation in all other cases.

Before the Court's conference of December 2, 1948, the Chief Justice informed the Committee that the Court was particularly interested in the views expressed by Judge John Paul, judge of the United States District Court for the Western District of Virginia, in a letter from him to the chairman of the Advisory Committee, dated February 13, 1947. Copies of all the letters from judges who had sat in TVA cases had been made available to the Court, and this letter from Judge Paul is one of them. Judge Paul strongly opposed jury trials and recommended the commission system in large projects like the TVA, and his views seemed to have impressed the Court and to have been the occasion for the conference.

The reasons which convinced the Advisory Committee that the use of commissioners instead of juries is desirable in TVA cases were these:

1. The TVA condemns large areas of land of similar kind, involving many owners. Uniformity in awards is essential. The commission system tends to prevent discrimination and provide for uniformity in compensation. The jury system tends to lack of uniformity. Once a reasonable and uniform standard of values for the area has been settled by a commission, litigation ends and settlements result.

2. Where large areas are involved many small landowners reside at great distances from the place where a court sits. It is a great hardship on humble people to have to travel long distances to attend a jury trial. A commission may travel around and receive the evidence of the owner near his home.

3. It is impracticable to take juries long distances to view the premises.

4. If the cases are tried by juries the burden on the time of the courts is excessive.

These considerations are the very ones Judge Paul stressed in his letter. He pointed out that they applied not only to the TVA but to other large governmental projects, such as flood control, hydroelectric power, reclamation, national forests, and others. So when the representatives of the Advisory Committee appeared at the Court's conference December 2, 1948, they found it difficult to justify the proposed provision in subdivision (h) of the rule that a jury should be used to fix compensation in all cases where Congress had not specified the tribunal. If our reasons for preserving the TVA system were sound, provision for a jury in similar projects of like magnitude seemed unsound.

Aware of the apparent inconsistency between the acceptance of the TVA system and the provision for a jury in all other cases, the members of the Committee attending the conference of December 2, 1948, then suggested that in the other cases the choice of jury or commission be left to the discretion of the District Court, going back to a suggestion previously made by Committee members and reported at page 15 of the Preliminary Draft of June 1947. They called the attention of the Court to the fact that the entire Advisory Committee had not been consulted about this suggestion and proposed that the draft be returned to the Committee for further consideration, and that was done.

The proposal we now make for subdivision (h) is 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; 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, unless the court in its discretion orders that, because of the character, location, or quantity of the property 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 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.

In the 1948 draft the Committee had been almost evenly divided as between jury or commission and that made it easy for us to agree on the present draft. It would be difficult to state in a rule the various conditions to control the District Court in its choice and we have merely stated generally the matters which should be considered by the District Court.

The rule as now drafted seems to meet Judge Paul's objection. In large projects like the TVA the court may decide to use a commission. In a great number of cases involving only sites for buildings or other small areas, where use of a jury is appropriate, a jury may be chosen. The District Court's discretion may also be influenced by local preference or habit, and the preference of the Department of Justice and the reasons for its preference will doubtless be given weight. The Committee is convinced that there are some types of cases in which use of a commission is preferable and others in which a jury may be appropriately used, and that it would be a mistake to provide that the same kind of tribunal should be used in all cases. We think the available evidence clearly leads to that conclusion.

When this suggestion was made at the conference of December 2, 1948, representatives of the Department of Justice opposed it, expressing opposition to the use of a commission in any case. Their principal ground for opposition to commissions was then based on the assertion that the commission system is too expensive because courts allow commissioners too large compensation. The obvious answer to that is that the compensation of commissioners ought to be fixed or limited by law, as was done in the TVA Act, and the agency dealing with appropriations—either the Administrative Office or some other interested department of the government—should correct that evil, if evil there be, by obtaining such legislation. Authority to promulgate rules of procedure does not include power to fix compensation of government employees. The Advisory Committee is not convinced that even without such legislation the commission system is more expensive than the jury system. The expense of jury trials includes not only the per diem and mileage of the jurors impaneled for a case but like items for the entire venire. In computing cost of jury trials, the salaries of court officials, judges, clerks, marshals and deputies must be considered. No figures have been given to the Committee to establish that the cost of the commission system is the greater.

We earnestly recommend the rule as now drafted for promulgation by the Court, in the public interest.

The Advisory Committee have given more time to this rule, including time required for conferences with the Department of Justice to hear statements of its representatives, than has been required by any other rule. The rule may not be perfect but if faults develop in practice they may be promptly cured. Certainly the present conformity system is atrocious.

Under state practices, just compensation is normally determined by one of three methods: by commissioners; by commissioners with a right of appeal to and trial de novo before a jury; and by a jury, without a commission. A trial to the court or to the court including a master are, however, other methods that are occasionally used. Approximately 5 states use only commis-

sioners; 23 states use commissioners with a trial de novo before a jury; and 18 states use only the jury. This classification is advisedly stated in approximate terms, since the same state may utilize diverse methods, depending upon different types of condemnations or upon the locality of the property, and since the methods used in a few states do not permit of a categorical classification. To reject the proposed rule and leave the situation as it is would not satisfy the views of the Department of Justice. The Department and the Advisory Committee agree that the use of a commission, with appeal to a jury, is a wasteful system.

The Department of Justice has a voluminous "Manual on Federal Eminent Domain," the 1940 edition of which has 948 pages with an appendix of 73 more pages. The title page informs us the preparation of the manual was begun during the incumbency of Attorney General Cummings, was continued under Attorney General Murphy, and completed during the incumbency of Attorney General Jackson. The preface contains the following statement:

It should also be mentioned that the research incorporated in the manual would be of invaluable assistance in the drafting of a new uniform code, or rules of court, for federal condemnation proceedings, which are now greatly confused, not only by the existence of over seventy federal statutes governing condemnations for different purposes—statutes which sometimes conflict with one another—but also by the countless problems occasioned by the requirements of conformity to state law. Progress of the work has already demonstrated that the need for such reform exists.

It is not surprising that more than once Attorneys General have asked the Advisory Committee to prepare a federal rule and rescue the government from this morass.

