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CRIMINAL RULES COMMITTEE
207 United States Supreme Court

Copy for Mr. Alexander Holtzoff, Secretary.

Monday, September 8, 1941.

Hearing Before the

ADVISORY COMMITTEE ON RULES OF CRIMINAL PROCEDURE

UNITED STATES SUPREME COURT

WASHINGTON, D. C.

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C O N T E N T S.

Monday, September 8, 1941.

Resolution of condolence on death of
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ADVISORY COMMITTEE ON RULES OF CRIMINAL PROCEDURE

UNITED STATES SUPREME COURT

WASHINGTON, D. C.

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Monday, September 8, 1941.

The Advisory Committee met at 10:30 o'clock a. m., in room 147-B, Supreme Court Building, Washington, D. C., Arthur T. Vanderbilt presiding.

Present: Arthur T. Vanderbilt, Chairman; James J. Robinson, Reporter; Alexander Holtzoff, Secretary; George James Burke, Frederick E. Crane, Gordon Dean, George H. Dession, Sheldon Glueck, George Z. Medalie, Lester B. Orfield, Murray Seasongood, J. O. Seth, Herbert Wechsler, G.Aaron Youngquist, George F. Longsdorf.

The Chairman. Gentlemen, it is my sorrowful duty to advise you of the death last Friday of our colleague Newman F. Baker.

Professor Baker had been on sabbatical leave from his law school during the second half of the academic year and had spent considerable of his time assisting on a similar enterprise for the State of Louisiana. Last Friday, with another member of the faculty of the University of Louisiana, he was in an automobile accident in which he was fatally injured.

It was my privilege to have worked two years with Mr. Baker as a member of the National Committee on Traffic Law Enforcement, and in the work of that committee I was very much impressed with the wealth of his knowledge and his tremendous ability to bring it to play on the problem in hand, as well as his entire freedom from confidence in the sufficiency of his own

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opinion, and his willingness to listen to the ideas of others who he must have felt were far less adequately informed than he.

I have asked Mr. Holtzoff to prepare a resolution, and if you approve of it I suggest we adopt it without formal motion, by standing. Mr. Holtzoff will read the resolution.

Mr. Holtzoff (reading):

"Professor Newman F. Baker, of Northwestern University Law School, a member of the Advisory Committee on Federal Rules of Criminal Procedure, met with a tragic and untimely death in an automobile accident on September 5, 1941.

"By his accomplishments in the field of criminal law and procedure Professor Baker had made constructive contributions of permanent value to the advancement of the administration of justice. By his affable personality and sterling qualities he had endeared himself to those who had the good fortune to be acquainted with him.

"Resolved, That the Advisory Committee on Federal Rules of Criminal Procedure hereby expresses its profound sorrow at Professor Baker's death and extends it deep sympathy to his family.

"Resolved, That copies of these resolutions be forwarded to Professor Baker's widow."

(All the committee members rose.)

The Chairman. The motion is carried.

There are just one or two preliminary matters that we should take up. First, what is your pleasure as to the hours of our sessions? I should like to recommend tentatively that

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we sit from 9:30 until 12:30, 1:30 to 4:30, and then, because there are quite a few matters of routine that must be attended to by the Reporter, the Secretary, and the Chairman, that we resume, say, at 8 and go on to 10 at night. Is that too heavy a session? (Silence.) If that meets with approval, will somebody make a motion?

Mr. Seth. I so move.

Mr. Longsdorf. I second it.

The Chairman. It has been moved and seconded. All those in favor will say aye. (A chorus of ayes.) Those opposed will say no. (Silence.) Carried.

The stenographer requests that we continue to occupy throughout the sessions the same seats so as to facilitate his work, and that has the added advantage that I think we may then leave our notes and other papers here overnight if we so desire.

The question as to how we may best proceed with our work has been given some attention by the Reporter and the Secretary, and the suggestion is made that we proceed through and discuss rule by rule, not reading the rule but calling on the Reporter in the first instance to bring to our attention any points that he thinks deserve special consideration, and then afford an opportunity to each member of the committee who desires to
2 comment on the rule. After we have gone through all the rules in that fashion we might then give each member of the committee an opportunity to suggest further rules or any changes in the present rules that have occurred to each of us as a result of going over the entire body of the rules. If that meets with approval I suggest that Mr. Robinson start with Rule 1.

RULE 1

Mr. Robinson. Chairman Vanderbilt and members of the

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Advisory Committee, I think that two or three members of the committee have just received their book in which is contained the tentative draft of the rules, due to their absence from their usual home addresses. It might be well, then, to notice at the outset, especially for their attention, the letter which went with the rules, just ahead of the table of contents. You will observe that the organizational books are to have the draft rules on the right-hand pages. Opposite the draft rule, on the left-hand page, have been collected the civil rule to which the criminal rule corresponds, and in some cases which the criminal rule duplicates. That is a fundamental principle that has been followed in preparing this tentative draft for your consideration: that is, to follow as closely as possible the organization and so far as possible the content of the civil rule in preparing the criminal rule.

The reason for that policy, or the reasons, are at least two. In the first place, the civil rules, as we know, have won a deserved prestige. There is no reason why the criminal rules might not well follow as closely as possible the plan and content of the civil rules and in that way gain some of the same confidence which has been afforded the civil rules. In the second place, I think it is the object of all of us to attract into the practice in criminal cases as many as possible of the lawyers whose practice frequently is exclusively on the civil side. It would seem that it would be some contribution toward that end if the criminal rules can be made as closely as possible like the civil rules. There are other reasons which would occur to you, I think.

Carrying out that idea in a purely mechanical respect, the

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effort has been made to use the same number for the criminal rule which is the number of the civil rule to which the criminal rule corresponds or which it duplicates. Obviously there are some civil rules to which no criminal rule can be drawn by analogy or as a parallel rule. For that reason, at the head of the table of contents I have prepared a substituted page which explains a little more clearly the organization so far as the number of the rules is concerned, and I would suggest that this substituted page be used by you instead of the table of contents page which came out with your materials.

You will find at the head of the table of contents page, which was placed before you, I believe, as new material this morning, the paragraph beginning:

> "The criminal rules follow as closely as possible in organization, in numbering and in substance the Federal Rules of Civil Procedure. The criminal rules omit those civil rule numbers which designate civil rules which are not duplicated by criminal rules--"

Mr. Longsdorf. Where is this you are reading from?

Mr. Robinson. It is from the substitute page headed "Table of Contents." It is in your material this morning; you will find it right on top, your second page there.

Mr. Longsdorf. Thank you.

Mr. Robinson (reading):

> "The criminal rules follow as closely as possible in organization, in numbering and in substance the Federal Rules of Civil Procedure. The criminal rules omit those

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civil rule numbers which designate civil rules which are not duplicated by criminal rules or to which no criminal rules correspond in title or in function. This draft of the criminal rules also omits a few civil rule numbers for which analogous criminal rules are in preparation."

That explanation is necessary for this reason, among others: I want you to understand that this draft has been prepared with the idea of carrying that parallelism as far as possible; and one of the first questions, then, that I want the committee to consider and to advise the Reporter concerning is the question of the extent to which the tentative criminal rule meets that principle. Therefore this draft is submitted to you for your very full and free criticism. I suppose I need not say that, but so far as the Reporter is concerned I want you to know that what is desired is your very complete analysis of the proposed rule with that question in mind: whether or not it does meet as closely as possible the comparable civil situation as indicated by the civil rule. And to the extent that it does not I hope that your corrections will be abundant; and to the extent that it tries to do so and perhaps you think should not do so, I likewise hope your criticisms will be ample.

But further, on that letter of introduction, you will notice that constitutional and statutory provisions and proposals such as those of the American Law Institute Code are placed on the left-hand side opposite the proposed criminal

3 rule, and then the recommendations likewise follow on the pages on the right-hand side.

Now, as to Rule 1, the comparable civil rule on the left-

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hand side, of course, provided that law and equity should be dealt with uniformly. Well, that will be Rule 2.

Rule 1 of the civil rules dealt with the scope of the rules. You will notice the comparable criminal rule on the right. Rule 1 need not be read, of course, but in line 3 that blank will be filled in with a number, 81. Rule 81 is a rule which will take up exceptions, which will be worked out as we work out the criminal rules. Obviously there will be proceedings of a criminal nature to which these rules will not apply, just as there are proceedings of a civil nature to which the civil rules did not apply; and in both cases Rule 81 is the rule which will take up exceptions. When we get to 81 a little later we shall find that the exceptions in the civil rules were quite numerous. We have reason to think they will be just as numerous in the criminal rules.

Now, Rule 2.

Mr. Glueck. May I inquire?

Mr. Robinson. Yes.

Mr. Glueck. You notice that the statute opposite goes into some detail as to the courts involved, the jurisdiction. I was wondering whether the expression "district courts of the United States" is ample to cover that whole situation.

Mr. Holtzoff. I do not think it is, and it occurs to me that perhaps we ought to say "district courts of the United States and district courts of Alaska, Hawaii, Puerto Rico, the Canal Zone, Virgin Islands, Supreme Court of Hawaii, Puerto Rico, and the United States Court of China."

I should like to say this, that in connection with the civil rules this provision did give rise to a little difficulty,

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because Hawaii and Puerto Rico found themselves outside the scope of the civil rules, and they were rather chagrined by that fact. The Puerto Rican people, particularly, are exceedingly anxious that any rules that we adopt here should be extended to Puerto Rico, and I would say that by the same token they should be applicable in the Hawaiian Islands, Alaska certainly, and possibly in the other insular possessions.

Mr. Robinson. Is there further comment?

Mr. Longsdorf. Mr. Chairman, I should like to put in another word supplementing what Mr. Holtzoff said. Now, the criminal procedure and the penal codes of Alaska, at least, take in other crimes than those defined in the United States Code. In other words, the ordinary crimes are also covered by the Alaska Code, and the same court tries violations of them. The applicability of these rules to that class of cases might very well have the consideration of the committee. I do not know that any alteration is required.

Mr. Holtzoff. May I venture this suggestion: that the same situation exists in the District of Columbia.

Mr. Longsdorf. Yes. And in Puerto Rico.

Mr. Holtzoff. Well, not in Puerto Rico.

Mr. Longsdorf. Doesn't it?

Mr. Holtzoff. Because in Puerto Rico there is a local court, but in the District of Columbia the United States District Court tries all cases under the United States Code.

Mr. Longsdorf. Yes.

Mr. Holtzoff. And also under the District of Columbia Code.

Mr. Longsdorf. Yes.

Mr. Holtzoff. And the same procedure, the federal procedure,

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is used in both cases.

Mr. Longsdorf. No; in Hawaii that is not quite true.

Mr. Holtzoff. And therefore there is no difficulty that arises out of that, and I daresay the same would work out in Alaska.

Mr. Longsdorf. I merely want to raise the question; that is all.

Mr. Holtzoff. Yes, I understand.

Mr. Robinson. In connection with that suggestion or those suggestions we wish, of course, to keep in mind constantly the admonition of Chief Justice Hughes. I think that the principal instruction that he has given us is, "Make them brief and simple." I should hate to start out with a catalog of Hawaii and Puerto Rico and other points east, south, north, and west if it can be avoided in that first rule; and therefore I take it that the suggestion would be that in Rule 1 we might add, say, in line 3 "with the additions and exceptions stated in Rule 81," something to that effect.

Mr. Glueck. You would then list these things in Rule 81?

Mr. Robinson. Yes, rather than destroy our brevity here in Rule 1 by a geographical catalog.

4 Mr. Glueck. But would you not increase Rule 81 by the exact amount cut out of Rule 1?

Mr. Robinson. That would be all right; that is back toward the end of the rules.

Mr. Holtzoff. Personally, I should rather see it in the beginning so that when you first start reading the rules you know what this code is.

Mr. Robinson. It would be interesting to the Hawaiians,

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I am sure.

Mr. Youngquist. Mr. Chairman, I do not like inclusion by reference, but would it do to say in Rule 1 "district courts referred to in the Act of June 29, 1940"?

Mr. Holtzoff. That cures it.

The Chairman. I think that is a happy suggestion because it avoids a catalog and yet embodies the resolution.

Mr. Robinson. The amendment, then, Mr. Youngquist, would be in line 2.

The Chairman. That is right.

Mr. Youngquist. I do not have the phraseology.

Mr. Holtzoff. After the words "United States", "referred to in the Act of June 29, 1940." I am just wondering.

Mr. Longsdorf. Will Mr. Holtzoff read that proposal?

Mr. Seasongood. What is going in now?

Mr. Holtzoff. In line 2, after the words "United States" insert "referred to in the Act of June 29, 1940."

Mr. Robinson. With perhaps the U. S. C. citation.

Mr. Holtzoff. Yes, citation to the United States Code. In parentheses "United States Code, Title 28, section 723a-1."

Mr. Seasongood. Mr. Chairman, I do not want to be fussy, but it seems to me it is just about as simple to write them in, so you can read them right there, rather than to refer to some other statute that you have to look up and see what is included.

The Chairman. I have this thought in mind as against that: this may be a shifting group, of course, here; there is some talk now of abandoning the court in China. I think it might vary with the scope of the enabling act.

Mr. Seasongood. Then you would have to change it anyway,

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because if you refer to the act it would refer to the situation as it is now, would it not?

Mr. Robinson. I understand, Mr. Seasongood, there is an erroneous addition to the courts in that statute, also, which we would not want to repeat. One or two are included to which these rules really do not apply: the Supreme Courts of Hawaii and Puerto Rico.

The Chairman. I think these were included in the enabling act in the event that it should be desired to apply these rules, but I doubt whether they should be made applicable. The only rules that would apply to those courts would be the appellate rules.

Mr. Robinson. That is right. And we are not drafting those yet.

Mr. Glueck. Of course there might be another possibility, Mr. Chairman, if you wanted to use some brief expression such as "and such other courts which have original final jurisdiction in United States matters," or something of that sort. I do not want to suggest that as an exact phraseology.

Mr. Holtzoff. If we have a definition like that, perhaps we shall have less room for controversy if we would enumerate the courts.

Mr. Glueck. We should probably have appeals on what that covers.

Mr. Holtzoff. Yes.

Mr. Robinson. May I make a suggestion on this at this point: I should like to have, in redrafting this thing, your suggestions in writing. Mr. Youngquist, Mr. Glueck, and others who have made suggestions, I should like you to write them down

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on these forms which have been prepared for your use--and I hope they are in each place--on the number of the proposed rule, subject heading of the rule. They were prepared principally for your own use in carrying them with you. Have they not been

5 placed there?

Mr. Holtzoff. No.

Mr. Seasongood. They are in this bound volume.

Mr. Robinson. There is just one there, so these you can write on, you see.

Mr. Crane. Why do they not say "United States courts and insular possessions"?

Mr. Robinson. Why do you not write that down, Judge Crane, so I shall be sure to have it?

The Chairman. Now are there any further suggestions on this point?

Mr. Youngquist. I have a question. The rules, I take it, refer to the proceedings before the United States commissioners. Is the office of the commissioner such a part of the district court that it would be included?

Mr. Holtzoff. I think so. The United States commissioners are regarded as appointees of these courts.

Mr. Robinson. The plan there, Mr. Youngquist--and I discussed it with Mr. Holtzoff, and I understand that others, too, feel that it would be acceptable at least tentatively for your consideration--is to place matters such as proceedings before United States commissioners and other proceedings of that nature in a section which will correspond to chapter 8 of the civil rules. You notice in chapter 8 that deals with provisional and final remedies and special proceedings. We shall extend that a

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little bit. There, again, our thought on it so far has been that it would not be wise to divert attention and to consume space right at the start of the rules by referring to proceedings before United States commissioners and dealing with them in full, but rather to wait until a section which begins with Rule 64, and following, to take up that point.

Mr. Holtzoff. I think Mr. Youngquist's question, as I interpret it, was whether in the definition of the scope, under Rule 1, "district courts" is broad enough to include commissioners. Was that not your question?

Mr. Youngquist. Yes.

Mr. Holtzoff. Or did I misunderstand it?

Mr. Youngquist. No. That really was the question.

Mr. Dean. I have the same question, Mr. Chairman.

Mr. Youngquist. Of petit court proceedings.

Mr. Robinson. And that is why we wished to prepare that for you in this section on special proceedings and preliminary proceedings, grand jury proceedings, removal, extradition, search and seizure, possibly habeas corpus, possibly criminal contempt of court.

Mr. Seth. Bail.

Mr. Robinson. Bail.

Mr. Youngquist. Then trial of petit offenses comes earlier in section 16.

Mr. Robinson. Chronologically it would, would it not?

The Chairman. I was wondering, Mr. Robinson, if the situation is not a bit controlled by the language of our enabling act, which refers expressly to the proceedings in the district courts, and then "and in proceedings before United

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States commissioners," obviously distinguishing them there; and if we confine our rules in Rule 1, dealing with scope, to the district courts, someone is certainly going to argue that the other group of cases is out.

Mr. Robinson. Yes. The amendment, then, Mr. Youngquist, might be that in line 2, after "district courts" you would say "and proceedings before United States commissioners."

Mr. Youngquist. "procedure in the district courts and before United States commissioners".

Mr. Seth. Now the federal statute provides for justices of the peace and district court judges and mayors to act as committing magistrates. Had you better limit it to United States commissioners?

Mr. Holtzoff. Why not say "before committing magistrates"?

Mr. Seth. We cannot change the statute.

Mr. Dession. Would it not simplify it some to incorporate the words of the statute beginning with "including district
6 courts" and so on, and ending with "before United States commissioners"?

Mr. Glueck. It seems to me that is the solution of several of these difficulties.

Mr. Holtzoff. What is it?

Mr. Glueck. To take the exact wording of this enabling act as it is applicable.

Mr. Holtzoff. Yes.

Mr. Glueck. It would be a little bit longer, but I think it would gain a great deal in clarity.

Mr. Crane. When you get back to what you propose and refer to the act, the enabling act, without quoting at all,--

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Mr. Robinson. It seems to me you may.

Mr. Crane. "Courts of the United States referred to in the Act of June 29, 1940."

Mr. Glueck. I have not had much chance to read these rules, but I observe some provisions here pertaining to what takes place inside the United States attorney's office.

Mr. Holtzoff. No.

Mr. Glueck. There are none?

Mr. Holtzoff. No, and that would not be within the scope of the enabling act.

Mr. Glueck. I wanted to be sure of that.

Mr. Dean. Mr. Chairman, I have one suggestion in that connection. It seems to me that we may not wish to make all these rules applicable to United States commissioners, particularly those rules dealing with pleadings, and so forth; and we might, therefore, in line 2, say "and, where so indicated, before United States commissioners," and the rule itself would use the word "commissioner."

The Chairman. I think that is a very pertinent suggestion.

Mr. Dession. I think that is a good idea.

Mr. Longsdorf. Mr. Chairman, might this be accomplished by changing the suggested words "referred to" to something like this: "to the extent provided in the Act of June 29, 1940"? "To the extent provided" would take in all the courts there referred to. Perhaps it would be a little bit less strong than identification of them by name, but it would be certainly just as broad as the enabling act was.

Mr. Holtzoff. May I venture this suggestion, Mr. Chairman: that if we agree now as to the substance of what we want to

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accomplish we might leave to the Reporter the exact phraseology, rather than to work it out at the committee meeting.

The Chairman. I think we would make more progress if we took that course. As I gather, the consensus of opinion is that this rule should in some way indicate that it refers to or covers the insular courts and also proceedings before United States commissioners when the rules specifically refer to the commissioners. Is that our consensus on the matter?

Mr. Holtzoff. Yes.

The Chairman. If so, we shall leave it to the Reporter to present a revised rule in that form.

Mr. Seasongood. Mr. Chairman, I do not know anything about the law of these different places; may I ask, is there anything peculiar in any of these laws? Has a study been made to see whether the rules might not be applicable as written?

Mr. Holtzoff. Yes. There is nothing peculiar, so far as procedure is concerned, in Puerto Rico and Hawaii or Alaska.

Mr. Seasongood. The Canal Zone, the Virgin Islands?

Mr. Holtzoff. In courts of the United States. Well, in the United States Court for China they have no grand jury; they proceed by information. And it may be necessary to make some exception here and there.

Mr. Seasongood. Yes?

Mr. Holtzoff. But you would not have to do that in your Rule 1; but in there as you go along you might have to put in an exception.

The Chairman. Would you note that, Mr. Holtzoff, as an item with reference to this rule?

Mr. Holtzoff. Yes.

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The Chairman. Is there anything further, gentlemen, on Rule 1?

(There was no response.)

The Chairman. If not, we shall move forward to Rule 2, Mr. Robinson.

RULE 2

Mr. Robinson. I think Rule 2 has already been explained.

7 The Chairman. I think the notion of keeping the parallel numbering of the two sets of rules, civil and criminal, is a splendid one. I have a doubt in my own mind as to how it is going to work out, whether it may not mean too much warping and twisting of our rule, but I think we can start with it tentatively and see how it materializes.

Mr. Glueck. May I inquire, Mr. Robinson, whether it entails any too great warping, to the extent of changing the procedural steps chronologically?

Mr. Robinson. The answer, I believe, would include the fact that there would be some civil rule numbers for which there will be no comparable criminal rule numbers. We just omit entirely certain numbers as we go from 1 to 86.

The Chairman. That does not bother me. The other portion of Mr. Glueck's question does.

Mr. Robinson. Yes. Now, I think you will find a case or two where that has occurred, and that is one job of this committee, to protect the rules against any warping and twisting in order to bring about a comparability which really should not be attempted.

The Chairman. Might it be avoided by the use of Rule 79a

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or 79-1/2, or something like that, so as to attain the object you have in mind of parallelism and yet not do any warping to our own rules?

Mr. Robinson. Yes. Sometimes an extra paragraph or subdivision heading has been added; there has been some of that.

Mr. Glueck. Well, we shall see that as we approach it.

The Chairman. Yes.

Mr. Medalie. Would it not be a good idea to leave out the first sentence of Rule 2? The sixth sentence tells you what you want to know.

Mr. Holtzoff. I would be inclined to agree with that.

The Chairman. Well, might we leave that in the form of a caveat there, depending on how this plan does work out?

Mr. Wechsler. Mr. Chairman, I have one point which cuts to the second sentence, which troubles me. The object of the second sentence is to secure interpretation in accordance with the interpretation of the civil rules and presumably to incorporate into the interpretative job here the policies that achieve dominance in the work on the civil rules. Now, without expressing a judgment as to whether that is wise or unwise, because I do not know enough about the civil rules and the grim detail that they present, nevertheless a priori it seems to me to be questionable, because we are dealing with situations in criminal cases in which the dominant policies may well be different. I hesitate to see the blanket incorporation of all policies that achieve dominance in connection with the civil rules here.

Take a matter as simple as the problem of depositions. In civil proceedings it may well be that speed and simplicity and economy may be and ought to be the guiding considerations. As

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soon as you turn to the criminal side you have other values asserting themselves.

Mr. Longsdorf. That is the trouble.

Mr. Glueck. I have the same doubts with reference to the term "speed." In some steps of procedure speed is necessary, and in others it might do a lot of harm.

Mr. Robinson. And the Constitution says "a speedy trial."

Mr. Glueck. Of course that pertains largely to delays before you actually go to trial.

Mr. Holtzoff. I think that is what is intended by the use of the word "speed" here.

Mr. Glueck. You mean in the constitutional sense?

Mr. Holtzoff. Yes. After all, what we are trying to attain, or one thing we are trying to attain, is to avoid dilatoriness in the administration of criminal law.

Mr. Glueck. Well, dilatoriness as a whole, but it may help, and I am sure Mr. Medalie could give plenty of instances where it is desirable in certain steps of the proceedings in certain cases, to slow up rather than speed up.

Mr. Holtzoff. I do not know.

Mr. Glueck. Do you not agree with that?

Mr. Youngquist. I do not think there is much danger from the use of the word "speed." We have before it the word "just"; the two must be construed together.

Mr. Medalie. I think "speed" originally meant that you could not throw a defendant in jail and keep him there for three years before you chose to try him. The word "speedy" referring to criminal law is put in for the purpose of protecting the defendants against an arbitrary government. Now, as things have

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8 changed it has gotten into the public mind that the defendant delays the trial. I can say practically, the defendant does not delay the trial. Delays in criminal cases are usually due to the fact that the government is either not prepared or does not deem it expedient to go to trial. The newspaper editorials to the contrary, but they do not state the fact.

Mr. Holtzoff, is that not so?

Mr. Holtzoff. That is so in the big metropolitan centers, but that is not always so in the rural districts, and they predominate in numbers, where by mechanical filing of a demurrer a defendant could throw a case over the term and get three or six months' time. He cannot do that in the southern district or eastern district of New York, but he can do it in the rural districts, and 75 percent of the federal courts are held in the rural sections where they have either two or four terms of court, and each term lasts about a week.

Mr. Medalie. I know, but the fault is the judge's, not the law's or procedure's. A judge who thinks that when a demurrer is filed he must take a vacation to pass on it is just obstructing justice himself.

Mr. Holtzoff. Oh, I agree with that.

Mr. Medalie. The fellow who files the demurrer has not obstructed justice. The average demurrer can be decided right at the session at which it is presented and that very morning.

Mr. Holtzoff. Yes, but what I meant was that there is an opportunity under the present procedure for defendants to delay trial if they have the type of judges who yield to that type of tactics.

Mr. Medalie. Is there anything in any rule that can

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obviate that? Can you make a judge decide a thing presented to him faster than he wants to?

Mr. Holtzoff. No.

Mr. Crane. This only expresses an intent upon the part of those who have drafted these rules or the rules themselves. It expresses an intent, and I cannot see anything the matter with it.

Mr. Longsdorf. Mr. Chairman, before we leave that second sentence I should like to say that it reminds me a great deal of that miscalled statute, the conformity act. Now, doing what? Do we want to say "as closely as possible" or "as near as may be," or don't we care which?

Mr. Holtzoff. "As near as may be," of course, is the phraseology of the conformity statute; is that what you have in mind?

Mr. Longsdorf. Yes.

The Chairman. My trouble is more fundamental than that. I am saying it from the same point of view as Professor Wechsler does, that the problems of criminal law I think are quite different from some of the problems of civil law.

Mr. Longsdorf. I agree with that, too, of course.

The Chairman. And I am still in favor of having the rules go parallel by number, but do we want to incorporate by reference all the decisions which have been rendered, as Mr. Holtzoff reports to us each week, which we try to read but do not always keep up with, into these what we hope will be very simple rules?

Mr. Longsdorf. No.

Mr. Holtzoff. I am wondering whether there is any need for Rule 2 at all, whether we could not just leave out Rule 2.

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Mr. Glueck. Yes, I was going to suggest that, because it seems to me that your first sentence, at least, pertains to something you put into your commentary, into your note to section 1 or into your introductory remarks, just as you did in this letter here.

Mr. Holtzoff. I am impressed very much with the fact that the problems of criminal procedure are so different, the work in criminal cases so different from trying a civil case, that it would be dangerous to tie the criminal rules too strongly to the civil rules, either textually or by rule of construction, such as the second sentence proposes.

Mr. Medalie. I cannot help making one comment about that. These rules of civil procedure have had technical constructions by many district judges, and they are not the subject of review; is that not so?

Mr. Longsdorf. Yes.

Mr. Holtzoff. It is so.

9 Mr. Medalie. Not always have they been liberal in their interpretation.

Mr. Holtzoff. It ~~is~~ so in the southern district of New York, but ~~the judges in the eastern district~~ they have been a little more technical than some of the judges.

Mr. Medalie. Of course, by filing them in the Federal Supplement they take up a lot of space.

Mr. Holtzoff. They do.

Mr. Medalie. And therefore supposedly carry weight. Now, on the other hand, in the criminal law, both pleading and procedure, the fact is that the judges have paid no attention to the ancient rules of pleading, generally speaking, and prac-

tically no attention to rules of proceeding, and very rarely is there a reversal because of such an attitude. Now, there is an advantage at this moment in the administration of federal criminal law, and that is that it is more anarchical and not bound by rules, which the civil procedure has been. In other words, they are free: they can decide against the defendant when he has no merit, with no technicality, and they still do; and I am wondering whether our conformity provision is not going to hamper the present free and easy administration of federal criminal law, which normally results in the conviction of the guilty speedily.

Mr. Holtzoff. I move that we strike out Rule 2. I am suggesting that to bring the discussion to a head.

Mr. Seth. I second the motion.

The Chairman. The motion has been made and seconded to strike out Rule 2. All those in favor will say aye.

(There was a chorus of ayes.)

The Chairman. Opposed, no.

(There was no response.)

The Chairman. Carried.

Rule 3.

RULE 3

Mr. Robinson. You have read that rule. I do not know that any extended explanation is necessary. "A criminal proceeding is commenced by filing a written accusation with the court." obviously applies to district courts. Now, it has been suggested again, by Mr. Holtzoff I believe, that after the word "filing" there should be inserted "a complaint with the committing magistrate or a written accusation with the court."

That, of course, again is subject to your will on the matter and subject also to the explanation I gave Mr. Youngquist a moment ago, that we might as far as possible keep procedure before the committing magistrates in a separate section in the interest of brevity. Of course there are arguments the other way, and as I see it it is immaterial whether it be placed in here, or what.

Mr. Holtzoff. I should like to make this suggestion: that I think it is perhaps erroneous to say that a criminal proceeding is commenced by filing an accusation with the court. That is true where the United States attorney files the information, nothing having gone before, or where he takes a case to the grand jury without a preliminary hearing before the commissioner; but 90 percent of criminal cases are commenced by proceedings before the United States commissioner; and, while I agree with the Reporter that it might be well in a subsequent rule to outline procedure before commissioners, here where we are defining what is commencement of the proceedings we have to take care of both the contingencies. Therefore I suggest that we substitute the following for the present Rule 3:

> "A criminal proceeding is commenced by filing an indictment, a presentment, or an information with the court or a complaint with the committing magistrate."

I am suggesting the words "committing magistrate" rather than "the United States commissioner" because under the statutes you can, although it is not frequently done, institute or file a federal complaint before a local justice of the peace.

Mr. Medalie. Also before a district judge who may sit as a magistrate.

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Mr. Seth. Would not the same be accomplished, Mr. Holtzoff, by leaving out the words "with the court"?

Mr. Holtzoff. I think it would be, but it would be a little less definite and might give rise to questions if you put it that way. The object would be accomplished, but if you do it by some such language as I have just suggested you make it short, concrete, and definite.

Mr. Medalie. That is right.

The Chairman. Will you read your suggestion again, Mr. Holtzoff?

11 Mr. Holtzoff(reading):

> "A criminal proceeding is commenced by filing an indictment, a presentment, or an information with the court or a complaint with the committing magistrate."

Mr. Robinson. May I ask a question about the law there? My understanding of the law is that a criminal proceeding is commenced, so far as the statute of limitations is concerned, by the indictment or presentment or information that is filed in the district court; is that not correct?

Mr. Medalie. Purposes of the statute of limitations?

Mr. Robinson. Yes.

Mr. Medalie. You can start it before the commissioner by swearing.

Mr. Robinson. And the statute begins to run.

Mr. Medalie. The minute the commissioner issues his warrant.

Mr. Robinson. The second proposition that I think needs to be raised there is: So far as the district court is concerned

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in which the indictment is on trial, when has that proceeding begun? At the time when the indictment was filed in the district court or back at the time when the complaint was filed before the committing magistrate?

Mr. Medalie. It depends on the viewpoint. From the viewpoint of figuring the statute of limitations you start from the time that the criminal proceedings started before the magistrate or the commissioner.

Mr. Robinson. Well, what other viewpoint, then, would there be?

Mr. Medalie. That raises the other thing that I was about to bring up.

Mr. Robinson. Yes?

Mr. Medalie. What is the purpose of defining this? What is there that comes later that requires our stating, other than the statute of limitations, when a criminal proceeding is commenced?

Mr. Holtzoff. I do not think there is anything but that, but for the sake of the statute of limitations we ought to have some such provision.

Mr. Medalie. Now this provision, then, I think ought to be the loosest and most general language. Now, you find some decisions that speak of what you call the complaint. I mean, we have a model code of criminal procedure gotten up by the American Law Institute, and that uses the word "complaint," does it not?

Mr. Seasongood. Yes.

Mr. Medalie. And that comes from the New York Code of Criminal Procedure, on which other states have modeled, and the

word "complaint" is used there in lieu of the old word "information." The old word was "information." Now, with that looseness they leave the words "information" and "complaint" together to cover all those possibilities. That is using "information" for both the information which is filed in lieu of an indictment and miscellaneous, and the information being whatever paper proceeding is started before the commissioner or magistrate, and also the word "complaints": all the possibilities are covered there.

Mr. Glueck. Would that cover the possibility of the complaint by the injured party on the basis of which a warrant is issued by a magistrate?

Mr. Medalie. Yes.

Mr. Holtzoff. That is not done under the federal procedure.

Mr. Glueck. That is not at all?

Mr. Holtzoff. No.

Mr. Medalie. An individual may file a complaint other than the information.

Mr. Glueck. Yes.

Mr. Medalie. Some of the decisions, some opinions, use the word "information" in lieu of the word "complaint" in filing before a commissioner.

Mr. Longsdorf. Yes.

The Chairman. Well, your suggestion is that the word "information" be used twice: once with reference to the court and once with reference to the commissioner?

Mr. Medalie. No. It will be used once, just as it is here, and it will have a different meaning, because you will find district court opinions, including that famous one by Hough--I

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do not have the citation here--in which he talks of a proceeding before a commissioner as an information.

Mr. Holtzoff. Yes, but I am not clear just how you would accomplish this. How would you rephrase this?

Mr. Medalie. I would not. I think the language is broad and loose enough to cover all the contingencies, and I say "loose" also in the sense of broad.

Mr. Holtzoff. Oh.

Mr. Medalie. I think we must have a little looseness.

Mr. Holtzoff. You mean as it now stands?

Mr. Medalie. I think it is in good shape.

Mr. Holtzoff. My difficulty is this: The question might be whether filing with the United States commissioner is filing with the court.

Mr. Medalie. Why do you not leave out the words "with the court"?

Mr. Holtzoff. Well, that is all right.

Mr. Robinson. May I ask a question on that?