The Department of Justice has twice tried and failed to persuade the Congress to provide that juries shall be used in all condemnation cases. The debates in Congress show that part of the opposition to the Department of Justice's bills came from representatives opposed to jury trials in all cases, and in part from a preference for the conformity system. Our present proposal opens the door for district judges to yield to local preferences on the subject. It does much for the Department's points of view. It is a great improvement over the present so-called conformity system. It does away with the wasteful "double" system prevailing in 23 states where awards by commissions are followed by jury trials.

Aside from the question as to the choice of a tribunal to award compensation, the proposed rule would afford a simple and improved procedure.

We turn now to an itemized explanation of the other changes we have made in the 1948 draft. Some of these result from recent amendments to the Judicial Code. Others result from a reconsideration by the Advisory Committee of provisions which we thought could be improved.

1. In the amended Judicial Code, the district courts are designated as "United States District Courts" instead of "District Courts of the United States," and a corresponding change has been made in the rule.

2. After the 1948 draft was referred back to the committee, the provision in subdivision (c)(2), relating to naming defendants, * * * which provided that 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 type and value of the property involved," the phrase in quotation marks was changed to read "in the light of the character and value of the property involved and the interests to be acquired."

The Department of Justice made a counter proposal * * * that there be substituted the words "reasonably diligent search of the records, considering the type." When the American Bar Association thereafter considered the draft, it approved the Advisory Committee's draft of this subdivision, but said that it had no objec-

tion to the Department's suggestion. Thereafter, in an effort to eliminate controversy, the Advisory Committee accepted the Department's suggestion as to (c)(2), using the word "character" instead of the word "type."

The Department of Justice also suggested that in subdivision (d)(3)(2) relating to service by publication, the search for a defendant's residence as a preliminary to publication be limited to the state in which the complaint is filed. Here again the American Bar Association's report expressed the view that the Department's suggestion was unobjectionable and the Advisory Committee thereupon adopted it.

3. Subdivision (k) of the 1948 draft is as follows:

(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, 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.

Occasionally condemnation cases under a state's power of eminent domain reach a United States District Court because of diversity of citizenship. Such cases are rare, but provision should be made for them.

The 1948 draft of (k) required a district court to decide whether a provision of state law specifying the tribunal to award compensation is or is not a "condition" attached to the exercise of the state's power. On reconsideration we concluded that it would be wise to redraft (k) so as to avoid that troublesome question. As to conditions in state laws which affect the substantial rights of a litigant, the district courts would be bound to give them effect without any rule on the subject. Accordingly we present two alternative revisions. One suggestion supported by a majority of the Advisory Committee is as follows:

(k) Condemnation Under a State's Power of Eminent Domain. 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 makes provision for trial of any issue by jury, or for trial of the issue of compensation by jury or commission or both, that provision shall be followed.

The other is as follows:

(k) Condemnation Under a State's Power of Eminent Domain. 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 gives a right to a trial by jury such a trial shall in any case be allowed to the party demanding it within the time permitted by these rules, and in that event no hearing before a commission shall be had.

The first proposal accepts the state law as to the tribunals to fix compensation, and in that respect leaves the parties in precisely the same situation as if the case were pending in a state court, including the use of a commission with appeal to a jury, if the state law so provides. It has the effect of avoiding any question as to whether the decisions in *Erie R. Co. v. Tompkins* and later cases have application to a situation of this kind.

The second proposal gives the parties a right to a jury trial if that is provided for by state law, but prevents the use of both commission and jury. Those members of the Committee who favor the second proposal do so because of the obvious objections to the double trial, with a commission and appeal to a jury. As the decisions in *Erie R. Co. v. Tompkins* and later cases may have a bearing on this point, and the Committee is divided, we think both proposals should be placed before the Court.

4. The provision * * * of the 1948 draft * * * prescribing the effective date of the rule was drafted before the recent amendment of the Judicial Code on that subject. On May 10, 1950, the President approved an act which amended section 2072 of Title 28, United States Code, to read as follows:

Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later

than the first day of May, and until the expiration of 90 days after they have been thus reported.

To conform to the statute now in force, we suggest a provision as follows:

Effective Date. This Rule 71A and the amendment to Rule 81(a) will take effect on August 1, 1951. Rule 71A governs all proceedings in actions brought after it takes effect and also all further proceedings in actions then pending, except to the extent that in the opinion of the court its application in a particular action pending when the rule takes effect would not be feasible or would work injustice, in which event the former procedure applies.

If the rule is not reported to Congress by May 1, 1951, this provision must be altered.

5. We call attention to the fact that the proposed rule does not contain a provision for the procedure to be followed in order to exercise the right of the United States to take immediate possession or title, when the condemnation proceeding is begun. There are several statutes conferring such a right which are cited in the original notes to the May 1948 draft * * *. The existence of this right is taken into account in the rule. In paragraph (c)(2), * * * it is stated: "Upon the commencement of the action, the plaintiff need join as defendants only the persons having or claiming an interest in the property whose names are then known." That is to enable the United States to exercise the right to immediate title or possession without the delay involved in ascertaining the names of all interested parties. The right is also taken into account in the provision relating to dismissal (paragraph (i) subdivisions (1), (2), and (3), * * *); also in paragraph (j) relating to deposits and their distribution.

The Advisory Committee considered whether the procedure for exercising the right should be specified in the rule and decided against it, as the procedure now being followed seems to be giving no trouble, and to draft a rule to fit all the statutes on the subject might create confusion.

The American Bar Association has taken an active interest in a rule for condemnation cases. In 1944 its House of Delegates adopted a resolution which among other things resolved:

That before adoption by the Supreme Court of the United States of any redraft of the proposed rule, time and opportunity should be afforded to the bar to consider and make recommendations concerning any such redraft.

Accordingly, in 1950 the revised draft was submitted to the American Bar Association and its section of real property, probate and trust law appointed a committee to consider it. That committee was supplied with copies of the written statement from the Department of Justice giving the reasons relied on by the Department for preferring a rule to use juries in all cases. The Advisory Committee's report was approved at a meeting of the section of real property law, and by the House of Delegates at the annual meeting of September 1950. The American Bar Association report gave particular attention to the question whether juries or commissions should be used to fix compensation, approved the Advisory Committee's solution appearing in their latest draft designed to allow use of commissions in projects comparable to the TVA, and rejected the proposal for use of juries in all cases.