Mr. Medalie. Where else can you file it? You file it in my law office or your law office, and that is not filing.

12 Mr. Robinson. Why not put it in the civil rules? May I ask about the analogy there? You will find in the civil rules, simplified, that a civil action is commenced by filing with the court.

Mr. Medalie. Well, there is a reason for that, based upon procedure such as you have in New York and other code states. I could start an action against you by serving you with summons and complaint, and not filing it.

Mr. Robinson. I think that is the answer.

Mr. Medalie. Or even giving it to the sheriff for the purpose of service.

The Chairman. I could start an action against you by signing the writ in my own office.

Mr. Medalie. Well, that is practically what we do in code states.

Mr. Glueck. Mr. Medalie, you asked about another purpose. For the purpose of a civil suit for malicious prosecution when does the ball start rolling?

Mr. Medalie. For the purpose of a civil suit?

Mr. Glueck. Yes.

Mr. Medalie. I can give you the New York procedure, and, Judge, you can check me on that: either at the time a defendant is served with summons and complaint or only summons if I have not the complaint, or when the paper is delivered to the sheriff for the purpose of service. That is right, is it not?

Mr. Glueck. So that even if the sheriff delays, that is perfectly all right: the ball has already started rolling?

Mr. Medalie. Yes. When you cannot find the defendant and your statute is running, you hurry up and give the process to the sheriff, which you make out in your own office and do not even file with the court.

Mr. Robinson. And that was considered in debates on the civil rules, and the procedure was rejected, was it not, in favor of this similar Rule 3a?

Mr. Medalie. I cannot state that.

Mr. Holtzoff. Yes, it was. The purpose of this rule, the purpose of the civil rule on this point, was to make it clear that this New York procedure and the New Jersey procedure was

not to be adopted by the federal courts.

Mr. Longsdorf. Mr. Holtzoff remembers it, I am sure.

Mr. Holtzoff. Yes.

Mr. Medalie. Well, notwithstanding possibilities of abuse by prosecutors, I think it would be better in the interests of justice that a suit start the minute anything is started before a commissioner or a court.

The Chairman. Well, your suggestion is that the rule read that:

> "A criminal proceeding is commenced by filing a written accusation ~~with the court~~. The written accusation may ~~by amendment~~ be an indictment, a presentment, an information, or a complaint"?

Mr. Medalie. Yes, sir.

Mr. Holtzoff. I think that is all right. The only question I had in mind was whether it would be as clear to the reader as it is to us what is intended by that.

Mr. Glueck. But would it not merely be a statement as to the existing practice and therefore be clear? That is what happens now.

The Chairman. Might not the Reporter put a note there of explanation which would clear it up?

Mr. Holtzoff. Yes.

Mr. Crane. I myself do not see why you use the word "filing." Should you not make it clear, even if you had to use a few more words, where the filing is to be?

Mr. Holtzoff. That is what I had in mind in making my suggestion.

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Mr. Crane. You say, "A criminal proceeding is commenced by filing a written accusation. The written accusation may be an indictment, a presentment, an information, or a complaint."

13 Now, is there any harm in stating where they are filed--there are only two places--whether with the court or with the commissioner?

Mr. Holtzoff. That was what I had in mind.

Mr. Youngquist. I call attention to succeeding sections which specify where the filing shall occur. I wonder if it would not be enough to strike out the words "with the court."

Mr. Crane. Well, perhaps it would be.

Mr. Youngquist. And leave that for clarification as it is clarified in the subsequent section.

Mr. Crane. That may be if it is covered by those subsequent sections.

Mr. Medalie. You know, there is another difficulty here. Sometimes they tell you that a magistrate or a commissioner is not a court.

Mr. Longsdorf. Ought to.

Mr. Medalie. Yes. All right. I said sometimes.

Mr. Holtzoff. That is why I suggested in my alternative that we say "with the court or with the commissioner."

Mr. Medalie. Keeping in mind the need for the simplest language possible, and since there is clarity in view of the procedure as everybody knows it and the procedure as later defined and discussed in the rules, I think we can leave it out.

Mr. Youngquist. I think so too.

Mr. Medalie. And not have any discussion as to the meaning of the word "court."

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The Chairman. Mr. Medalie has made a motion to amend the rule as now written by eliminating the words "with the court."

Mr. Crane. I second the motion.

Mr. Seasongood. What does it mean when we pass the motion? Is that final now?

The Chairman. Oh, no.

Mr. Seasongood. We may consider it further, may we not?

The Chairman. Oh, yes. I think it is understood that all these decisions are tentative. I think I said at the outset that if they want to the members may go back and bring up points on the specific rules. And with that understanding of the motion, all those in favor of the motion will say aye.

(There was a chorus of ayes.)

The Chairman. All those opposed will say no.

(There was no response.)

The Chairman. Carried.

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11:30am

Mr. Youngquist. May I ask about the use of the word "presentment"? I recall that there was some recommendation about the abolition of the word "presentment". The Constitution uses that phrase, but I have not been able to find any other use for the word "presentment" except calling matters to the attention of the Court by public officers.

Is it the practice in Federal courts to use the presentment as initiating the prosecution?

Mr. Holtzoff. The word "presentment" has two meanings. The Constitution uses it in the sense in which it was used many years ago. Frequently grand juries did not have the benefit of prosecuting attorneys attending them, and instead of filing an indictment they filed their accusation in the form of an informal document which they called a presentment. The modern type of presentment is a more recent growth and development.

Mr. Youngquist. That presentment is a kind of instrument that directs the attention of the court and the prosecuting officer to a certain situation.

Mr. Holtzoff. The word presentment as used in the Constitution, ~~or~~ the first type of presentment which I have referred to, has one meaning. Nowadays that type of presentment is entirely obsolete. It seems to me that in view of the fact that it is used in the Constitution that it might be well to carry it into the rules although it is entirely obsolete.

Mr. Glueck. Isn't it really the situation where the grand jury investigates a major or public calamity and makes a presentment?

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Mr. Medalie. It is not how the word presentment is used here. As I understand what is left of the word "presentment" today is that there is a representation made either orally or in writing to the prosecutor that the grand jury finds a true bill. Then the district attorney proceeds to draft an indictment. That is the only legitimate use of the word "presentment" that is left. The other form is where these grand juries have been working under the guidance of some very vocal person and in notifying the public that the railroads, for example, are not being run right. That kind of presentment has no legal value at all. In fact, it has been denounced by the courts.

Mr. Holtzoff. We have taken the position that such presentments are nullities, and the courts have held that they are not privileged and may be the subject of a libel suit.

Mr. Carr. The Department of Justice on several occasions has drafted such presentments, particularly in antitrust suits.

There are different types of presentments. There is the document known as the presentment, which is an invitation to the United States Attorneys that they can go ahead and draft an indictment. That is one thing.

Another is the so-called grand jury report, which has no legal significance, and the third way is as the Constitution uses it, where the grand jury returns an indictment on its own motion without the assistance of the prosecutor. In other words, it originates the case. It is a sort of runaway grand jury.

Mr. Holtzoff. I suppose it would be assumed that one using the term in these rules meant the constitutional sense.

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Mr. Dean. That is what bothers me, because it is used loosely quite often.

Mr. Holtzoff. Could we not have a comment by the reporter that where the word "presentment" is used that it is intended as used in the Constitution of the United States?

The Chairman. Must we have that? If you put that in, aren't you encouraging the improper use of the word?

Mr. Dession. That is what bothers me. There have been instances in the Department of Justice, which have been mentioned, that instead of indicting, the grand jury made a report.

Mr. Glueck. May I ask a question?

The Chairman. Yes.

Mr. Glueck. In the case of this report by the grand jury, whether it is on its own initiative or by the prodding of the district attorney, for example a general report about the Triangle Fire, can you hold the witness later for perjury if he changes his story as it was given before a sitting of the Grand Jury, the purpose of which is merely a general report?

c2 Mr. Medalie. The courts have held that there is really no limitation as to what the grand juries can inquire into because they really do not know where to start. They have to start somewhere. It may be a mere rumor; it may be a guess as to whether a crime has been committed. Therefore, all their proceedings are subject to perjury prosecution. There are very few limitations of the word "material" in perjury before the grand jury.

Mr. Crane. In actual practice you have prosecution by indictment or by information. You never have prosecution by

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presentment; not that I ever heard of.

Mr. Holtzoff. They used to have them many years ago.

Mr. Crane. They are kind of separate.

Mr. Holtzoff. Yes.

Mr. Crane. I never heard in my life of a prosecution by presentment. Why do you want the word in here?

Mr. Holtzoff. I move to strike it out.

Mr. Dean. I second the motion.

Mr. Medalie. You cannot prosecute under our existing statutes by presentment because the district attorney will sign the bill.

Mr. Holtzoff. That is under existing statutes, but they can change it if they want to.

Mr. Medalie. It is still our assumption that prosecutions should be conducted by the Department of Justice and not by these 23 gentlemen who think they know how to run things.

Mr. Holtzoff. I think it would be well to strike out the word.

Mr. Wechsler. Is it the purpose of this rule to define the point of beginning for the purpose of the statute of limitations? Is it not the practice for the grand jury and prosecutor to draft a true bill, having the same status as a complaint filed by a private individual with a committing magistrate?

In that connection I should add that I wonder if we should define the point of beginning for the purpose of the statute of limitations, which would probably be beyond our scope, and the point of beginning in any litigation would involve an interpretation of the statute.

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Mr. Holtzoff. The civil rules committee felt that it was not within the committee's jurisdiction.

Mr. Seth. Then I think there is a point that the presentment of the sort that survives should also define the point of beginning for the purpose of limitation.

Mr. Holtzoff. Under existing laws, as I understand them, the action on the part of the grand jury advising the district attorney to draw a true bill does not toll the statute of limitations. The statute is tolled when the indictment is found and submitted to the court.

Mr. Wechsler. Does the complaint filed toll the statute where the indictment is necessary to begin prosecution?

Mr. Medalie. Yes.

Mr. Holtzoff. All that is necessary is to start the judicial proceedings to toll the statute.

Mr. Glueck. I should prefer the retention of the presentment phrase with an explanatory note by the reporter, because "presentment" is used in the Constitution. That would mean that all opinions and all the judicial interpretations of that word be made a part and parcel of this.

Mr. Crane. It is not the presentment that counts; it is the indictment that counts. We are dealing with prosecutions today, not a hundred years ago. Everybody understands that the indictment is the thing. Why should we confuse the bar and the courts by the use of that word instead of clarifying it. It is
3 our duty to clarify it and to present it in clear light and not to put in notes that we do not need.

The Chairman. There is something to that point of view because in my state the presentment was used where there was only

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one prosecutor, namely, the attorney general of the state. That lost any point so far as necessity was concerned when each county had its own prosecutor.

Then in our state they had the habit where they did not want an indictment but where they wanted to raise the devil with someone of bringing a presentment against him. It was generally a railroad or some corporation or some general situation.

Our courts have always said that they are improper, but they achieved the purpose of the grand jury by getting on the first page of the newspaper. I think that if we have that word in it, we are merely encouraging that very thing.

Mr. Dession. I wonder whether we want to state the forms of action that we want the grand jury to be able to take. When we get to the grand jury section, we will have the legal forms of action that are open to the grand jury.

Mr. Medalie. I think we should keep in mind the tendencies outside the United States and in some states in the United States of getting rid of grand juries. In England the indictment has virtually disappeared.

Mr. Holtzoff. In about half of the states the grand juries have virtually disappeared.

Mr. Medalie. Yes.

Mr. Holtzoff. In the Federal courts we cannot go that far because of the Constitution, but we can provide for waiver of indictment.

Mr. Medalie. We are dealing with this situation: The district attorney or the attorney general is primarily responsible for the prosecution rather than the grand jury. I think that is

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the tendency and I think that we should recognize it. It is also the fact that in certain instances the grand juries are nothing more than rubber stamps. I think the responsibility is on the district attorney or the attorney general.

Mr. Holtzoff. I have seen them when they were not rubber stamps.

Mr. Medalie. That happens occasionally. I mean that it is usually irresponsible in some respect. I mean that the average grand jury is totally incapable of evaluating and weighing evidence and entirely without the capacity for producing it. It also has no responsibility as to what is going to be done later with the documents that are produced. They disappear to the district attorney.

Mr. Holtzoff. Let me cite an example.

The Chairman. If I may interrupt, aren't we off on another issue? I do not think it is pertinent to the question.

Mr. Medalie. The only relevency is with respect to giving the grand jury more power than it has today.

Mr. Holtzoff. I seconded the motion to strike out the word "presentment".

The Chairman. The motion is to eliminate the word "presentment". All those in favor say aye.

(There was a chorus of ayes.)

The Chairman. All those opposed.

(There was a chorus of noes.)

The Chairman. We will have a showing of hands. Let us get the ayes first.

(There was a show of hands.)

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Mr. Holtzoff. Eight.

The Chairman. And those opposed?

(There was a show of hands.)

Mr. Holtzoff. Eight to six.

Mr. Medalie. My guess, Mr. Chairman, is that it is an open question.

Mr. Crane. Let us leave it to the reporter, although I voted to strike it out. Just make a note that there may be some other recommendations that we have not considered right here.

The Chairman. These motions are not binding on us. We always reserve the right to change them.

Mr. Seasongood. Before we proceed to the next one, I think we will have to decide on the question of criminal contempt, and I think it may as well be done now.

As I understand it, the contempt charge can be filed by simply filing an affidavit or by the judge on his own motion.

The Chairman. I think Mr. Holtzoff can give us some

4 information on that.

Mr. Holtzoff. In the case of Nye against the United States the Supreme Court held that criminal contempt proceedings are not within the scope of the Act relating to criminal appellate rules because of the peculiar phraseology of that Act. That Act relates to all proceedings subsequent to a plea of guilty, verdict or finding of guilty by the court if the jury is waived.

The Supreme Court held that that enumeration does not apply to criminal contempt proceedings.

Now, the same phraseology is used in the 1940 Act, under which we are operating. Therefore I think that we must assume

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by virtue of the Nye case that at the present time our authority does not extend to criminal contempts.

At the suggestion of the Chairman of the committee I drafted a bill to cure that omission because the anomalous result is that the Supreme Court can now regulate all types of legal proceedings, civil and criminal, ~~suits and~~ criminal contempt. That bill was introduced by Congressman Sumners of the House, chairman of the House Judiciary Committee. I communicated with Chief Justice Stone, and he gave his approval to the bill. The bill has been reported by the House Judiciary Committee. It is now on the House calendar. In the ordinary course of events it will come up for action on the House floor next Monday. Unless someone interposes an objection it will probably pass by unanimous consent, and will then go to the Senate.

Mr. Seasongood. My recollection of the Nye case is that there was a rather sharp division on the point.

Mr. Holtzoff. There was ~~no~~ a division on the main point, not on the question as to whether criminal appellate ~~law~~ rules applied. That was not mentioned in the dissenting opinion.

Mr. Wechsler. There was another division on the procedural point but it was not applicable to our statute of criminal contempt.

The Chairman. It is not within our ~~review~~ at the present time. There is no doubt about that, is there?

Mr. Seasongood. I thought there might be some question there.

Mr. Orfield. Arrest without a warrant would not be a criminal proceeding, would it?

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Mr. Holtzoff. Criminal proceeding does not start until something is filed with the court or the United States Commissioner.

Mr. Glueck. Is it your contention to rule out of the proceedings arrest or detention pending bail? I mean detention in a station house, of which there is some abuse.

Mr. Holtzoff. Of course, we do not have station houses in Federal court. That is not a part of the proceeding in the court. If you read the enabling act, it does not cover this.

Mr. Glueck. I wasjust wondering whether they did not intend to cover this, or whether probably that is an accidental omission.

Mr. Holtzoff. No, I do not think that is an accidental omission. This 1940 Act was drafted to follow the pattern of the 1934 Act relating to civil procedure, and the purpose was for the Supreme Court to regulate the procedure in the courts by rule and take it away from the ~~courts.~~ legislature

The regulation of the manner of arrest and what is open to the prisoner before he is brought before the Commissioner is substantially outside of that.

Mr. Medalie. It is an unfortunate omission, because it is dealt with in the state codes of criminal procedure. It is a very practical difficulty because in the state courts it is recognized where there is a provision of that sort in the code of criminal procedure that there must be immediate arraignment. In fact, federal prosecutors are often outraged by the fact that federal agents failed to produce the prisoners before the Commissioner and they do not want to share in that

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guilt. I personally have had controversies with federal agents because of their failure to produce the prisoner immediately. What happens in the interim, you can only guess. Some of them come in black and blue, and prosecutors do not want to share in that kind of thing.

Mr. Glueck. That is exactly what I mean, and it seems to me a serious matter.

Mr. Dean. Would it not be within our power to prescribe some duty which faces the committing magistrate when the prisoner is brought in? That he must be brought in within a certain time after arrest?

4 Mr. Crane. How does this particular problem come up at this time?

Mr. Medalie. It is the procedure relating to the arrest in the case of the prisoner's being delayed.

Mr. Crane. Where does that come under Rule 3? Does it?

The Chairman. No. It is the question of whether it comes under Mr. Orfield's question as to whether we should not have something to say about preliminary matters.

Mr. Crane. Under Rule 3?

The Chairman. Could we not keep that in mind as a separate matter?

Mr. Crane. That may be a separate matter.

Mr. Robinson. I stated at the outset that arrest and such are matters which come under Section 8, under Rule 64.

The Chairman. With that reservation noted, may we proceed to Rule 4.

RULE 4

Mr. Robinson. On Rule 4 I take it that your discussion of Rule 3 would indicate that in line 3 after "written accusation the clerk" there should be inserted "or committing magistrate shall forthwith issue a warrant or a summons."

Is that correct, in line with what the committee stated?

(There was no response.)

Beginning with line 5 the sentence there is added asthe result of requests which came in from federal judges, officers, and lawyers and others. They may be found in the abstract of suggestions for Rule 4 on page 5 and three or four pages ahead.

On page 5 you see point 1, Raymond E. Thomason, United States Marshal, Alabama, Southern District, who suggests that the form of the warrant be changed to permit United States Commissioners to issue separate warrants for each defendant, rather than, as is now required, a single warrant bearing the names of all defendants in the case.

Mr. Seth. Would not that more properly come under United States Commissioners' proceedings?

Mr. Robinson. I don't know, Mr. Seth. This 4-A provides for the issuance of warrants if it is a question whether there should be more than one warrant. It would seem to be distinctly in line with the last topic.

Mr. Seth. Well, there is the provision for United States Commissioners.

Mr. Robinson. It is a matter of convenience. Otherwise you have a single warrant bearing the names of all defendants.

Mr. Seth. The clerk could issue them.

Mr. Holtzoff. The way it is now, isn't that broad enough

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to permit a single warrant or a separate warrant? It is a matter of detail that I do not think we should provide for in the rules.

Mr. Medalie. I think you are right. However, this reads, "Upon the filing of the written accusation," which may be a complaint, "the clerk shall forthwith issue a warrant."

The Chairman. The clerk or committing magistrate. We are interpolating in the second line after the word clerk the words "or committing magistrate."

Mr. Robinson. The other change in paragraph 4-A is to add the words "or a summons." The present federal law does not provide for summons except in cases of corporations.

Mr. Medalie. That is in here.

6 Mr. Robinson. That is paragraph 4-A, line 4. You add "or a summons." The present federal law does not provide for the issuance of a summons except in cases of corporations.

The American Law Institute code in Sections 196 and 197 state that a defendant may be brought into court by summons as well as by warrant. Various states have adopted that provision. The use of the summons to bring an individual into court in misdemeanor cases is established by statute in many states.

Mr. Holtzoff. I think a summons would be a very useful addition, for example in petty cases like the violation of the migratory bird laws where the penalty would be about a $2 fine, and it would be useful in connection with petty offenses tryable by United States Commissioners because of the act passed a year ago in which United States Commissioners have been given trial jurisdiction over petty offenses committed on federal reservations

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like traffic violations.

I think this addition to include the summons is a very useful one.

Mr. Glueck. It is useful in juvenile cases or bail bond cases.

Mr. Medalie. The language as you have it here as to summons might be intended to refer only to such summonses as at present can be issued, namely to corporations. If we want to have individuals brought in by summons, I think it should make it clear that this applies to individuals.

Mr. Youngquist. Lines 16, 17, and 18 cover it.

Mr. Holtzoff. I think it is clear, Mr. Medalie, because this rule says that warrants or summonses shall be issued, and it does not limit it to existing statutes.

Mr. Medalie. Yes, I think it is clear.

The Chairman. Is there any further discussion of Rule 4-A?

(There was no response.)

If not, we will go on to Rule 4-B.

Mr. Robinson. This states the contents of the warrant. The suggestion was made that the words in line 9 and line 10, namely, "in the name of the President of the United States," be omitted.

Mr. Holtzoff. They do that with civil process. They no longer say "The President of the United States sends greetings." I think we should omit that in criminal proceedings as well.

I move that we strike out the phrase "in the name of the President of the United States."

Mr. Seasongood. I second it.

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Mr. Glueck. What is the substitute? In the name of the United States.

Mr. Holtzoff. There is no substitute, just as in the description of the summons.

Mr. Glueck. How about the civil rules?

Mr. Holtzoff. In the civil rules you do not have anything.

The Chairman. There is a motion. All those in favor of the motion.

Mr. Medalie. (Interposing) Just a moment, Mr. Chairman. It says "Signed bythe clerk."

Mr. Holtzoff. Or the committing magistrate. It should be "or by the committing magistrate."

The Chairman. We are on the question of eliminating the phrase "President of the United States." All those in favor of the motion say aye.

(There was a chorus of ayes.)

The Chairman. All those opposed.

(There was no response.)

The Chairman. It is carried.

Mr. Medalie. I move that the words "or committing magistrate" be inserted after the word "clerk" in the second line.

Mr. Seasongood. Shouldn't that be "in the name of the United States"?

Mr. Holtzoff. The summons in civil cases is not in the individual's name.

Mr. Seasongood. This is the warrant.

Mr. Holtzoff. Why not make it just as simple as we can and cut out all ancient verbiage?

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Mr. Robinson. But the United States is a party to a criminal proceeding.

Mr. Glueck. That is the way the proceedings are entitled in the reports. I think "United States" would be a good

7 substitute.

Mr. Holtzoff. You do not have anything like that in civil summons. I would like to see our criminal forms just as simple, if possible.

Mr. Glueck. What do you do in the case of warrants issued by the state courts?

Mr. Medalie. It is "the People of the State of New York."

Mr. Holtzoff. I do not think we want to follow that.

Mr. Crane. It is an order of the court signed by the clerk. It is like any other order by direction of the court. That is part of the United States, so far.

Mr. Glueck. The civil rules do not prescribe the contents.

Mr. Holtzoff. I think it is provided that warrants shall be signed by the clerk.

Mr. Crane. Yes.

Mr. Robinson. There is a reason for that.

The Chairman. Well, there is a motion to insert the words "or committing magistrate" after the word "clerk" in line 10.

Mr. Youngquist. I do not think it would fit.

Mr. Holtzoff. I think we will have to make another amendment at that point.

Mr. Robinson. It is my experience in working on these rules that you begin to get into complications as soon as you

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put in the words "committing magistrate."

Mr. Holtzoff. I thinkyou have to put in "committing magistrate" because that is one of the ways you start the proceeding.

Mr. Robinson. But we can bring it in by a separate rule.

Mr. Youngquist. I am wondering whether in place of Rule 2 we can insert a section of definitions. Here we use the word "government." Is that the United States Government or what? If it is, it is the United States, but I do not think that is proper.

Secondly, we speak of the defendant or his attorney. Why should we not provide that any act that may be done by the attorney or the defendant may be done by the defendant himself?

Next we speak of the United States Attorney doing this or doing that.

With respect to saying that the warrant shall be signed by the clerk or the committing magistrate, may we say that the word "clerk" shall include the committing magistrate? It seems to me we would simplify the thing greatly. I perhaps go too far in the use of definitions, but I think they are extremely valuable. In legislation it is now used a great deal.

Mr. Holtzoff. Sometimes it is carried too far.

Mr. Youngquist. There may be a danger of going too far in that direction, but I threw out the suggestion nevertheless. I think something along that line would tend to simplify and shorten the rules.

Mr. Robinson. There is a reason for omitting them, which I may explain. I understand that the committee on civil rules agreed not to have a section on definitions because definitions

for the purpose of litigation sometimes are just too definite. Mr. Tolman informed me that after very extensive deliberation the Advisory Committee on Civil Rules decided that there should not be a definition section. However, whether that should preclude us is a question that is up to the committee to decide.

Mr. Youngquist. I did not have in mind that definitions should be used for any purpose other than appellation; not to define what an indictment is or an attorney or a complaint or a warrant or anything of that sort but simply in the case we are discussing, to define the use of the word "clerk" plus the words "committing magistrate."

Mr. Holtzoff. I agree with the reporter. I think the clarity with which the civil rules were drawn is something to be admired. They did not have definitions, but used each word in its ordinary and accepted sense. I think that there is a very undesirable tendency to have too many definition sections. I know that in certain cases of legislation it is carried to such an extent that you distort the meaning of words, like as if you say "for the purpose of this Act, the word 'table' includes the word 'chair,'" and that sort of thing.

That is the type of thing that is done with some definitions. I quite agree with the reporter on this thing.

Mr. Youngquist. You have a different situation in the rules of civil procedure. There you have a district court. Here you have a district court or a committing magistrate.

Mr. Holtzoff. It would be an artificiality, to say that the word "clerk" shall include "committing magistrate."

Mr. Youngquist. Well, any act that is to be done by the clerk also may be done by the committing magistrate.

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Mr. Holtzoff. But there may be some that you may not want to apply it to. I think you would get yourself into a great maze and labyrinth by doing that and by repeating the words in the four or five cases.

Mr. Youngquist. I hope it may be open to further discussion. I made the suggestion on the last amendment, and if I may, I would like to propose the amendment that line 10 read "be signed by the clerk under the seal of the court or by the committing magistrate, shall contain."

The Chairman. Do you accept that, Mr. Medalie?

Mr. Medalie. Yes, sir.

Mr. Crane. That the warrant issued by the magistrate contain the name of the court? Is a magistrate a court? Is a commissioner a court?

Mr. Medalie. It would say "The United States District Court for the Southern District of New York" or the "Eastern District Court," or whatever the state was.

Mr. Crane. It says that it "shall contain the name of the court and the name of the defendant."

Mr. Holtzoff. And the Commissioner's warrant gives the name of that district court.

Mr. Seth. Yes, it does.

Mr. Holtzoff. There is no difficulty about that.

Mr. Seth. Could not all this be provided by the provision under United States Commissioner's proceeding stating that where the word "court" is used that it shall include the commissioners?

Mr. Crane. That is what I was asking before where we had the discussion about the commissioners. Isn't he a part of the court? When you use the word "court," why is it necessary to say

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"any commissioner"? Isn't he part of the court? He is just a functionary of the court.

Mr. Holtzoff. The reason it is necessary is because you use the word "clerk."

Mr. Crane. Why is it here? Why speak about the word "commissioner"?

Mr. Holtzoff. Because the enabling act says district court and United States Commissioners, and for the purpose of our enabling act, there seems to be a definition of them.

Mr. Crane. That may be the answer to it, but I always supposed that commissioners were really officers of the court.

Mr. Holtzoff. There is no doubt about that. I think he clearly is. He is always treated as such.

The Chairman. We have a motion on the amendment presented by Mr. Medalie with the amendment by Mr. Youngquist, accepted by Mr. Medalie. All those in favor of the motion say aye.

(There was a chorus of ayes.)

The Chairman. All those opposed. (Silence.)

It is carried.

Mr. Holtzoff. I have another motion. I move that we strike out the last sentence. The last sentence says that the court in its discretion may direct the clerk to issue a summons instead of a warrant. I believe that in the use of summonses the discretion should be with the United States Attorney rather than with the court because the United States Attorney will be held responsible ~~for~~ for the prisoner's ~~case~~ custody, not the judge. I think the United States Attorney should have the election as to when the summons should be used rather than the court.

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Mr. Seth. Couldn't the United States Attorney make application to the court?

Mr. Holtzoff. Yes, but this last sentence gives to the court discretion to refuse to issue a summons instead of a warrant.

Mr. Medalie. We know how these things operate in large metropolitan centers. The United States Attorney's office of the Southern District of New York has something like 65 young lawyers in addition to the head of the office. Very often these young men are broken in by being allowed to appear before the commissioner. It is the experience of many United States Attorneys that some of these young men regard very petty offenses as being almost capital offenses. Some person with experience should be with them to give them a word of caution.

Mr. Holtzoff. I think that is right so far as the Southern District of New York is concerned because that is a tremendously large office, and the Chicago office as well, but that is not true of probably 90% of the United States Attorneys offices. After all, we are dealing with the entire country. We must bear in mind the rural courts as typical federal courts.

Now, of course you have young men, and they often should be cautioned, but could not the word of caution come from their chief?

Mr. Medalie. He does not often have the opportunity to do so. I have in mind other districts, for example the Northern District of New York. It is pretty well scattered, and when the men are on assignment they are often located at places where the chief has no opportunity to see them.

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Mr. Holtzoff. But in districts like that, isn't it the practice to have men who are experienced, not as in the large cities.

Mr. Medalie. I think it would be a serious thing to leave that in the hands of the prosecutor, considering the kind of judicial system we have.

Mr. Holtzoff. The rule provides that summonses may be used instead of warrants. Now then, the question is who should have the determination when the summons should be used instead of the warrant? We are making quite a radical change, and a good one, in federal procedure, and I think that it should not be the court but rather the prosecutor who should have the determination.

Mr. Youngquist. The fact that it is a radical change makes it appropriate for use by the court rather than by United States Attorneys. Your fear is that the court will use that discretion too freely, and I think it is well founded because I doubt that any judge would issue a summons instead of a warrant unless there was really good reason for it. I have no doubt that he would never do it without asking the United States Attorney.

Mr. Crane. Isn't the summons also signed by the judge? The judge never does it of his own volition. I never heard of that.

Mr. Holtzoff. But in the last sentence of this paragraph the judge would have the discretion to deny a warrant and issue a summons instead. I doubt whether that discretion should be lodged with the judge; rather it should be with the United

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States Attorney.

Mr. Youngquist. This rule provides that. It says the clerk shall forthwith issue the summons.

Mr. Holtzoff. What actually happens is that the clerk does not move himself. The United States Attorney goes to the clerk's office and says, "Give me a warrant," or "Give me a summons."

Mr. Medalie. It is just a routine matter. The minute the indictment is made, the clerk fills out a sheet of paper unless the district attorney tells him not to.

Mr. Wechsler. If there is to be application by the district attorney for process, couldn't paragraph (a) indicate that?

Mr. Robinson. The American Law Institute has that on summons. It is on the left-hand page, page 6, section 196:

> "When an indictment has been found or an information filed against a person charging a misdemeanor only, if he is not in custody or at large or bail for the offense charged, the court or a judge thereof shall direct the clerk to issue a summons instead of a warrant, if the court or judge has reasonable ground to believe that the person will appear in response to a summons."

Mr. Holtzoff. A judge may insist on a summons instead of a warrant. We have had cases where particular judges would take particular prejudice against specific statutes. We had those situations recently.

Mr. Medalie. We should not have any difficulty about this. If this summons business is worth doing at all, it is worth trusting to the court. With respect to the commissioners, the

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district court has tremendous power over the commissioners, and if it does not like what they are doing it just puts them out.

Mr. Holtzoff. I certainly do not think commissioners should be trusted with a lot of authority, because in many cases commissioners are persons who can do a little clerical work and that is about as far as they can go.

Mr. Seth. Not those who try petty offenses?

Mr. Holtzoff. Those commissioners who have trial jurisdiction are especially designated by the court.

Mr. Medalie. If a case is important enough the United States Attorney does not have to go to the United States Commissioner; he can go to the district judge.

Mr. Holtzoff. I do not think that is done in many districts. It may be done in the Southern District of New York. I know it is, but it is not done in the average district because the average district covers quite an area and the judge travels from one division to another, and they may be too far apart.

Mr. Medalie. That happens when you are worried about the defendant getting away? If it is a serious case, say kidnapping or extortion, the procedure is really initiated not by warrant but by arrest, isn't it? The actual problem does not exist.

Mr. Holtzoff. Very frequently it is initiated by warrant before the arrest is made. I know of any number of important cases where we got the commissioner's warrant first; then made the raid and arrested the defendant.

Mr. Medalie. Are you afraid that in cases of that kind the commissioner would issue summonses?

Mr. Holtzoff. It may happen; not in big cases, it is true,

but it may happen in run-of-the-mine cases.

Mr. Medalie. In run-of-the-mine cases I think it is important that overenthusiastic prosecutors be subject to some supervision. You take the cases of operating a still, or whatever the new line of bootlegging cases are, it is not necessary to arrest the landlord on whose premises that law is being violated. A sensible commissioner or judge would say, "That is a responsible man. Maybe he knew about it and maybe he did not. We will see. We will give him a summons and he will come in."

In tax cases the defendant is usually easily produced. You know from experience that many of the important cases are not done in that way. The district attorney does not even ask for the issuance of a warrant; he calls up the defendant's lawyer and says, "You come in a week from next Tuesday with your client."

Mr. Holtzoff. That is true only in big cases; it is not true in run-of-the-mine cases.

Mr. Youngquist. It seems to me that if commissioners are responsible enough to be vested with authority to decide whether a man shall be held for the grand jury, they should have enough authority to say whether a defendant should be made to appear by summons or by a warrant.

Mr. Holtzoff. I must confess that my experience leads me not to have too high a regard for United States Commissioners.

The Chairman. We have a motion here. Your motion was to strike out the words giving the court discretion?

Mr. Holtzoff. Yes.

The Chairman. I should think a good part of it would depend

upon whether or not the judge would sign a summons as well as a warrant. I know some judges who do not sign summonses. If they had to sign both, they may reflect as to which would be the better in a particular case.

Your next rule seems to indicate that the judge signs the summonses, but that is rather unusual.

Mr. Holtzoff. The next rule indicates the form the summons shall be in and the form of the warrant. Here the judge does not have to sign the summons, but it merely gives a residual power to the court to interpose and say to the clerk not to issue a warrant but issue a summons instead.