In November 1950 a committee of the Federal Bar Association, the chairman of which was a Special Assistant to the Attorney General, made a report which reflected the attitude of the Department of Justice on the condemnation rule.

Aside from subdivision (h) about the tribunal to award compensation the final draft of the condemnation rule here presented has the approval of the American Bar Association and, we understand, the Department of Justice, and we do not know of any opposition to it. Subdivision (h) has the unanimous approval of the Advisory Committee and has been approved by the American Bar Association. The use of commissions in TVA cases, and, by fair inference, in cases comparable

to the TVA, is supported by 17 out of 20 judges who up to 1947 had sat in TVA cases. The legal staff of the TVA has vigorously objected to the substitution of juries for commissions in TVA cases. We regret to report that the Department of Justice still asks that subdivision (h) be altered to provide for jury trials in all cases where Congress has not specified the tribunal. We understand that the Department approves the proposal that the system prevailing in 23 states for the "double" trial, by commission with appeal to and trial de novo before a jury, should be abolished, and also asks that on demand a jury should be substituted for a commission, in those states where use of a commission alone is now required. The Advisory Committee has no evidence that commissions do not operate satisfactorily in the case of projects comparable to the TVA.

Original report

General Statement. 1. Background. When the Advisory Committee was formulating its recommendations to the Court concerning rules of procedure, which subsequently became the Federal Rules of 1938, the Committee concluded at an early stage not to fix the procedure in condemnation cases. This is a matter principally involving the exercise of the federal power of eminent domain, as very few condemnation cases involving the state's power reach the United States District Courts. The Committee's reasons at that time were that inasmuch as condemnation proceedings by the United States are governed by statutes of the United States, prescribing different procedure for various agencies and departments of the government, or, in the absence of such statutes, by local state practice under the Conformity Act ([former] 40 U.S.C. sec. 258), it would be extremely difficult to draft a uniform rule satisfactory to the various agencies and departments of the government and to private parties; and that there was no general demand for a uniform rule. The Committee continued in that belief until shortly before the preparation of the April 1937 Draft of the Rules, when the officials of the Department of Justice having to do with condemnation cases urgently requested the Committee to propose rules on this subject. The Committee undertook the task and drafted a Condemnation Rule which appeared for the first time as Rule 74 of the April 1937 Draft. After the publication and distribution of this initial draft many objections were urged against it by counsel for various governmental agencies, whose procedure in condemnation cases was prescribed by federal statutes. Some of these agencies wanted to be excepted in whole or in part from the operation of the uniform rule proposed in April 1937. And the Department of Justice changed its position and stated that it preferred to have government condemnations conducted by local attorneys familiar with the state practice, which was applied under the Conformity Act where the Acts of Congress do not prescribe the practice; that it preferred to work under the Conformity Act without a uniform rule of procedure. The profession generally showed little interest in the proposed uniform rule. For these reasons the Advisory Committee in its Final Report to the Court in November 1937 proposed that all of Rule 74 be stricken and that the Federal Rules be made applicable only to appeals in condemnation cases. See note to Rule 74 of the Final Report.

Some six or seven years later when the Advisory Committee was considering the subject of amendments to the Federal Rules both government officials and the profession generally urged the adoption of some uniform procedure. This demand grew out of the volume of condemnation proceedings instituted during the war, and the general feeling of dissatisfaction with the diverse condemnation procedures that were applicable in the federal courts. A strongly held belief was that both the sovereign's power to condemn and the property owner's right to compensation could be promoted by a simplified rule. As a consequence the Committee proposed a Rule 71A on the subject of condemnation in its Preliminary Draft of May 1944. In the Second Prelimi-

nary Draft of May 1945 this earlier proposed Rule 71A was, however, omitted. The Committee did not then feel that it had sufficient time to prepare a revised draft satisfactorily to it which would meet legitimate objections made to the draft of May 1944. To avoid unduly delaying the proposed amendments to existing rules the Committee concluded to proceed in the regular way with the preparation of the amendments to these rules and deal with the question of a condemnation rule as an independent matter. As a consequence it made no recommendations to the Court on condemnation in its Final Report of Proposed Amendments of June 1946; and the amendments which the Court adopted in December 1946 did not deal with condemnation. After concluding its task relative to amendments, the Committee returned to a consideration of eminent domain, its proposed Rule 71A of May 1944, the suggestions and criticisms that had been presented in the interim, and in June 1947 prepared and distributed to the profession another draft of a proposed condemnation rule. This draft contained several alternative provisions, specifically called attention to and asked for opinion relative to these matters, and in particular as to the constitution of the tribunal to award compensation. The present draft was based on the June 1947 formulation, in light of the advice of the profession on both matters of substance and form.

2. Statutory Provisions. The need for a uniform condemnation rule in the federal courts arises from the fact that by various statutes Congress has prescribed diverse procedures for certain condemnation proceedings, and, in the absence of such statutes, has prescribed conformity to local state practice under [former] 40 U.S.C. §258. This general conformity adds to the diversity of procedure since in the United States there are multifarious methods of procedure in existence. Thus in 1931 it was said that there were 269 different methods of judicial procedure in different classes of condemnation cases and 56 methods of nonjudicial or administrative procedure. First Report of Judicial Council of Michigan, 1931, §46, pp. 55-56. These numbers have not decreased. Consequently, the general requirement of conformity to state practice and procedure, particularly where the condemnor is the United States, leads to expense, delay and uncertainty. In advocacy of a uniform federal rule, see Armstrong, Proposed Amendments to Federal Rules for Civil Procedure 1944, 4 F.R.D. 124, 134; id., Report of the Advisory Committee on Federal Rules of Civil Procedure Recommending Amendments, 1946, 5 F.R.D. 339, 357.

There are a great variety of Acts of Congress authorizing the exercise of the power of eminent domain by the United States and its officers and agencies. These statutes for the most part do not specify the exact procedure to be followed, but where procedure is prescribed, it is by no means uniform.