Mr. Dession, Isn't that what the court is for?

Mr. Crane. Well, who would have discretion? The attorney?

Mr. Holtzoff. I would say that if this sentence was out, the United States Attorney would ask the clerk.

Mr. Crane. Don't you think that many United States Attorneys are just as overzealous as any commissioner in going the other way?

Mr. Holtzoff. No. My observation has been that the overzealousness of those Mr. Medalie referred to is limited to a few big cities where the custom has been to take very young men as Assistant United States Attorneys, brilliant law-school graduates, but those with very little experience. In the rural districts and smaller towns you find older men as Assistant United States Attorneys, and there the overzealousness is absent.

We have noticed it in the Department, but it is confined to two or three large centers, and particularly to New York.

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Mr. Wechsler. To bring this discussion to a head, I move the following: the result be achieved by drafting first that the summons shall issue automatically upon application either by the clerk or the commissioner, as the case may be.

Mr. Youngquist. Application by whom?

Mr. Wechsler. The United States Attorney.

(Continuing) And second that in the case of an application for a warrant of arrest, it be not automatic for issuance either by the court or by the commissioner, but they both have jurisdiction to issue a warrant of arrest.

Mr. Holtzoff. That is all right as to the complaint, of course, but in the case of indictment the present system is to issue the warrant automatically. However, I think the United States Attorney is in a better position to determine it.

Mr. Glueck. Well, someone must review the discretion of the United States Attorney.

Mr. Crane. I hate to ask these questions, but I must confess that I cannot quite get your viewpoint on that. If the application is made to somebody for a warrant or a summons, it will always be the prosecuting attorney. If he asked for it, that will be granted except in some extreme cases, exceptional cases. If he asks for a warrant, he goes to the clerk and gets the warrant. Is the clerk going to the judge and say that he should issue the summons?

May it not be that where there is a request for the warrant that the attorney for the defendant, knowing that he is there and that he will come, that they do not issue a warrant but issue a summons and he will bring him in?

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I cannot quite see the difficulty that you have in mind. I cannot imagine a judge, as I know them, refusing anything that the district attorney requested. Maybe I have not had any experience with anything like that, but I cannot imagine it.

The Chairman. Maybe we can ask Mr. Holtzoff whether there are many cases where a judge and the district attorneys cannot get along any too well.

Mr. Holtzoff. These cases are in ~~some minor situations~~ the minority where there might be difficulty. Of course, today warrants issue automatically. The court has no discretion to deny a warrant after the indictment is found, but this provision will give to the judge the authority to refuse a warrant even after the indictment is found.

Mr. Medalie. He has the authority, where he may impose a ten-year penalty, to suspend the sentence.

Mr. Holtzoff. I do not want to impress ~~to strongly~~ my viewpoint on you too strongly

Mr. Crane. No, you have not as far as I am concerned. I wanted to get your viewpoint.

Mr. Glueck. That last sentence more appropriately should come at the end of section (a).

The Chairman. We have two unseconded motions before us: Mr. Holtzoff's and Mr. Wechsler's. I think we should take care of them.

Mr. Holtzoff. Suppose I withdraw my motion.

Mr. Wechsler. I will withdraw mine if it will help.

The Chairman. No, we want to take care of that.

Mr. Medalie. It seems to me it is one of the most important

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phases. I do not think we need to make a decision now. We can debate it at another time. I think it is very important.

The Chairman. Mr. Wechsler's motion was that the summons would be the normal course of procedure unless the court ordered the warrant.

Mr. Wechsler. That the summons would issue automatically, and that in the case of the warrant judicial discretion would interpose.

Mr. Medalie. The procedure today to issue the warrant on indictment automatically should be continued unless the discretion is exercised not to do so.

Mr. Crane. Yes.

Mr. Seasongood. The element of time may be important. It should issue automatically unless there is some reason for not issuing it.

Mr. Holtzoff. Yes. The judge may be ~~in~~ at a division point two or three hundred miles from the ~~point of~~ division point at ~~in~~ which the arrest was made.

Mr. Wechsler. I think the point is sound. I withdraw the motion.

The Chairman. Would you make a motion, Mr. Medalie, on the point you mention that the reporter prepare a rule which would embody the idea that the warrant shall be the automatic procedure unless the Court orders otherwise?

Mr. Medalie. Yes, I think that covers it.

Mr. Holtzoff. My idea is it should be used by the United States Attorney or the investigating officer and in petty cases should be limited to this. For instance, an inspector or an

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officer of the Department catches somebody shooting wild duck two minutes before sunrise. Shouldn't he issue a summons?

Mr. Medalie. That is anotherprocedure. That procedure is analogous to the traffic police issuing a summons instead of arresting the defendant. That is not covered by this.

Mr. Holtzoff. I think it should be.

Mr. Medalie. It does not belong here.

Mr. Wechsler. If we cannot cover arrest, we cannot cover summons.

Mr. Holtzoff. You would cover summonses, if summonses are by judicial process.

Mr. Crane. According to my New York timepiece, it is half past one, and my digestion has not become accustomed to the fact that it may be half past 12 here.

The Chairman. I was about to rule. We will adjourn for lunch.

(Thereupon, at 12:30 o'clock p. m., a recess was taken until 1:30 o'clock p. m. of the same day.)

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AFTERNOON SESSION

The proceedings were resumed at 1:30 o'clock p.m., at the expiration of the recess.

PRESENT: Same as the morning session. Also Mr. John B.Waite.

RULE 4(b) (2)

The Chairman. Gentlemen, let us resume. I think we are now up to Rule 4(b) (2).

Mr. Robinson. The principal question as to Rule 4(b) (2) is whether or not the grammar or the style of expression on the first line is adequate:

"The summons shall be the same as the warrant except that it shall command that the defendant shall appear."

I had the advantage of talking that over with Mr. Holtzoff and Mr. Tollman yesterday and some question was raised about it. In the first place, is it clear?

The Chairman. It is clear, but I do not think it is artistic.

Mr. Holtzoff. I suggest that it read:

"The summons shall be in the same form as the warrant except that it shall command the defendant to appear."

Mr. Seasongood. The thought occurs to me that it might be, "except that the defendant shall not be arrested but shall be ordered," because, while it may be hypocritical, conceivably, it will still allow arrest on a summons, instead of saying it is the same.

While we are on that, it occurred to me, is your penalty for contempt sufficient? There are other penalties for not obeying it.

Mr. Holtzoff. You could issue a warrant.

Mr. Seasongood. Will people say, "Well, after all, the only penalty is for contempt, and I won't pay any attention to it."

Mr. Holtzoff. Then he will issue a warrant if the defendant does not appear.

Mr. Seasongood. Could anybody say that is a limitation, that the only penalty is the penalty for contempt of court for not obeying a summons?

Mr. Robinson. I tried to save space, possibly at some cost.

Mr. Seasongood. I am not sure, but I present that question.

Mr. Robinson. If he does not appear in response to the summons, then a warrant shall be issued. Perhaps that should be in.

Mr. Dession. That could be done in any case. That does not have to go in.

Mr. Crane. I do not know, but any process of the court, if it is disobeyed, is subject to contempt. Do you have to add that to every order or process of the court? I did not think that you needed to emphasize it. I may be wrong, but I took for granted that any order or process, whether a summons or warrant or any other order, civil or criminal, is subject to contempt.

The Chairman. That is true. This is the language so that the man who receives it will be apprised of that fact.

Mr. Crane. That may be an answer, then.

Mr. Robinson. We will reword line 19, so that it will be more finished. I think Mr. Holtzoff's suggestions are good, except that I object to "in the same form." I want to indicate

that it is in the same substance also.

Those are questions I have.

The Chairman. If there is nothing further, we will go on to subdivision (c).

Mr. Robinson. That Rule 45 deals with the Rule 45, page 2, Service. That is carried over from the civil rules, and I do not know that any comment or discussion is required.

The Chairman. You do not want to take it up now?

Mr. Robinson. No, sir. That subdivision (b), beginning at line 28, as far as we get in the law of arrest and other details of arrest, as we have suggested, it seems should come at a later section.

Mr. Holtzoff. Well, that could hardly be within the scope of the Enabling Act.

Mr. Robinson. Well, I suppose arrest would be part of the proceedings in a criminal case before arrest.

Mr. Holtzoff. Arrest without a warrant is not part of
2 the proceedings in the case.

Mr. Dession. I wonder about that. That is within the terms and conditions under which such an affidavit might be received and could include the time within which it is filed after the arrest took place.

Mr. Holtzoff. Maybe that is so, but the manner of the arrest itself, the right to make the arrest without a warrant, would be outside the scope of the Enabling Act.

Mr. Dean. But that designation in the complaint would not be sufficient unless it appeared therefrom that the arrest had been made under certain circumstances. How could that be beyond our jurisdiction?

Mr. Holtzoff. Well, the validity of the complaint does not depend on the legality of the arrest. That would be a new rule of substantive ~~arrest~~ law. There is many an illegal arrest in which the defendant is afterwards prosecuted and convicted, even though the manner of arrest may have been illegal.

Mr. Dession. Well, the manner of making an arrest is usually embodied in codes of procedure. In any case, I feel very strongly that before we leave out anything of this kind we ought to make every effort to make sure that we can't get it into this. I think a code of criminal procedure which did not cover arrest would hardly be worth our efforts.

Mr. Robinson. Mr. Waite's presence is not here. He is one of our experts on arrest. He is to be here this afternoon. Let us wait until he comes.

Mr. Holtzoff. Anyway, it does not come under this particular section.

The Chairman. That was merely brought up, as I understand it, as a point to be kept in mind.

Mr. Dession. Yes. I wanted to be quite sure that we were not leaving that out.

Mr. Dean.

May I ask, in connection with (d), in the last sentence on page 2, why is it provided that the officer need not have the warrant in his possession in case of arrest?

Mr. Robinson. The reason for that is that there are telegraphic communications to an officer which are used as authority for making an arrest.

Mr. Holtzoff. Then it is an arrest without a warrant?

Mr. Robinson. Well, there has been a warrant issued.

Mr. Glueck. There is a warrant on file.

Mr. Holtzoff. The rule today is that in order to serve a warrant legally and validly an officer must have the warrant with him so that he can exhibit it to the person at the time.

Now, if he makes an arrest because he received authoritative information by telephone, telegraph, or otherwise, that a warrant has been issued against the defendant, the arrest is nevertheless regarded as an arrest without a warrant and is tested as to its validity in the same manner as any arrest by warrant.

Now, this would change the rule of law on that point. I do not see any particular objections to the proposed change in that, although I think it is fair to say that it would change the law.

Mr. Medalie. Yes, but there is a practical legal reason. Of course, an arrest without a warrant means that the burden is onthe arresting officer to prove probable cause, or whatever the statutes or law of the state requires.

When he arrests upon a warrant he is protected by the process, unless it was void, as, for example, issued by a commissioner without a proper complaint being filed.

Now, practically it works this way. A warrant may be out for a notorious character who can't be found. Every deputy marshal in the district does not walk around with that warrant. Furthermore, the deputy marshal having it may have gone out on it, worked on it for a week, then given it up. Then when he runs in to the defendant he has not the warrant in his possession. He ought nevertheless be protected in making that arrest.

Mr. Holtzoff. I think so. I think this is a desirable

change. It does not hurt the defendant at all.

Mr. Dean. I am thinking of the situation where either you have authority for the arrest on the basis of a warrant or you have authority in the absence of a warrant. Now, in the case of an ordinary marshal, where the warrant has been issued and he is making the arrest in another district, he has reasonable grounds to believe that the crime has been committed, and he is sufficiently protected to arrest without a warrant because of the issuance of a warrant in another place and the fact that that was communicated to him by teletype.

3 Mr. Holtzoff. There is a point there, though. You know, the Federal rule is that in order to justify an arrest without a warrant it is not sufficient that the arresting officer have reasonable ground to believe that the defendant has committed a felony. There must be two elements: First, that the felony must have actually been committed, and, second, that the arresting officer have reasonable ground to believe that the defendant has committed such felony.

Now, sometimes it may turn out later that no felony has actually been committed, although the warrant has been issued.

I have heard of very few suits for false imprisonment against officers. However, they do lay themselves open to such actions, and this rule would protect them, and I think perhaps they are entitled to that protection.

I am in favor of the proposed change.

Mr. Dean. I am not sure of the law of arrest in the Federal system, but my recollection is that if the officer has reasonable grounds to believe that a felony has been committed he is protected. In the event of private ~~interests~~ affairs, he must

have two elements: First, reasonable grounds to believe that the felony was committed by the defendant, and, second, that the felony was actually committed.

Mr. Holtzoff. No. The Federal rule is, as, I think distinguished from the New York rule --

Mr. Crane. The New York rule is as you stated.

Mr. Holtzoff. It is also the Federal rule.

Mr. Crane. That is, in a felony case the felony must have been committed and he must have reasonable grounds to believe that the defendant committed it.

Mr. Holtzoff. There are certain states which have it that way, but the states have the two elements: that the felony was committed and that the defendant committed it.

Mr. Glueck. In some states the Federal officer has no more authority than a private citizen?

Mr. Holtzoff. That is correct. I know the 1934 Act, and you may remember it, relating to the authority of F.B.I. agents to make arrests, distinctly defines it that way. For that very reason the protection which this draft would extend to a Federal officer I think is very desirable.

Mr. Youngquist. Almost necessary.

Mr. Holtzoff. Yes.

Of course, officers sometimes have to take their chances. They are not going to fail to arrest a man on a telegraphic notice that the warrant is there merely because they cannot comply with the letter of the statute. They assume they are going to be protected, but this would protect them.

Mr. Dean. If that is the state of the Federal law, and you are absolutely sure of that --

Mr. Holtzoff. I am.

Mr. Dean. My objection is not well founded.

Mr. Youngquist. May I ask a question about the first sentence on line 29? It says:

"The warrant shall be served or executed by the arrest of the defendant."

What office does the word "served" have?

Mr. Holtzoff. "Served or executed."

Mr. Youngquist. Well, a warrant is always executed by making the arrest, is it not? He serves the summons, of course.

Mr. Robinson. You notice the heading there, "How Served."

Mr. Holtzoff. You speak of serving a warrant bymaking the arrest, so either one is correct. You do not need both.

Mr. Youngquist. You execute a warrant.

Mr. Dession. "Served" would refer only to leaving or serving a copy.

Mr. Robinson. "Service" as a broader term is in line 24: "service of all process," but line 28 would be certain to refer to that, Mr. Youngquist.

Mr. Youngquist. It is not important, though.

Mr. Robinson. We will save as many words as we can.

The Chairman. Which one is going out.

Mr. Robinson. "Served" would go out.

4 Mr. Longsdorf. Why not alter the headline in (d) by saying, "Execution of Warrant"?

Mr. Robinson. We just mentioned"warrants shall be executed." "Served or" goes out.

Mr. Holtzoff. Are you changing the heading?

Mr. Robinson. Yes.

Mr. Holtzoff. How?

Mr. Robinson. Change "Served" to "Executed," so that it reads, "How Executed."

Mr. Seasongood May I raise a question? Should not you leave out the word "request" in reference to the warrant? Shouldn't he leave it, so there would not be a dispute as to whether he requested it?

Mr. Holtzoff. You do not leave a copy with the defendant.

Mr. Seasongood. I should think he might want to see it.

Mr. Holtzoff. He has a right to be shown it.

Mr. Seasongood. He cannot keep it and show it to his lawyer.

Mr. Holtzoff. No, but a warrant is not issued in duplicate. There are no copies. You would have to change the warrant procedure if you are going to do that.

Mr. Medalie. Practically no question comes up, because the warrant must be returned, filed in court, in the interim between the service or execution of the warrant and the arraignment. The defendant is in no position to do anything. If he or his lawyer wants to raise a fuss about it later, he has ample opportunity to do it in the court files. Actually, if the warrant is found to be illegal, it makes no difference, if he pleads to the indictment.

Mr. Youngquist. I once had the question of the sufficiency of the warrant. We said, "Go ahead. We will issue a new one."

Mr. Seasongood. If you get an ordinary summons in a civil action, you get a copy of it.

The Chairman. Yes, but you do not get a writ of certiorari. A summons is the only thing you do get.

Mr. Robinson. Rule 4 (2) is an effort to save words and space on criminal rules by tagging to the civil rules Rule 4, on the left-hand side opposite the first page of this rule, where you find the civil rule procedure, and then, moving on back, go back to the A.L.I. Code.

The main thing is to refer to the civil rules system, and that is on Rule 4. That shows how summonses shall be served.

Mr. Longsdorf. Is it all right to refer to the civil rules which permit service of summons on a person at the residence of the defendant, or must there be actual personal service on a defendant himself in a criminal case?

Mr. Robinson. That is a question for us to decide.

Mr. Holtzoff. If you are going to punish the defendant for contempt of court in the event that he fails to comply with the summons, ~~he~~ ought not to be allowed to leave the summons at his residence, and that is what you can do under the rules of civil procedure.

Mr. Crane. Do you not think it is wise that we make these rules for criminal procedure complete in this, without referring to anything else? What is the harm in leaving out the civil rules altogether. Write out our own rules, so that anybody can see what they are without referring to anything else.