The following are instances of Acts which merely authorize the exercise of the power without specific declaration as to the procedure:

U.S.C., Title 16:

- §404c-11 (Mammoth Cave National Park; acquisition of lands, interests in lands or other property for park by the Secretary of the Interior).
- §426d (Stones River National Park; acquisition of land for parks by the Secretary of the Army).
- §450aa (George Washington Carver National Monument; acquisition of land by the Secretary of the Interior).
- §517 (National forest reservation; title to lands to be acquired by the Secretary of Agriculture).

U.S.C., Title 42:

- §§1805(b)(5), 1813(b) (Atomic Energy Act).

The following are instances of Acts which authorized condemnation and declare that the procedure is to conform with that of similar actions in state courts:

U.S.C., Title 16:

- §423k (Richmond National Battlefield Park; acquisition of lands by the Secretary of the Interior).

- §714 (Exercise by water power licensee of power of eminent domain).

U.S.C., Title 24:

- §78 (Condemnation of land for the former National Home for Disabled Volunteer Soldiers).

U.S.C., Title 33:

- §591 (Condemnation of lands and materials for river and harbor improvement by the Secretary of the Army).

U.S.C., Title 40:

- §257 [now 3113] (Condemnation of realty for sites for public building and for other public uses by the Secretary of the Treasury authorized).
- §258 [former] (Same procedure).

U.S.C., Title 50:

- §171 (Acquisition of land by the Secretary of the Army for national defense).
- §172 (Acquisition of property by the Secretary of the Army, etc., for production of lumber).
- §632 App. (Second War Powers Act, 1942; acquisition of real property for war purposes by the Secretary of the Army, the Secretary of the Navy and others).

The following are Acts in which a more or less complete code of procedure is set forth in connection with the taking:

U.S.C., Title 16:

- §831x (Condemnation by Tennessee Valley Authority).

U.S.C., Title 40:

- §§361-386 [former] (Acquisition of lands in District of Columbia for use of United States; condemnation).

3. Adjustment of Rule to Statutory Provisions. While it was apparent that the principle of uniformity should be the basis for a rule to replace the multiple diverse procedures set out above, there remained a serious question as to whether an exception could properly be made relative to the method of determining compensation. Where Congress had provided for conformity to state law the following were the general methods in use: an initial determination by commissioners, with appeal to a judge; an initial award, likewise made by commissioners, but with the appeal to a jury; and determination by a jury without a previous award by commissioners. In two situations Congress had specified the tribunal to determine the issue of compensation: condemnation by the Tennessee Valley Authority; and condemnation in the District of Columbia. Under the TVA procedure the initial determination of value is by three disinterested commissioners, appointed by the court, from a locality other than the one in which the land lies. Either party may except to the award of the commission; in that case the exceptions are to be heard by three district judges (unless the parties stipulate for a lesser number), with a right of appeal to the circuit court of appeals. The TVA is a regional agency. It is faced with the necessity of acquiring a very substantial acreage within a relatively small area, and charged with the task of carrying on within the Tennessee Valley and in cooperation with the local people a permanent program involving navigation and flood control, electric power, soil conservation, and general regional development. The success of this program is partially dependent upon the good will and cooperation of the people of the Tennessee Valley, and this in turn partially depends upon the land acquisition program. Disproportionate awards among landowners would create dissatisfaction and ill will. To secure uniformity in treatment Congress provided the rather unique procedure of the three-judge court to review de novo the initial award of the commissioners. This procedure has worked to the satisfaction of the property owners and the TVA. A full statement of the TVA position and ex-

perience is set forth in Preliminary Draft of Proposed Rule to Govern Condemnation Cases (June, 1947) 15-19. A large majority of the district judges with experience under this procedure approve it, subject to some objection to the requirement for a three-judge district court to review commissioners' awards. A statutory three-judge requirement is, however, jurisdictional and must be strictly followed. *Stratton v. St. Louis, Southwestern Ry. Co.*, 1930, 51 S.Ct. 8, 282 U.S. 10, 75 L.Ed. 135; *Ayrshire Collieries Corp. v. United States*, 1947, 67 S.Ct. 1168, 331 U.S. 132, 91 L.Ed. 1391. Hence except insofar as the TVA statute itself authorizes the parties to stipulate for a court of less than three judges, the requirement must be followed, and would seem to be beyond alteration by court rule even if change were thought desirable. Accordingly the TVA procedure is retained for the determination of compensation in TVA condemnation cases. It was also thought desirable to retain the specific method Congress had prescribed for the District of Columbia, which is a so-called jury of five appointed by the court. This is a local matter and the specific treatment accorded by Congress has given local satisfaction.

Aside from the foregoing limited exceptions dealing with the TVA and the District of Columbia, the question was whether a uniform method for determining compensation should be a commission with appeal to a district judge, or a commission with appeal to a jury, or a jury without a commission. Experience with the commission on a nationwide basis, and in particular with the utilization of a commission followed by an appeal to a jury, has been that the commission is time consuming and expensive. Furthermore, it is largely a futile procedure where it is preparatory to jury trial. Since in the bulk of states a land owner is entitled eventually to a jury trial, since the jury is a traditional tribunal for the determination of questions of value, and since experience with juries has proved satisfactory to both government and land owner, the right to jury trial is adopted as the general rule. Condemnation involving the TVA and the District of Columbia are the two exceptions. See Note to Subdivision (h), *infra*.

Note to Subdivision (a). As originally promulgated the Federal Rules governed appeals in condemnation proceedings but were not otherwise applicable. Rule 81(a)(7). Pre-appeal procedure, in the main, conformed to state procedure. See statutes and discussion, *supra*. The purpose of Rule 71A is to provide a uniform procedure for condemnation in the federal district courts, including the District of Columbia. To achieve this purpose Rule 71A prescribes such specialized procedure as is required by condemnation proceedings, otherwise it utilizes the general framework of the Federal Rules where specific detail is unnecessary. The adoption of Rule 71A, of course, renders paragraph (7) of Rule 81(a) unnecessary.

The promulgation of a rule for condemnation procedure is within the rule-making power. The Enabling Act [Act of June 19, 1934, c. 651, §§1, 2 (48 Stat. 1064), 28 U.S.C. §§723b, 723c [see 2072]] gives the Supreme Court "the power to prescribe, by general rules * * * the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law." Such rules, however, must not abridge, enlarge, or modify substantive rights. In *Kohl v. United States*, 1875, 91 U.S. 367, 23 L.Ed. 449, a proceeding instituted by the United States to appropriate land for a post-office site under a statute enacted for such purpose, the Supreme Court held that "a proceeding to take land in virtue of the government's eminent domain, and determining the compensation to be made for it, is * * * a suit at common law, when initiated in a court." See also *Madisonville Traction Co. v. Saint Bernard Mining Co.*, 1905, 25 S.Ct. 251, 196 U.S. 239, 23 L.Ed. 449, *infra*, under subdivision (k). And the Conformity Act, [former] 40 U.S.C. §258, which is superseded by Rule 71A, deals only with "practice, pleadings, forms and proceedings and not with matters of substantive laws." *United States v. 243.22 Acres of Land in Village of Farmingdale, Town of Babylon, Suffolk County, N.Y.*, D.C.N.Y. 1942, 43 F.Supp.

561, affirmed 129 F.2d 678, certiorari denied, 63 S.Ct. 441, 317 U.S. 698, 87 L.Ed. 558.

Rule 71A affords a uniform procedure for all cases of condemnation invoking the national power of eminent domain, and, to the extent stated in subdivision (k), for cases invoking a state's power of eminent domain; and supplants all statutes prescribing a different procedure. While the almost exclusive utility of the rule is for the condemnation of real property, it also applies to the condemnation of personal property, either as an incident to real property or as the sole object of the proceeding, when permitted or required by statute. See 38 U.S.C. [former] §438j (World War Veterans' Relief Act); 42 U.S.C. §§1805, 1811, 1813 (Atomic Energy Act); 50 U.S.C. §79 (Nitrates Act); 50 U.S.C. §§161-166 (Helium Gas Act). Requisitioning of personal property with the right in the owner to sue the United States, where the compensation cannot be agreed upon (see 42 U.S.C. §1813, *supra*, for example) will continue to be the normal method of acquiring personal property and Rule 71A in no way interferes with or restricts any such right. Only where the law requires or permits the formal procedure of condemnation to be utilized will the rule have any applicability to the acquisition of personal property.

Rule 71A is not intended to and does not supersede the Act of February 26, 1931, ch. 307, §§1-5 (46 Stat. 1421), 40 U.S.C. §§258a-258e [now 40 U.S.C. 3114, 3115, 3118], which is a supplementary condemnation statute, permissive in its nature and designed to permit the prompt acquisition of title by the United States, pending the condemnation proceeding, upon a deposit in court. See *United States v. 76,800 Acres, More or Less, of Land, in Bryan and Liberty Counties, Ga.*, D.C.Ga. 1942, 44 F.Supp. 653; *United States v. 17,280 Acres of Land, More or Less, Situated in Saunders County, Nebr.*, D.C.Neb. 1942, 47 F.Supp. 267. The same is true insofar as the following or any other statutes authorize the acquisition of title or the taking of immediate possession:

U.S.C., Title 33:

§594 (When immediate possession of land may be taken; for a work of river and harbor improvements).

U.S.C., Title 42:

§1813(b) (When immediate possession may be taken under Atomic Energy Act).

U.S.C., Title 50:

§171 (Acquisition of land by the Secretary of the Army for national defense).

§632 App. (Second War Powers Act, 1942; acquisition of real property for war purposes by the Secretary of the Army, the Secretary of the Navy, and others).

Note to Subdivision (b). This subdivision provides for broad joinder in accordance with the tenor of other rules such as Rule 18. To require separate condemnation proceedings for each piece of property separately owned would be unduly burdensome and would serve no useful purpose. And a restriction that only properties may be joined which are to be acquired for the same public use would also cause difficulty. For example, a unified project to widen a street, construct a bridge across a navigable river, and for the construction of approaches to the level of the bridge on both sides of the river might involve acquiring property for different public uses. Yet it is eminently desirable that the plaintiff may in one proceeding condemn all the property interests and rights necessary to carry out this project. Rule 21 which allows the court to sever and proceed separately with any claim against a party, and Rule 42(b) giving the court broad discretion to order separate trials give adequate protection to all defendants in condemnation proceedings.

Note to Subdivision (c). Since a condemnation proceeding is in rem and since a great many property owners are often involved, paragraph (1) requires the property to be named and only one of the owners. In other re-

spects the caption will contain the name of the court, the title of the action, file number, and a designation of the pleading as a complaint in accordance with Rule 10(a).