The Chairman. Your motion, Judge Crane, is that the committee prepare a rule under this 4(d) (2), incorporating the pertinent sections of the rules of civil procedure?

Mr. Crane. Yes.

The Chairman. Is there any debate on that motion?

Mr. Holtzoff. I second the motion.

Mr. Youngquist. They are very lengthy.

The Chairman. I know, but I think the rules should stand by themselves.

Mr. Holtzoff. They are lengthy, but I do not think they all apply to a criminal case.

Mr. Crane. I agree with you. I think that in a criminal matter the defendant should be served personally. Take our big cities. Who knows what their residences are?

Mr. Holtzoff. The civil rules refer to service on the United States, service on corporations --

Mr. Crane. I just refer to service personally on the defendant.

The Chairman. Let us dispose of this motion.

All those in favor of that motion say "aye."

(There was a chorus of ayes.)

The Chairman. Opposed, "no." (Silence.)

Very well, the motion is passed.

5 I am wondering if line 38 should be changed. You do not speak of executing a summons.

Mr. Holtzoff. Why not say "executed or served"?

Mr. Robinson. "Served" covers both.

Mr. Holtzoff. I think it does, too.

Mr. Dession. Do you want to make any arrangement for service on a corporation, in part (2), at the top of page 3?

The Chairman. Would not that come under the provisions that are to be taken from the civil rules?

Mr. Dession. I should assume that it would, yes.

The Chairman. It is under (b) (3).

All right. Now, let us proceed to subsection (e).

Mr. Robinson. (e) was left in. Of course, in the civil

rules it is designed to cover matters such as service by publication, but that is impossible in a criminal case. That is one clause that we left in on the remote possibility that some member of the committee might see some occasion for such provision.

If there is no suggestion of any possibility of the use of such a provision, I think we should just drop it.

Mr. Holtzoff. I move that we strike out subsection (e).

The Chairman. All those in favor say "aye."

(There was a chorus of ayes.)

The Chairman. Opposed, "no." (Silence.)

The motion is carried.

Let us take up (f).

Mr. Holtzoff. I think (f) requires a change.

Mr. Longsdorff. Is that going to be all right in a criminal case? Is it all right to make that applicable in criminal cases?

Mr. Holtzoff. No. That would be a considerable change in the existing law, but I think it would be a very desirable change. Today a subpoena to a witness in a criminal case runs throughout the United States. A warrant of arrest in a criminal case runs only to the district. In other words, if you find an indictment in ~~some~~ the southern district in New York and the defendant is arrested in Brooklyn, you have to bring a removal proceeding to take him across Brooklyn Bridge.

Mr. Crane. Is that so?

Mr. Holtzoff. Yes. We had a case where it took three years to remove a defendant ~~in~~ from Jersey City to the Southern District of New York.

Mr. Seth. That would still be true under this.

Mr. Holtzoff. That would still be true under this, but this would cure it as between two districts within the same State.

A subpoena in a criminal case runs throughout the United States, so that you can bring a witness from San Francisco to New York, but a warrant runs only within the district, and that is the reason for the removal proceedings.

Mr. Glueck. Why should that be?

Mr. Seth. A subpoena on behalf of a defendant does not run throughout the country.

Mr. Holtzoff. I myself think that a warrant of arrest should run throughout the country, but I doubt very much whether you could ever get Congress to accept any set of rules which would permit a person to be moved across the continent without a removal proceeding, although theoretically I would like to see it done.

Mr. Youngquist. I do not think it should be.

Mr. Medalie. It works two ways. One is the abuse you get in trying to get a man across the state line who is only a few miles away. The other difficulty still exists today, in that there are differences of opinion in different sections of the country as to what constitutes a crime. Someone in Alabama may get very excited about a labor leader in New York who while in New York allegedly engaged in a conspiracy with someone down in Birmingham or Mobile and bring him in when he ought not to be brought in.

Now, it is difficult to work this out. The procedures ought to be simplified. These obstructions ought to be stopped, but it ought not to be possible to take people lightly from one

part of the country to another.

Mr. Holtzoff. If you ~~committed~~ permitted removals automatically when there was an indictment but not in a case where there was only a commissioner's warrant, you might possibly meet the point.

Mr. Medalie. There are a lot of other difficulties. For instance, what lawyers, rightly or wrongly, regard his present abuse by the Government of the United States in picking out a favorable district in which to prosecute oil people or tobacco people or whatever it happens to be. It is a very complicated thing, and we ought to be careful about any theoretical rules.

Mr. Holtzoff. This particular rule is very desirable. This would make it unnecessary to have removal procedures as between two or three districts within the same state. That certainly is innocuous.

Mr. Medalie. When you get back to that we will get it sooner or later. I am troubled by one or two raw deals I got from district judges in adjoining districts. And, on the other hand, the fact that we can abuse our power when we are employed by the Government.

Mr. Seth. The present law, I think, is that a summons against a corporation runs throughout the United States in a criminal case. There are decisions to that effect, and why should not these rules so provide? They do it right along where a corporation is indicted. In Colorado they summon them from anywhere.

I just make that as a suggestion -- why a summons against a corporation at least should not run throughout the country.

Mr. Holtzoff. I do not understand that it runs throughout

the United States. The corporation has to be located in the district.

Mr. Seth. In criminal cases in recent indictments under the Anti-Trust law in Denver they summoned corporations without any more ado.

Mr. Holtzoff. Maybe they did not raise any question.

Mr. Seth. There are decisions to the effect that it runs throughout the United States. There are two or three circuit courtof appeals decisions. I make that as a suggestion.

6 Mr. Glueck. You would limit that to corporations, would you?

Mr. Seth. That is my idea. That is the present law.

Mr. Wechsler. What is the affirmative task for extending the scope of the warrant throughout the state rather than limiting it to a district? Some states are rather large, and that would mean that a man could be arrested and removed and carried to another part of the state without any removal proceeding at all.

Mr. Holtzoff. Let us take the longest distance within a state, El Paso to Dallas --

Mr. Seth. Make it Beaumont, in the eastern part, about 1500 miles or 1000 miles.

Mr. Holtzoff. Why should not the man who committed the crime in Dallas and escaped to El Paso be removed to Dallas? We assume he is indicted at Dallas and he is arrested in El Paso. Why should it be necessary to bring long, laborious removal proceedings in order to decide whether he might be taken across the state to Dallas?

Mr. Wechsler. Well, if you assume that he committed the

crime and escaped, the case is weak, but let us assume that he--

Mr. Medalie. If that crime was being prosecuted by the State, it would make no difference where he was. I have in mind, for example, a man committing a crime in Buffalo, and he happens to be in Long Island, summering there, in the eastern district. Under the present Federal procedure you need removal proceedings, but if he is indicted in Erie County and arrested in Suffolk County, there is no trouble.

Mr. Wechsler. But if the provision be that he be arraigned where he is arrested, then I take it there is no problem.

Mr. Medalie. But you haven't that in your state procedure, where you take him from one end of the state and arraign him and have him plead in the other end of the state without any preliminaries. The sheriff or policeman can execute the warrant and bring him to the other end of the State.

Mr. Holtzoff. Suppose a man is indicted in Buffalo and arrested in Long Island. He is not arraigned in Long Island. He is brought to Buffalo and arraigned there.

Mr. Seasongood. Isn't there a constitutional provision that you shall be tried by jury in your own locality?

Mr. Holtzoff. No; where the crime was committed.

Mr. Seth. Wouldn't that be helped by a provision that a warrant runs one hundred miles, like a subpoena?

Mr. Youngquist. This now seems to limit the serving of the warrant to a district.

Mr. Holtzoff. Well, the present law limits it to the district. This would limit it throughout the state.

Mr. Youngquist. It says that a warrant may be served within the district. That seems to be inconsistent with the

preceding sentence, which says that all process other than a warrant or a subpoena may be served --

Mr. Holtzoff. That sentence would also have to go out.

Mr. Robinson. Would you want to change the word "district" to "state" in line 52?

Mr. Holtzoff. Yes.

Mr. Youngquist. If you eliminate the word "warrant" in line 48 --

Mr. Holtzoff. You do not need that sentence at all.

Mr. Youngquist. That is right.

Mr. Crane. The only thing we have to change is to take out "a warrant or."

The Chairman. In other words, we are taking out the words "warrant or a" in line 48 and the sentence beginning on line 51, "a warrant may be served within the district."

Mr. Glueck. What about the case of a district covering several states?

Mr. Holtzoff. There are not any such districts.

Mr. Seth. How does the preceding sentence read?

The Chairman. It reads the same as it is now except three words in line 48 come out, namely, "warrant or a," so that it reads:

"All process other than a subpoena may be served,"

and so forth.

If there is no objection, we will go on to (g).

Mr. Medalie. I am not sure about this yet, where there is the territorial restriction on the service of a warrant.

Mr. Holtzoff. Well, the way it reads now is:

"All process other than a subpoena may be served

anywhere within the territorial limits of the state."

Mr. Medalie. All right. I have it now.

Mr. Youngquist. May I ask a question? What does this refer to? "When a statute of the United States so provides, beyond the territorial limits of that state."

Are there such statutes?

Mr. Holtzoff. No.

Mr. Robinson. That is just for an eventuality,which may not occur.

Mr. Youngquist. Then we won't have to change the rules.

Mr. Holtzoff. I think this is just copied from the civil rules and it is surplusage.

Mr. Wechsler. If there is not such an existing statute, it should go out, I think.

Mr. Holtzoff. I would rather see it go out, because I think it is misleading rather than truthful.

The Chairman. All right. If there is no objection, beginning with the word "and" in line 50,to the end of that sentence will be deleted.

Let us consider (h).

Mr. Longsdorf. With reference to (g), do you want to alter the words "serving the process" to include the word "execute"?

Mr. Robinson. We decided that "serving" does include "executing."

Mr. Longsdorf. All right.

The Chairman. Let us consider (h).

Mr. Wechsler. What is the point of (h), Mr. Chairman? Does that mean that a defective warrant of arrest can be amended

after it has been served and thus deprive the person who has been arrested of civil rights?

Mr. Holtzoff. How does that deprive him of civil rights?

7 I do not think any arrested person has any civil right to be liberated because someone made a mistake.

Mr. Wechsler. I was not suggesting a civil right to be liberated. I meant if there has been a defect in the form of process, in the sufficiency of process in which the arrest has been made, do we mean that impropriety to be eliminated subsequently?

The Chairman. Does it necessarily follow from this rule that it would affect the civil rights?

Mr. Holtzoff. You mean there might be an action ~~of~~ for damages because of that?

Mr. Wechsler. Yes.

Mr. Seasongood. I suggest: "Unless it appears that material prejudice would result."

The Chairman. Does not the last clause safeguard that?

Mr. Crane. It can always come up as a question of not being permissible.

Mr. Youngquist. In the situation Mr. Wechsler proposes, where a warrant is defective and an arrest is made in circumstances which would give rise to a cause of action for false arrest, and thereafter the warrant is amended, does that operate nunc pro tunc; and, secondly, is the deprivation of the right to a cause of action for false arrest one of the rights of the defendant referred to here? Or do these substantial rights refer, as I should think properly they would, to his rights in a criminal proceeding?

Mr. Crane. Suppose a man's name was spelled wrong and the "e" was left off at the end of a name. Suppose they put it "Mac" instead of "Mc." Those are things that could be amended. If an amendment did affect any substantial rights, he would not be barred in the civil remedies that he had.

Mr. Holtzoff. Suppose a defendant is arrested under a defective warrant. I do not think that that fact makes the arrest void or the officer subject to a suit for damages, but the warrant has to be void, not merely voidable, in order to give rise to a cause of action for damages, so I am wondering if your point is not perhaps academic.

Mr. Medalie. I think this section is unnecessary. When a man is arrested and is before the court, it does not make any difference at all what kind of process he was brought in on.

Mr. Holtzoff. Mr. Welchsler wants to save his action for damages for false arrest.

Mr. Medalie. Therefore, you do not need to amend the warrant for any such reason.

Mr. Welchsler. I was searching for the purpose of this subdivision.

Mr. Medalie. I think this is simply in conformity with the civil rules that we do not need in criminal cases.

Mr. Holtzoff. I agree that this is absolutely unnecessary.

Mr. Medalie. There is a subject that ~~you~~ we were vitally interested in at one time, and that is search and seizure; and if this has any effect on matters relating to search and seizure, we ought to take it out, because there we are dealing with something very, very serious.

Mr. Youngquist. I may just point out that this is not

limited to warrants. It affects all process.

Mr. Holtzoff. Well, "process" has been defined so far as either a summons or warrant.

Mr. Medalie. Now, if the warrant is defective and you have the defendant, it does not matter if it is defective. If the summons is defective, you can issue a new warrant or go ahead with the summons or warrant, any way you wish to.

Mr. Seth. Don't you think the substitution for return should go in?

Mr. Medalie. I do not think you need that, either. Suppose the marshal makes an affidavit of service or a certificate. It does not require any new provision to let him put in an additional certificate.

Mr. Seth. I do not know, but I think he should have the right to amend the return. That should be permitted.

Mr. Holtzoff. What purpose does that serve?

Mr. Seth. Well, there may be some technicality raised that the summons was not served by the proper officer.

Mr. Holtzoff. He can make an additional return. I do not think we need a rule on that.

Mr. Robinson. Let us ask a question for the purpose of the record, to state the distinction between civil rule and criminal rule. Why is it in the civil and not in the criminal rule?

Mr. Holtzoff. Because there is no such thing as a default judgment in a criminal case, so that you do not need it.

Mr. Medalie. I think that it arises out of the old practice with respect to remedies and attachments and civil orders of arrest. There are certain defects that are not fundamental,

and in the civil practice it has been provided that there may be amendments of those defects instead of voiding the attachment or voiding the arrest.

Mr. Glueck. Apropos what you said before, what about the situation where the warrant charges one crime and it turnsout that another crime was committed? Does that affect it?

Mr. Medalie. No. You have the defendant there.

Mr. Glueck. So long as he is in, it does not make any difference?

Mr. Medalie. That is like something which comes up in connection with removal or extradiction. No matter how you have the defendant, once you have him that does not affect it.

Mr. Holtzoff. So long as he is arrested, you can arraign him on any other charge.

Mr. Seasongood. I feel it should not be excluded. It is in the statute law relating to criminal cases in Rule 4, page 3, in the United States Code. The exact terms are in there. There is no harm in providing for an amendment, so long as the substantial rights of the defendant are not affected. That has been a rule so long that I do not see why we should leave it out. That is Rule 4, page 3, (h).

Mr. Holtzoff. That is the civil rule. That is not the statute.

Mr Youngquist. The statutes begin at the bottom of that page.

Mr. Robinson. Of course, he is talking about search warrants for property as distinguished from a defective warrant for arrest.

The courts overlook the defective warrants for arrest,

since they have the defendant, and deal with him as if he was brought in legally. But when you are talking about search warrants for property, they will throw it out.

Mr. Holtzoff. Would it be fair to permit a search warrant to be amended? I rather doubt it.

Mr. Robinson. That is a question that we picked up in
8 search and seizure, but if it is fair in one place it would be
8 fair in another, or vice versa.

Mr. Medalie. Except we are dealing with constitutional provisions. Certain rights arise from arrest.

Mr. Holtzoff. They are not the same, because once you have the defendant in custody, the validity of the paper by which he was brought in is an academic question.

Mr. Glueck. I often wonder why, if they throw the illegal arrest evidence out, it is not a fieri facias case, if the defendant was kidnapped and brought before --

Mr. Medalie. The logic is not involved. The question involved is that of informing the judges. The question of search and seizure has been abused, especially throughout the prohibition era.

Mr. Seasongood. The statute I had in mind was Rule 4, page 6, amendment of process. It is Rule 4, page 6, Title 28, 767.

Mr. Holtzoff. That is taken from the Judicial Code. Title 28 does not relate to criminal process. That relates to civil process.

Mr. Medalie. There is another fetish in our criminal law that is to be affected, and that is one that relates to amendment of an indictment. The judge may not put his pen to the indictment. Quite a number of cases have followed the line of

the Boyd case. Then they narrowed it down so that only the count in the indictment which the judge tampered with is void.

Mr. Holtzoff. There is some logic to that, because the grand jury finds ~~that~~ the indictment.

Mr. Medalie. That is the theory of it.

Mr. Holtzoff. I move that we strike out paragraph (h).

The Chairman. Is there any further discussion on the motion to strike out paragraph (h), Rule 4?

If not, all those in favor of the motion say "aye."

(There was a chorus of ayes.)

The Chairman. Opposed, "No." (Silence.)

Carried.

RULE 5

The Chairman. We shall now consider Rule 5.

Mr. Robinson. I believe Mr. Holtzoff has some suggestion on this, too.

Mr. Holtzoff. The thought I had in mind is this: that Rule 5 (a), the way it is now worded, seems to assume -- anyway, it may be so construed as to mean -- there will be written pleadings; and, of course, we do not have written pleadings in criminal cases beyond the indictment, unless you have a ~~plead-ing of~~ plea in abatement or demurrer, but the ordinary plea in a criminal case is oral.

Therefore, without endeavoring to suggest exact phrasing at this point, because the reporter might be able to do it alone better, I move that 5 (a) be rephrased, on the assumption that there will not be any written pleas.

The Chairman. In other words, what you want to avoid is having this rule construed as meaning that the plea of the

defendant should be in writing?

Mr. Holtzoff. Exactly. I move that it be rephrased so that that construction be not possible.

Mr. Robinson. Some later rules raise the question whether certain motions and pleadings may not be in writing, and it may be decided or not by the committee that this business of oral pleas of not guilty and all other pleas in a criminal case being oral, be modified, in which event this might become material.

Mr. Holtzoff. One of the main purposes of our work is to simplify criminal proceed~~ings~~ure. We should not take any steps to complicate it.

After all, the average court sits about three or four days, four times a year or twice a year. They find all the indictments on the first day. They hear all their pleas on the second day. If there are ~~no~~ any pleas of not guilty, and sometimes there are not, they try them on the third day and finish the term.

Mr. Crane. I thought at first the affirmative pleas should be written like in civil cases. That was quite an innovation in my mind. It is quite an innovation because, when you come to take the pleas, there are pleas taken down by the stenographer or clerk. If you are going to have pleas taken down in writing, like in a civil proceeding, it is a great innovation. I have never heard of it in our State. I have never heard of anything to be in writing by the defendant, although he can make his motion, which must be based on a written plea, and they must make their motions and try out their affirmative defenses.

I do not offer any objection to it, but I am saying, from my own personal experience, that I have never heard of it.

Mr. Holtzoff. That motion would take the place of the present demurrer.

Mr. Crane. I did not mean that. I think it should be based on the pleadings in writing.

Mr. Robinson. We have so many recommendations by judges, lawyers, bar associations with regard to the requirement that pleas or alibis and that pleas of insanity should be made in advance of trial that the defendant will offer such evidence on trial.

If you begin to try to draw a rule covering alibis and insanity, leaving out affirmative defenses, for which there is equally good reason to have notice in advance --

The Chairman. What would the other defenses be?

Mr. Crane. If you wish to go to Rule 8--

Mr. Seth. Could not this rule be amended to provide that pleas of guilty, not guilty, nolo contendere should be oral and all other pleas in writing?

Mr. Robinson. What was your question?

Mr. Seth. My question is, if there is any doubt about this rule 5 (a), could not it be amended to provide that pleas of guilty, not guilty, or nolo contendere should be oral and all other pleas in writing?

Mr. Holtzoff. Rule 5 (a) provides that in ~~pleas~~ lieu of demurrers or pleas in abatement bar you may make a motion, but a motion is not a pleading. There is no written pleading provided for by the rules other than the original indictment, and I therefore am directing my thought to the idea that the way this Rule 5 (a) is

worded seems to imply that there are pleadings to be served.

Mr. Robinson. Let us answer the Chairman's question first.

The Chairman. I will withdraw the question, because we are getting into deep water.

9 Mr. Robinson. That is the reason, Judge Crane, for written pleadings or motions following the indictment.

I have had experience with oral bonds, oral recognizances. In the state practice I recall some of the trouble we got into was because there was no provision for bonds in writing. At least, our code provided that the defendant could come into court with two sureties, stand before the court, tell the court how much property they had, and all three would agree that they would be held liable for a certain amount if the defendant did not appear for trial.

Instead of that being a simple process, it proved to be quite complicated, and it was very difficult --

Mr. Holtzoff. A bond is not a pleading. This rule refers to pleadings.

Mr. Robinson. I think my point is still good on this. In other words, you cannot assume safely that by keeping the pleadings and motions oral you will make it simple. You are liable to get into situations that are quite troublesome.

Mr. Holtzoff. I would dislike to see any requirement introduced ~~produced~~ which would require defendants ~~them~~ to file written ~~different~~ pleas, because some of them cannot write their names. In the second place, suppose he refuses.

Mr. Robinson. You might make the plea oral.

Mr. Holtzoff. I do not see what object is accomplished, and, in addition to that, you are likely to create delays and

have --

The Chairman. We are going to get into a discussion of this under Rule 8.

Your motion tentatively, Mr. Holtzoff, is that Rule 5 (a) will be so phrased as to safeguard the right of the defendant to make an oral plea?

Mr. Holtzoff. Yes.

The Chairman. Is there any further discussion of that?

Those in favor say "aye."

(There was a chorus of"ayes.")

Opposed, "No." (Silence.)

It is carried tentatively.

Mr. Medalie. There is one other thing on 5 (a) I would like to bring out. Lines 8 to 9 read:

> "And similar paper shall be served upon each of the parties directly affected thereby."

Now, in practice what we are really doing is this. The defendant serves papers only on the Government. He ought not be compelled to serve it on each of the other defendants.

Mr. Holtzoff. Suppose you had a big mail fraud case. You would not want to require one defendant to file a motion to dismiss on all the co-defendants.

Mr. Medalie. That is the point involved.

Mr. Robinson. I want to state this principle that I think also is controlling in our work. We want, of course, these rules to be fair to the Government. At the same time they must be fair to the defendant. We must have a balance between the two.

I think we all agree we do not want just speedy and quick

convictions. As some New York lawyers told me, "Be careful about short cuts to the penitentiary. We do not want short cuts just for the Government's convenience."

You take a big case where there are 67 defendants or a hundred defendants. If I am not mistaken, I have seen evidence and heard observations with regard to fairness as to those numerous defendants, to the effect that rights as between themselves are not adequately taken care of and that there probably ought to be information available to the defendant as to what the others are doing.

Mr. Holtzoff. This would impose a burden on the defendant rather than help him. Here is a defendant who would have to serve a motion to dismiss the indictment on all of the 49 co-defendants as well as the United States Attorney. I think instead of helping the defendant you are burdening him.

Mr. Robinson. What about the others, those who are getting the notice?

Mr. Medalie. This is what happens, and I know what they have in mind. Counsel for one of the defendants will make a motion for a bill of particulars. He will do it so badly that he will spoil the work being carefully done by another one of counsel, and get it in and get a decision.

Now, I had an experience of that sort and was quite helpless, even when I knew it. I did not think that a motion for a bill of particulars should be made, because it would involve a statement of the law, which would mean that the indictment was good. The Government was anxious to wiggle out of an indictment that it was stuck with. They foolishly indicted. Now, they would gladly have gotten rid of it if they could have gotten a

favorable judicial decision.

Counsel representing one of the defendants made a motion which brought out a proposition of law which was distasteful both to the Government and my client.

That is what they had in mind, but you are not adversely affected by these things except to the extent that poor judgment or poor strategy has been used.

Mr. Robinson. All this would amount to would be to give you information about what these other defendants were doing.

Mr. Medalie. Here is the difficulty you have, and you must state it frankly. Some defendants are able to get competent lawyers with experience, defendants who can pay well, and the lawyers are willing to do a lot of work. In many of these cases, even where there are defendants of that sort, who can afford that kind of thing, there are some defendants who are exceedingly unimportant, who cannot afford to spend money, who cannot afford to get good defense counsel, and their lawyers cannot even afford to do all the stenographic work and the typewriting that goes with the case. It is a burden which ought not to be imposed on poor defendants who cannot get that service.

10 Mr. Holtzoff. I move that that last clause, lines 8 and 9, go out.

Mr. Medalie. Let us see practically what this really means and whether we get notice. In the larger districts, the busy districts -- New York, Brooklyn, Chicago -- the lawyers know what is going on in the case. In New York it is published in the Law Journal.

In districts where the court meets only occasionally and

has motion terms, isn't it possible to keep in touch with the motions that come on in the regular list?

Mr. Holtzoff. They do not have a regular list of those cases, but what happens is that it is easier for a lawyer to keep in touch, because in the case of those districts where a criminal court is held twice or four times a year, all the members who are practicing in the Federal court are in court on the opening day of the term, because they all have several cases.

Mr. Medalie. In other words, practically, we really know, don't we?

Mr. Holtzoff. We do.

Mr. Robinson. What about civil cases? Wouldn't you know in a civil case, too, just the same?

Mr. Medalie. You would in my district, because you would read it in the Law Journal.

Mr. Holtzoff. The civil rules are so different from criminal prosecutions I do not think this is applicable.

Mr. Robinson. It is a question whether it is.

Mr. Holtzoff. A civil case is a controversy between two private individuals, which is different from criminal procedure.

Mr. Dean. In a case, for instance, where there are 60 defendants and one group wants to file demurrers, another a motion for a bill of particulars, another a motion to quash, are you going to require one of those defense counsel to serve 60 copies on counsel for the other defendants? It seems to me it is a practicable question.

Mr. Robinson. That is an exceptional case. Take three in a conspiracy case. You have got to have three defendants to

have a conspiracy conviction in a Federal case.

Mr. Holtzoff. You have got to have two.

Mr. Robinson. That is right. Maybe you do have three or four defendants, but you have got to fasten the guilt on at least two in order to have a conviction for conspiracy. I think I can cite a case where it has been extremely material to each of the defendants to know how many of his co-defendants were going to pass out of the picture.

Mr. Dean. That is true, but what can you do about it?

Mr. Holtzoff. Do not forget, too, that the number of cases with numerous defendants is much larger in the Federal courts than it is in the State courts, and this rule will impose a terrific burden on the poor defendant who cannot afford big stenographer's bills.

Mr. Youngquist. Well, isn't it taken care of by the provision that it shall be served on each of the parties directly affected thereby?

If I am representing a defendant and make a motion to dismiss, that will be not a motion to dismiss or quash the indictment as a whole, but to dismiss as to my client.

Isn't that true in the case of every motion and every plea? It goes to the one directly affected. Even if it be a bill of particulars, that is a bill of particulars to him and not to the others. He is the one making the motion on the one hand, and the Government on the other, and if the Government files a reply to same, as is later provided for in the rules, that is a reply to a motion made by some particular defendant, and only that defendant is affected, because even though there may be ground for a motion to dismiss, it will be effective only as to

those who make the motion, and the indictment will stand as to the others.

Mr. Holtzoff. But if that is so, then this provision is surplusage. Then surely it should go out.

Mr. Youngquist. Is there any provision for the serving of pleadings and motions on adverse parties elsewhere in the rules?

Mr. Holtzoff. Yes. (b) does that, the very next paragraph.

Mr. Medalie. I think, answering your question, you have a situation where, having over one hundred district judges, you get a variety of interpretations. Also, having countless counsel all over the country, you will get a variety of demands and particulars. This is left unclear. You do not know whom to serve.

Mr. Youngquist. I assume that, from the presence of the word "directly," which is not in the civil rules, it was intended to follow somewhat along the lines that I have tried to state.

Mr. Crane. In connection with that, who is to determine whether a party is directly affected or not?

Mr. Youngquist. If a motion is made by a defendant, the only one who could be directly affected would be the Government, whatever his motion may be.

Mr. Holtzoff. Well, isn't that all the more reason for striking it out, because then this provision is surplusage; and yet it might be construed some other way.

If it is construed the way you say it is, it is certainly unnecessary. The possible ambiguity in it is a source of danger. Therefore I think the defendant is put at a disadvantage.

Mr. Youngquist. I would not see any particular harm in striking it out as long as there is some provision for serving on the United States Attorney, let us say, a motion made by a defendant.

Mr. Holtzoff. That is taken care of by 5 (b).

Mr. Youngquist. That simply prescribes the method of service. What is required you have got to find in (a).

Mr. Glueck. Why not just substitute "upon the Government"?

Mr. Holtzoff. "Upon the adverse party" I think would be all right.

Mr. Youngquist. I think that would cover it.

Mr. Medalie. That would cover it.

The Chairman. The motion is to strike, in line 8, the words "each of the parties" and to substitute "upon the adverse party," and to strike out the rest of the sentence.

Is that motion seconded?

(The motion was seconded.)

The Chairman. All those in favor of the motion say "Aye."

(There was a chorus of ayes.)

The Chairman. Opposed, "No." (Silence.) The motion is carried.

Mr. Holtzoff. I would like to make a motion in reference to line 7 of 5 (a). I think the words "offer of plea or consent arrangement" should be stricken.

Mr. Crane. That was included in your motion as carried. You asked the reporter to rewrite it so as to take out any reference to pleading.

Mr. Youngquist. May I ask a question concerning the

language appearing in lines 4 and 5, "unless the court otherwise
11 orders because of numerous defendants."

Just what is that intended to cover?

Mr. Holtzoff. That would be out now.

The Chairman. In view of the changes in lines 8 and 9?

Mr. Holtzoff. Yes.

The Chairman. Is that so?

Mr. Robinson. Of course, that was a saving clause in connection with our discussion before. The court could say Defendant A, B, and C should be served, instead of sixty defendants.

The Chairman. Does not that trouble relate to instances where you have short terms with many judges?

Mr. Robinson. When a man's life or liberty is at stake, I do not think we ought to take that into consideration.

Mr. Holtzoff. These terms are fixed by statute. We have to take the courts as we find them.

Mr. Robinson. We have to take the rights of defendants as we find them. Judges shift around in district courts.

Mr. Holtzoff. They cannot do it without the defendant's consent.

Mr. Robinson. They usually consent to it. There are a lot of shiftings.

Mr. Holtzoff. In the Federal courts?

Mr. Robinson. Yes.

Mr. Holtzoff. It is not done very often.

The Chairman. But if the changeis made in lines 8 and 9, does not the change as now suggested in lines 4 and 5 necessarily follow?

Mr. Holtzoff. It does.

Mr. Robinson. I think it is rather unfortunate if it does.

Mr. Seth. Does not the earlier language make the language in lines 8 and 9 unnecessary?

Mr. Robinson. I was not noticing that, because it was so definitely stated. I had not read my text here carefully enough.

Mr. Holtzoff. I certainly think that lines 4 and 5 have got to go out. Otherwise it would not serve any purpose here.

Mr. Dean. Mr. Chairman, is it not the consensus that, on Rule 5 (a), which was to be redrafted in order to make provision for pleas, they need not be in writing; that all we need is that in the event of a written motion it should be served on the adverse parties? Haven't we said everything?

Mr. Crane. That is going to be rewritten. We can take it up then.

The Chairman. With that understanding, we will pass on to (b).

Mr. Medalie. Will you have the words "offer of plea or consent arrangement"?

Mr. Holtzoff. That is going out.

Mr. Seasongood. What about designation of record on appeal? Isn't that beyond our jurisdiction?

Mr. Robinson. It is not a question of policy that the committee has to find. We find, on drafting these rules, that we keep running into matters of appeal. In other words, you cannot assume that there is a sharp distinction between matters of plea of guilty and matters following. Therefore, you have

to consider appeals in many places, regardless of whether we had any drafting in regard to appeal rules or not.

The Chairman. May I suggest that wherever a question comes up as a question of appeal, as this one, we will indicate that by brackets, so that we will have it called particularly to our attention, so we won't skip it?

I think it is quite likely that our references may be extended to include a revision of the appeals rules. Tentatively we can leave these things in.

Mr. Holtzoff. May I suggest this, though, Mr. Chairman, that even though the words "designation of record on appeal" do not belong in this one, because that should be in one of the subsequent rules which relates to appeals, under any circumstances I think perhaps these words or this phrase should go out of this particular one.

The Chairman. All right. Do you agree to that?

Mr. Robinson. Yes, with this question. You notice that that, too, is a civil rule provision. As I have said, I want all of your criticisms on the matters that really cannot be carried over on civil rule analogy. At the same time I do not want us to change too much the order as established in the civil rules.

If we begin to leave a thing out as dealt with in the civil rules at one point and proceed to make our own rearrangement, we are going to get pretty far away from our plan of holding the two systems of rules pretty closely together. That is my only question.

Mr. Glueck. Besides, this deals only with one of a series of documents with reference to service.

The Chairman. All right. Let us consider (b).

Mr. Medalie. Is this under civil rule?

Mr. Holtzoff. There is a typographical error on line 13. It says "services." It should be "service."

Mr. Medalie. I do not want to raise any question about the civil rules, but isn't it the practice in New York that when the other fellow's office is closed, you throw the pleading or notice of motion through the slot in his door and make affidavit to that effect? That is good service. You do not have to go looking for him at his house.

Mr. Holtzoff. Yes. Well, line 21 takes care of that, Mr. Medalie.

Mr. Medalie. If the office is closed or the person to be served has no office.

Now, if his office is closed, why, our practice is to throw it in somehow, either over the transom or through the slot.

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Mr. Holtzoff. Lines 19 and 20 take care of that, on page 2,--

"or, if there is no one in charge, leaving it in a conspicuous place therein;"

Mr. Medalie. There might be an office boy in there, but not in charge. The office is open.

Mr. Youngquist. Dropping it through the transom in a conspicuous place is the point Mr. Holtzoff I think has in mind.

Mr. Medalie. This is not serious, but it incidentally raises questions that run away from the normal practices today in cities. I do not know how they do it in small towns. I suppose with the lawyer out and the office closed you slip it under the door.

Mr. Holtzoff. But it works all right in the Civil Rules.

Mr. Medalie. Yes. I hate to raise the question. There is no use of our trying to amend the Civil Rules, and I think there ought to be uniformity, I suppose.

The Chairman. I think we had better let it stand.

Mr. Medalie. I was simply noting my disapproval.

Mr. Robinson. The record will so show.

The Chairman. Proceed.