Since the general standards of pleading are stated in other rules, paragraph (2) prescribes only the necessary detail for condemnation proceedings. Certain statutes allow the United States to acquire title or possession immediately upon commencement of an action. See the Act of February 26, 1931, ch. 307 §§1-5 (46 Stat. 1421), 40 U.S.C. §§258a-258e [now 40 U.S.C. 3114, 3115, 3118], supra; and 33 U.S.C. §594, 42 U.S.C. §1813(b), 50 U.S.C. §§171, 632, supra. To carry out the purpose of such statutes and to aid the condemnor in instituting the action even where title is not acquired at the outset, the plaintiff is initially required to join as defendants only the persons having or claiming an interest in the property whose names are then known. This in no way prejudices the property owner, who must eventually be joined as a defendant, served with process, and allowed to answer before there can be any hearing involving the compensation to be paid for his piece of property. The rule requires the plaintiff to name all persons having or claiming an interest in the property of whom the plaintiff has learned and, more importantly, those appearing of record. By charging the plaintiff with the necessity to make "a search of the records of the extent commonly made by competent searchers of title in the vicinity in light of the type and value of the property involved" both the plaintiff and property owner are protected. Where a short term interest in property of little value is involved, as a two or three year easement over a vacant land for purposes of ingress and egress to other property, a search of the records covering a long period of time is not required. Where on the other hand fee simple title in valuable property is being condemned the search must necessarily cover a much longer period of time and be commensurate with the interests involved. But even here the search is related to the type made by competent title searchers in the vicinity. A search that extends back to the original patent may be feasible in some midwestern and western states and be proper under certain circumstances. In the Atlantic seaboard states such a search is normally not feasible nor desirable. There is a common sense business accommodation of what title searchers can and should do. For state statutes requiring persons appearing as owners or otherwise interested in the property to be named as defendants, see 3 Colo. Stat. Ann., 1935, c. 61, §2; Ill. Ann. Stat. (Smith-Hurd) c. 47, §2; 1 Iowa Code, 1946, §472.3; Kans. Stat. Ann., 1935, §26-101; 2 Mass. Laws Ann., 1932, ch. 80A, §4; 7 Mich. Stat. Ann., 1936, §8.2; 2 Minn. Stat., Mason, 1927, §6541; 20 N.J. Stat. Ann., 1939, §1-2; 3 Wash. Revised Stat., Remington, 1932, Title 6, §891. For state provisions allowing persons whose names are not known to be designated under the descriptive term of "unknown owner", see Hawaii Revised Laws, 1945, c. 8, §310 ("such [unknown] defendant may be joined in the petition under a fictitious name."); Ill. Ann. Stat., Smith-Hurd, c. 47, §2 ("Persons interested, whose names are unknown, may be made parties defendant by the description of the unknown owners; . . ."); Maryland Code Ann., 1939, Ar. 33A, §1 ("In case any owner or owners is or are not known, he or they may be described in such petition as the unknown owner or owners, or the unknown heir or heirs of a deceased owner."); 2 Mass. Laws Ann., 1932, c. 80A, §4 ("Persons not in being, unascertained or unknown who may have an interest in any of such land shall be made parties respondent by such description as seems appropriate, * * *"); New Mex. Stat. Ann., 1941, §25-901 ("the owners * * * shall be parties defendant, by name, if the names are known, and by description of the unknown owners of the land therein described, if their names are unknown."); Utah Code Ann., 1943, §104-61-7 ("The names of all owners and claimants of the property, if known, or a statement that they are unknown, who must be styled defendants").

The last sentence of paragraph (2) enables the court to expedite the distribution of a deposit, in whole or in

part, as soon as pertinent facts of ownership, value and the like are established. See also subdivision (j).

The signing of the complaint is governed by Rule 11.

Note to Subdivision (d). In lieu of a summons, which is the initial process in other civil actions under Rule 4 (a), subdivision (d) provides for a notice which is to contain sufficient information so that the defendant in effect obtains the plaintiff's statement of his claim against the defendant to whom the notice is directed. Since the plaintiff's attorney is an officer of the court and to prevent unduly burdening the clerk of the court, paragraph (1) of subdivision (d) provides that plaintiff's attorney shall prepare and deliver a notice or notices to the clerk. Flexibility is provided by the provision for joint or several notices, and for additional notices. Where there are only a few defendants it may be convenient to prepare but one notice directed to all the defendants. In other cases where there are many defendants it will be more convenient to prepare two or more notices; but in any event a notice must be directed to each named defendant. Paragraph (2) provides that the notice is to be signed by the plaintiff's attorney. Since the notice is to be delivered to the clerk, the issuance of the notice will appear of record in the court. The clerk should forthwith deliver the notice or notices for service to the marshal or to a person specially appointed to serve the notice, Rule 4 (a). The form of the notice is such that, in addition to informing the defendant of the plaintiff's statement of claim, it tells the defendant precisely what his rights are. Failure on the part of the defendant to serve an answer constitutes a consent to the taking and to the authority of the court to proceed to fix compensation therefor, but it does not preclude the defendant from presenting evidence as to the amount of compensation due him or in sharing the award of distribution. See subdivision (e); Form 28.

While under Rule 4(f) the territorial limits of a summons are normally the territorial limits of the state in which the district court is held, the territorial limits for personal service of a notice under Rule 71A (d)(3) are those of the nation. This extension of process is here proper since the aim of the condemnation proceeding is not to enforce any personal liability and the property owner is helped, not imposed upon, by the best type of service possible. If personal service cannot be made either because the defendant's whereabouts cannot be ascertained, or, if ascertained, the defendant cannot be personally served, as where he resides in a foreign country such as Canada or Mexico, then service by publication is proper. The provisions for this type of service are set forth in the rule and are in no way governed by 28 U.S.C. §118.

Note to Subdivision (e). Departing from the scheme of Rule 12, subdivision (e) requires all defenses and objections to be presented in an answer and does not authorize a preliminary motion. There is little need for the latter in condemnation proceedings. The general standard of pleading is governed by other rules, particularly Rule 8, and this subdivision (e) merely prescribes what matters the answer should set forth. Merely by appearing in the action a defendant can receive notice of all proceedings affecting him. And without the necessity of answering a defendant may present evidence as to the amount of compensation due him, and he may share in the distribution of the award. See also subdivision (d)(2); Form 28.

Note to Subdivision (f). Due to the number of persons who may be interested in the property to be condemned, there is a likelihood that the plaintiff will need to amend his complaint, perhaps many times, to add new parties or state new issues. This subdivision recognizes that fact and does not burden the court with applications by the plaintiff for leave to amend. At the same time all defendants are adequately protected; and their need to amend the answer is adequately protected by Rule 15, which is applicable by virtue of subdivision (a) of this Rule 71A.

Note to Subdivision (g). A condemnation action is a proceeding in rem. Commencement of the action as against a defendant by virtue of his joinder pursuant to

subdivision (c)(2) is the point of cut-off and there is no mandatory requirement for substitution because of a subsequent change of interest, although the court is given ample power to require substitution. Rule 25 is inconsistent with subdivision (g) and hence inapplicable. Accordingly, the time periods of Rule 25 do not govern to require dismissal nor to prevent substitution.

Note to Subdivision (h). This subdivision prescribes the method for determining the issue of just compensation in cases involving the federal power of eminent domain. The method of jury trial provided by subdivision (h) will normally apply in cases involving the state power by virtue of subdivision (k).

Congress has specially constituted a tribunal for the trial of the issue of just compensation in two instances: condemnation under the Tennessee Valley Authority Act; and condemnation in the District of Columbia. These tribunals are retained for reasons set forth in the General Statement: 3. Adjustment of Rule to Statutory Provisions, *supra*. Subdivision (h) also has prospective application so that if Congress should create another special tribunal, that tribunal will determine the issue of just compensation. Subject to these exceptions the general method of trial of that issue is to be by jury if any party demands it, otherwise that issue, as well as all other issues, are to be tried by the court.

As to the TVA procedure that is continued, U.S.C., Title 16, §831x requires that three commissioners be appointed to fix the compensation; that exceptions to their award are to be heard by three district judges (unless the parties stipulate for a lesser number) and that the district judges try the question *de novo*; that an appeal to the circuit court of appeals may be taken within 30 days from the filing of the decision of the district judges; and that the circuit court of appeals shall on the record fix compensation "without regard to the awards of findings theretofore made by the commissioners or the district judges." The mode of fixing compensation in the District of Columbia, which is also continued, is prescribed in U.S.C., [former] Title 40, §§361-386. Under §371 the court is required in all cases to order the selection of a jury of five from among not less than 20 names, drawn "from the special box provided by law." They must have the usual qualifications of jurors and in addition must be freeholders of the District, and not in the service of the United States or the District. A special oath is administered to the chosen jurors. The trial proceeds in the ordinary way, except that the jury is allowed to separate after they have begun to consider their verdict.

There is no constitutional right to jury trial in a condemnation proceeding. *Bauman v. Ross*, 1897, 17 S.Ct. 966, 167 U.S. 548, 42 L.Ed. 270. See, also, Hines, Does the Seventh Amendment to the Constitution of the United States Require Jury Trials in all Condemnation Proceedings? 1925, 11 Va.L.Rev. 505; Blair, Federal Condemnation Proceedings and the Seventh Amendment 1927, 41 Harv.L.Rev. 29; 3 Moore's Federal Practice 1938, 3007. Prior to Rule 71A, jury trial in federal condemnation proceedings was, however, enjoyed under the general conformity statute, [former] 40 U.S.C. §258, in states which provided for jury trial. See generally, 2 Lewis, Eminent Domain 3d ed. 1909, §§509, 510; 3 Moore, *op. cit. supra*. Since the general conformity statute is superseded by Rule 71A, see *supra* under subdivision (a), and since it was believed that the rule to be substituted should likewise give a right to jury trial, subdivision (h) establishes that method as the general one for determining the issue of just compensation.

Note to Subdivision (i). Both the right of the plaintiff to dismiss by filing a notice of dismissal and the right of the court to permit a dismissal are circumscribed to the extent that where the plaintiff has acquired the title or a lesser interest or possession, *viz.*, any property interest for which just compensation should be paid, the action may not be dismissed, without the defendant's consent, and the property owner remitted to another court, such as the Court of Claims, to recover just compensation for the property right taken. Circuity of action is thus prevented without increasing the

liability of the plaintiff to pay just compensation for any interest that is taken. Freedom of dismissal is accorded, where both the condemnor and condemnee agree, up to the time of the entry of judgment vesting plaintiff with title. And power is given to the court, where the parties agree, to vacate the judgment and thus revest title in the property owner. In line with Rule 21, the court may at any time drop a defendant who has been unnecessarily or improperly joined as where it develops that he has no interest.

Note to Subdivision (j). Whatever the substantive law is concerning the necessity of making a deposit will continue to govern. For statutory provisions concerning deposit in court in condemnation proceedings by the United States, see U.S.C., Title 40, §258a [now 40 U.S.C. 3114(a)-(d)]; U.S.C., Title 33, §594—acquisition of title and possession statutes referred to in note to subdivision (a), *supra*. If the plaintiff is invoking the state's power of eminent domain the necessity of deposit will be governed by the state law. For discussion of such law, see 1 Nichols, Eminent Domain, 2d ed. 1917, §§209-216. For discussion of the function of deposit and the power of the court to enter judgment in cases both of deficiency and overpayment, see *United States v. Miller*, 1943, 63 S.Ct. 276, 317 U.S. 369, 87 L.Ed. 336, 147 A.L.R. 55, rehearing denied, 63 S.Ct. 557, 318 U.S. 798, 87 L.Ed. 1162 (judgment in favor of plaintiff for overpayment ordered).

The court is to make distribution of the deposit as promptly as the facts of the case warrant. See also subdivision (c)(2).

Note to Subdivision (k). While the overwhelming number of cases that will be brought in the federal courts under this rule will be actions involving the federal power of eminent domain, a small percentage of cases may be instituted in the federal court or removed thereto on the basis of diversity or alienage which will involve the power of eminent domain under the law of a state. See *Boom Co. v. Patterson*, 1878, 98 U.S. 403, 25 L.Ed. 206; *Searl v. School District No. 2*, 1888, 8 S.Ct. 460, 124 U.S. 197, 31 L.Ed. 415; *Madisonville Traction Co. v. Saint Bernard Mining Co.*, 1905, 25 S.Ct. 251, 196 U.S. 239, 49 L.Ed. 462. In the Madisonville case, and in cases cited therein, it has been held that condemnation actions brought by state corporations in the exercise of a power delegated by the state might be governed by procedure prescribed by the laws of the United States, whether the cases were begun in or removed to the federal court. See also *Franzen v. Chicago, M. & St. P. Ry. Co.*, C.C.A.7th, 1921, 278 F. 370, 372.

Any condition affecting the substantial right of a litigant attached by state law is to be observed and enforced, such as making a deposit in court where the power of eminent domain is conditioned upon so doing. (See also subdivision (j)). Subject to this qualification, subdivision (k) provides that in cases involving the state power of eminent domain, the practice prescribed by other subdivisions of Rule 71A shall govern.

Note to Subdivision (l). Since the condemnor will normally be the prevailing party and since he should not recover his costs against the property owner, Rule 54(d), which provides generally that costs shall go to the prevailing party, is made inapplicable. Without attempting to state what the rule on costs is, the effect of subdivision (l) is that costs shall be awarded in accordance with the law that has developed in condemnation cases. This has been summarized as follows: "Costs of condemnation proceedings are not assessable against the condemnee, unless by stipulation he agrees to assume some or all of them. Such normal expenses of the proceeding as bills for publication of notice, commissioners' fees, the cost of transporting commissioners and jurors to take a view, fees for attorneys to represent defendants who have failed to answer, and witness' fees, are properly charged to the government, though not taxed as costs. Similarly, if it is necessary that a conveyance be executed by a commissioner, the United States pay his fees and those for recording the deed. However, the distribution of the award is a matter in which the United States has no legal interest.

Expenses incurred in ascertaining the identity of distributees and deciding between conflicting claimants are properly chargeable against the award, not against the United States, although United States attorneys are expected to aid the court in such matters as *amici curiae*." Lands Division Manual 861. For other discussion and citation, see *Grand River Dam Authority v. Jarvis*, C.C.A.10th, 1942, 124 F.2d 914. Costs may not be taxed against the United States except to the extent permitted by law. *United States v. 125.71 Acres of Land in Loyalhanna Tp., Westmoreland County, Pa.*, D.C.Pa. 1944, 54 F.Supp. 193; Lands Division Manual 859. Even if it were thought desirable to allow the property owner's costs to be taxed against the United States, this is a matter for legislation and not court rule.

NOTES OF ADVISORY COMMITTEE ON RULES—1963
AMENDMENT

This amendment conforms to the amendment of Rule 4(f).

NOTES OF ADVISORY COMMITTEE ON RULES—1985
AMENDMENT

Rule 71A(h) provides that except when Congress has provided otherwise, the issue of just compensation in a condemnation case may be tried by a jury if one of the parties so demands, unless the court in its discretion orders the issue determined by a commission of three persons. In 1980, the Comptroller General of the United States in a Report to Congress recommended that use of the commission procedure should be encouraged in order to improve and expedite the trial of condemnation cases. The Report noted that long delays were being caused in many districts by such factors as crowded dockets, the precedence given criminal cases, the low priority accorded condemnation matters, and the high turnover of Assistant United States Attorneys. The Report concluded that revising Rule 71A to make the use of the commission procedure more attractive might alleviate the situation.

Accordingly, Rule 71A(h) is being amended in a number of respects designed to assure the quality and utility of a Rule 71A commission. First, the amended Rule will give the court discretion to appoint, in addition to the three members of a commission, up to two additional persons as alternate commissioners who would hear the case and be available, at any time up to the filing of the decision by the three-member commission, to replace any commissioner who becomes unable or disqualified to continue. The discretion to appoint alternate commissioners can be particularly useful in protracted cases, avoiding expensive retrials that have been required in some cases because of the death or disability of a commissioner. Prior to replacing a commissioner an alternate would not be present at, or participate in, the commission's deliberations.

Second, the amended Rule requires the court, before appointment, to advise the parties of the identity and qualifications of each prospective commissioner and alternate. The court then may authorize the examination of prospective appointees by the parties and each party has the right to challenge for cause. The objective is to insure that unbiased and competent commissioners are appointed.

The amended Rule does not prescribe a qualification standard for appointment to a commission, although it is understood that only persons possessing background and ability to appraise real estate valuation testimony and to award fair and just compensation on the basis thereof would be appointed. In most situations the chairperson should be a lawyer and all members should have some background qualifying them to weigh proof of value in the real estate field and, when possible, in the particular real estate market embracing the land in question.

The amended Rule should give litigants greater confidence in the commission procedure by affording them certain rights to participate in the appointment of commission members that are roughly comparable to

the practice with regard to jury selection. This is accomplished by giving the court permission to allow the parties to examine prospective commissioners and by recognizing the right of each party to object to the appointment of any person for cause.

NOTES OF ADVISORY COMMITTEE ON RULES—1987
AMENDMENT

The amendments are technical. No substantive change is intended.

NOTES OF ADVISORY COMMITTEE ON RULES—1988
AMENDMENT

The amendment is technical. No substantive change is intended.

NOTES OF ADVISORY COMMITTEE ON RULES—1993
AMENDMENT

The references to the subdivisions of Rule 4 are deleted in light of the revision of that rule.

AMENDMENT BY PUBLIC LAW

1988—Subd. (e). Pub. L. 100-690, which directed amendment of subd. (e) by striking "taking of the defendants property" and inserting "taking of the defendant's property", could not be executed because of the intervening amendment by the Court by order dated Apr. 25, 1988, eff. Aug. 1, 1988.

Rule 72. Magistrate Judges; Pretrial Orders

(a) NONDISPOSITIVE MATTERS. A magistrate judge to whom a pretrial matter not dispositive of a claim or defense of a party is referred to hear and determine shall promptly conduct such proceedings as are required and when appropriate enter into the record a written order setting forth the disposition of the matter. Within 10 days after being served with a copy of the magistrate judge's order, a party may serve and file objections to the order; a party may not thereafter assign as error a defect in the magistrate judge's order to which objection was not timely made. The district judge to whom the case is assigned shall consider such objections and shall modify or set aside any portion of the magistrate judge's order found to be clearly erroneous or contrary to law.

(b) DISPOSITIVE MOTIONS AND PRISONER PETITIONS. A magistrate judge assigned without consent of the parties to hear a pretrial matter dispositive of a claim or defense of a party or a prisoner petition challenging the conditions of confinement shall promptly conduct such proceedings as are required. A record shall be made of all evidentiary proceedings before the magistrate judge, and a record may be made of such other proceedings as the magistrate judge deems necessary. The magistrate judge shall enter into the record a recommendation for disposition of the matter, including proposed findings of fact when appropriate. The clerk shall forthwith mail copies to all parties.

A party objecting to the recommended disposition of the matter shall promptly arrange for the transcription of the record, or portions of it as all parties may agree upon or the magistrate judge deems sufficient, unless the district judge otherwise directs. Within 10 days after being served with a copy of the recommended disposition, a party may serve and file specific, written objections to the proposed findings and recommendations. A party may respond to another party's objections within 10 days after being