Mr. Glueck. That is"whenever under these rules service is required." Surely the warrant we propose to serve personally?

The Chairman. This is under a caption of "Service of Pleadings" as distinguished from the service of either summons or warrants.

Mr. Glueck. Quite true, but I was wondering whether the expression "whenever under these rules" is too broad, nevertheless.

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The Chairman. Oh, I get your point.

Mr. Holtzoff. I say it is taken from the Civil Rules and it works out all right in the Civil Rules, because there is a separate rule for service of summons, which is the initial process for subsequent papers.

Mr. Glueck. The pleadings?

Mr. Holtzoff. Yes; and this phraseology is sanctioned by the precedent of the Civil Rules.

Mr. Glueck. I am a little afraid, where criminal cases are involved or personal liberty is involved, to have it this loose.

Mr. Longsdorf. Mr. Chairman, may I make a suggestion that I think may help to clear this up? You will find in numerous statutes the language speaking of service, when they mean service of papers in the case, and yet the statutes are worded as if it might seem to mean service of summons or something of that order.

Now, it is not the same kind of service, and it is not intended to do the same sort of thing, and maybe if we bear that in mind we will keep straight on this.

The Chairman. In the earlier rule you have dealt with original process.

Mr. Longsdorf. Yes, exactly.

The Chairman. This deals with service of pleadings and documents in the nature of pleadings. Then, Mr. Glueck, we are driven either to following the language and conforming or taking it out. Which is the safer?

Mr. Glueck. I think the Reporter ought to note it and see what he can do with it. The question is whether the caption here takes care of this difficulty, or whether some change

should be made in this expression, "whenever under these rules."

Mr. Holtzoff. Do not overlook this limitation, Mr. Glueck. This refers to a party represented by attorney.

Mr. Glueck. I notice that.

Mr. Holtzoff. A person before he is arrested is not represented by attorney.

Mr. Glueck. Occasionally he might be.

Mr. Holtzoff. Well, there would be no representation required because there is no action.

Mr. Youngquist. I do not think there is any danger, because of rule 4, where we have in great detail provided for the service of process, both warrant and summons.

The Chairman. I agree with you.

Mr. Longsdorf. I had that in mind. I think that will cover it.

Mr. Holtzoff. I think (c) should go out because it is not at all applicable to criminal cases. That of course is a civil rule, and I do not think it has any application to a criminal case.

Mr. Robinson. Hold that for 8 again, will you? I think that is tied up with our whole problem that we will get into in Rule 8. If it is not, I will let you strike it out or do anything you want to with it; but I suggest you defer it, there.

The Chairman. Fine. "(d)".

(d) Filing.

Mr. Robinson. I suppose there is no problem there of filing with the United States Commissioner, or anything of that kind.

Mr. Dean. Do we hereafter require that certain of these

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pleadings and documents must be in writing and must be served?

Mr. Robinson. Yes.

Mr. Holtzoff. We have a written motion to take the place of a demurrer.

Mr. Dean. But do we require that they be served?

The Chairman. Rule 8, we are talking about.

Mr. Robinson. It is in there.

The Chairman. Let us wait until we get to it. Then, I do not know what will happen to it.

Subdivision (e).

Mr. Crane. Pass that.

Mr. Medalie. That means you can file an indictment by giving it to the judge if the clerk is not around, if the other pleadings are oral?

The Chairman. If you require a written alibi pleading or a written insanity pleading, it shall be filed.

Mr. Robinson. What about an information?

Mr. Medalie. Yes, the pleading or the information could be filed with the judge.

Mr. Robinson. Yes, or the information could be filed with the clerk, although the indictment I suppose would have to be returnable to the judge, would it not, to be operative in his court?

Mr. Dession. You have to get leave of court to file it. It is pro forma in some districts, but the Supreme Court has held that the court is entitled to require some showing. Sometimes it is not required, sometimes it is.

Mr. Holtzoff. I think that is one of the things we should change in these rules.

Mr. Dession. The judge could be satisfied with anything he likes. In some districts it has become pro forma. The informer still has leave to file in the record.

The Chairman. If there is nothing further on Rule 5, we will proceed to Rule 6.

Rule 6. Time.

Mr. Robinson. That happens to be a rule which is just the civil rule carried over with practically no change, so far.

Mr. Youngquist. Speaking of a legal holiday, I question whether that is a federal legal holiday or state. The Civil Rules use the same language as here, but as I recall it the Appeals Rule says "federal or state holiday." Let us see where I got that--on page 2, preceding page 2:

> "Sundays or legal holidays, whether under federal law or under the law of the state where the case is brought."

I do not know whether the Civil Rules have been construed judicially in that regard or not.

Mr. Holtzoff. They have not.

Mr. Medalie. How many federal holidays are there?

Mr. Holtzoff. There aren't any.

The Chairman. Thanksgiving?

Mr. Youngquist. Wait a minute. Yes, that is a state holiday.

Mr. Holtzoff. The presidential proclamation has no legal effect except in the District of Columbia and on federal reservations.

Mr. Youngquist. I thought the Fourth of July was a federal holiday.

Mr. Holtzoff. No.

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Mr. Dean. It does not even have persuasive effect in some jurisdictions.

Mr. Holtzoff. In fact it would be unconstitutional as a federal holiday, except in the District of Columbia and on federal reservations.

Mr. Youngquist. What about the operation of the federal courts?

Mr. Medalie. I have worked on legal holidays in federal courts.

Mr. Holtzoff. Lots of federal courts are open.

Mr. Medalie. Especially if a Vermont judge came in and did not recognize New York holidays.

Mr. Youngquist. The point I was making is, I do not see why Congress could not declare certain holidays shall be effective with respect to all federal business.

Mr. Holtzoff. Oh, it has done that, but what I meant was, there are no federal holidays that are effective anywhere except in federal buildings and in the District of Columbia.

Mr. Youngquist. Well, that is true.

Mr. Medalie. Tell me what happens with banks? I do not know much about it, but the bank has to stay closed on election day, Thanksgiving, and I think Christmas Day and New Years day.

Mr. Holtzoff. That is because of state law.

Mr. Medalie. No, it applies to federal banks and the national banks.

Mr. Holtzoff. I know. The rule as to banks is this--a bank can close on any day on which you cannot present negotiable paper under the laws of the state; that is, where you cannot present negotiable paper on a state holiday; and that is why

even federal banks close on state holidays.

Mr. Medalie. We have solved the mystery.

Mr. Youngquist. I am interested. You say there are certain days upon which Congress says that federal business shall be suspended. What are those?

Mr. Holtzoff. I haven't got them.

Mr. Youngquist. Would not that be a federal legal holiday?

Mr. Holtzoff. In that sense, yes. I thought you meant a federal holiday within the state.

Mr. Youngquist. Oh, no; they couldn't do that, of course. But these are ~~legal~~ federal courts we are dealing with, and they are subject to a rule of Congress. I think in order to avoid question we ought to follow the Criminal Appeals Rules so as to make it both federal and state holidays; and we certainly have good precedent for it. The Supreme Court has already adopted it.

Mr. Holtzoff. The Civil Rules are more recent than the Criminal Appeals Rules, and they do not use the words "federal or state."

Mr. Robinson. I am told that one reason they did not put the federal holidays in the Civil Rules is because there are no federal holidays. That point was being discussed.

Mr. Seasongood. Election day with us is a half holiday, and Saturday or Saturday afternoon is a half holiday.

Mr. Holtzoff. Lines 10 and 11 say--

"A half holiday shall be considered as other days and not as a holiday."

Mr. Seasongood. Oh, yes; that is right.

The Chairman. Is there any objection to 6 (a) standing

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"as is"?

Mr. Dean. Might it not be well in the 9th line, where you say

"When a period of time prescribed or allowed is less than 7 days,"

and so and so, to make it read this way:

"When a period of time prescribed or allowed is expressed in a number of days as distinguished from weeks or months, then intermediate Sundays or holidays shall be excluded in the computation?"

Why do we limit it to 7 days?

The Chairman. I do not know what was controlling with the draftsman of the civil rule, which uses exactly the same language.

Mr. Youngquist. That is common state practice, too.

Mr. Medalie. If you had a 60-day period, just think of all the Sundays and holidays you would take out; for instance, a 60-day period from Labor Day in New York--Columbus Day--election day.

The Chairman. Armistice day?

Mr. Medalie. Armistice and election day, and Thanksgiving day, and your Sundays.

Mr. Youngquist. I know the practice in our state is that whenever the period is not more than a week they exclude intervening Sundays and holidays.

The Chairman. Is there anything on "(c)"? "(d)"?

Mr. Holtzoff. I want to make a suggestion as to (d). This provides for 5 days.

The Chairman. Just a minute. I asked if there were any

questions on "(d)". Did you have any, Judge Crane?

Mr. Crane. No, not at all.

The Chairman. (b), (c), and (d). That will be on page 2, of Rule 6.

Mr. Holtzoff. This provision 6 (d) would provide for a 5-days' notice of motion. Now, there we must bear in mind that later on we provide for a motion instead of a demurrer, or a motion to quash. Well, that might operate perfectly all right in the large metropolitan centers, but it is impossible of operation in the average federal court where the term might last a week and where the trials commence on the second or third day of the term.

The defendant might be given a couple of hours to make his motion, or a half a day, if he is going to make one; he cannot take 5 days, because by taking 5 days he gets a 3 months' continuance.

Mr. Youngquist. But you have there-

"unless a different period is fixed by these rules or by order of the court."

Mr. Holtzoff. It ought to be "by local rules."

Mr. Youngquist. "By order of the court."

Mr. Holtzoff. "By order of the court" I think applies to a specific case.

Mr. Youngquist. Yes.

Mr. Holtzoff. If you change the word "these" to "local" that would meet the thing I have in mind. By local rules, in other words, in some districts they might provide for 2 days' notice, and in another, for 24 hours.

As a matter of fact it was found by experience that the 5-

day notice under the Civil Rules is not operative in Chicago, because they never had a 5-day notice, and they ignored that provision of the ~~rule in our~~ Civil Rules.

Mr. Glueck. In practice do they use up the full 5 days?

Mr. Holtzoff. Most of them do. Well, it is not only that, but the average. The average person that serves a notice knows that he has to give notice returnable at least 5 days later.

Mr. Seth. I think we should not pay too much attention to the short terms in these districts. Five days' notice is pretty short notice in lots of instances. I think the defendant has some rights, and it should not be merely a question of convenience to the government all the time. Now, that is my frank opinion.

Mr. Holtzoff. Now, you take it in this form, the defendant files a demurrer, and that demurrer may be argued the very following morning. They would not postpone a trial because the defendant filed a demurrer; whereas this rule in its present form might mean that the case would go over for the term.

Mr. Robinson. If he doesn't have a lawyer, what does he do in that sort of case?

Mr. Holtzoff. He does not demur if he doesn't have a lawyer.

Mr. Seth. Why should a man be indicted on Monday and tried on Tuesday?

Mr. Holtzoff. Well, he would either be put on trial Tuesday or he might have to languish in jail for two or three months until the next term of court.

Mr. Seth. He probably would not be demurring; but there

is too much of a tendency it seems to me to do away with the rights of the defendants to meet the convenience of the government. If the court cannot reasonably handle it at the time, why it should be put over until a later day.

The Chairman. Mr. Seth, these cases, as I got the picture--and I must confess, coming from a district with fixed judges, I was shocked by it--some of these district judges will move about to five or six different places, and some of them are places that are not very conspicuous on the map.

Mr. Seth. That is right.

The Chairman. --except, I suppose, through some great victory, some statute was amended to include the sitting of the court in his home town; and I suppose that is going to be one of the things that we won't dare touch, if we hope to get our rules accepted by Congress. I think we have got to bend to it a bit.

Mr. Seth. I think we have got to bend the other way if we want to get them accepted by Congress, Mr. Vanderbilt.

Mr. Holtzoff. But that is the common practice.

Mr. Seth. I think that is the most serious difficulty we confront. We have got to put up reasonable rules or Congress will reject them.

Mr. Holtzoff. No, but Congress is perfectly satisfied with the present practice. The only time we run any risk of rejection is when we change the practice.

Now, the only suggestion that I make as to this paragraph is--and I so move--that in line 35 we change the phrase "these rules" to "local rules".

Mr. Wechsler. Would it meet your point, Mr. Holtzoff, if

the shortening of the time could be by the consent of the defendant? If he is going to languish in jail throughout a summer probably he would be glad to avoid it.

Mr. Medalie. What is the "confidence," Alex?

The Chairman. I remarked I thought Mr. Seth had a point, there.

Mr. Holtzoff. And my answer was that you cannot meet that point without changing the federal court system, and 75 percent of the places where federal court is held are of this type, where court is held every six months, and then the judge moves on.

Now, you talk about Congress changing those statutory terms. Well, I would like to answer Mr. Wechsler's point. You take your defendant who is out on bail, he could use this rule for dilatory purposes. He would move to dismiss on an indictment for insufficiency or some very minor ground and be given his 5 days' motion. He could have the case thrown over for the term.

Now, I think this is a matter that should be taken care of by local rules. As I see it, in the big centers of population there might not be any harm with this rule, but we have got to look at the majority of the federal courts. The only modification of this paragraph that I suggest is to insert the word "local" in place of "these".

Mr. Medalie. You mean by rules of the district court?

Mr. Holtzoff. Yes.

Mr. Longsdorf. Then you destroy uniformity.

Mr. Holtzoff. But under the Civil Rules there are lots of points that are handled by local rules, and I venture to

say there will be lots of things under these rules that will have to be handled by a local rule.

Mr. Seth. But not a matter of time. That is not handled by a local rule. This is a civil rule.

Mr. Holtzoff. Yes, 6 (c); but I do not think it is applicable to the criminal rule.

Mr. Seth. Well, these short terms you speak of operate just as disastrously on civil cases as they do the criminal cases.

Mr. Holtzoff. Yes, the defendants in civil cases get civil cases thrown over for the term by filing a motion.

Mr. Seth. Sure.

Mr. Medalie. Not necessarily; cases on the calendar for trial on a certain day, motions made returnable several days later, the judge trying the case is not to be halted by that motion if he doesn't want to be.

Mr. Holtzoff. But there is another point, there. Your civil cases might be brought in vacation and just pending and brought to issue before the term of court, but your criminal case starts when the indictment is found, on the first day of the term, and the defendant pleads the next day, and if he pleads "not guilty", and he is tried the day after.

Mr. Seth. Well, that is not right. It should not be permitted.

Mr. Holtzoff. Well, it is done in 90 percent of the cases.

Mr. Seth. I know it is done in lots of cases, but it works injustices.

Mr. Holtzoff. I do not think it does in actual practice.

Mr. Medalie. That depends of course on what crime is

charged. There are petty offences for which indiscriminately acts of Congress prescribe ridiculous penalties, but they are really petty cases.

Mr. Holtzoff. Of course 90 percent of the cases in the average country federal court are liquor cases or national-law motor vehicle theft cases or Canadian and Mexican border immigration cases, or the sale of liquor to Indians out in the Indian country, and that accounts for about 90 percent of those cases.

Mr. Seth. To get back to the automobile theft case, some young fellow is arrested going through the country with a car, indicted one day and put on trial the next, away from his people, and it is not fair, whatever the necessity may be. I have prosecuted them. I have done it over and over again.

Mr. Holtzoff. In some ~~places~~ instances he would not even ~~have~~ ask for a trial, but plead guilty.

Mr. Glueck. That is not the test. It seems to me, Mr. Chairman, that the phraseology you have here covers the point made by Mr. Holtzoff adequately. I interpret that, "or by order of the court," to permit sufficient flexibility.

The Chairman. Yes, but should we not leave out the word, by "these" rules?

Mr. Holtzoff. I would like to substitute the word "local" for the word "these"--

"by local rules or by order of court."

Mr. Medalie. If you say "local" you create an ambiguity.

Mr. Glueck. Yes, you create confusion.

The Chairman. If you leave in "by these rules" those words are meaningless, because we are putting in "5 days". Why

not leave it up to the court each time?

Mr. Glueck. That is right.

Mr. Youngquist. I assume "a different period is fixed by these rules" somewhere in the rules. I have not seen it yet, but I assume there is some different period fixed.

Mr. Holtzoff. That is under the Civil Rules. I do not think you need it here.

Mr. Medalie. This language would permit reference to any amendatory rules later. I think it ought to stay in these rules.

Mr. Robinson. Just the same as the Civil Rules?

Mr. Medalie. You might have different provisions in the other rules, even if you haven't got them in mind. Also, the district court has its own experience, the judge also responds reasonably to bar pressure. When the bar is annoyed and feels that the practice is unfair he would provide appropriate rules. I do not think there is a district in the country where the bar is not hurt occasionally about things not working well and calls it to the attention of the judges.

Through bar associations or otherwise rules are prepared to meet those situations. The district court ought to be trusted to have that power.

Mr. Holtzoff. But I would like to have a saving clause which would permit the district court to change this.

Mr. Medalie. I agree with you about that, and if you said, "a different period as fixed by these rules or by rule of the district court"--

Mr. Holtzoff. "or by rule of the district court."

Mr. Medalie. All three things in there, then that will

amply safeguard.

Mr. Holtzoff. Yes. I did not catch your amendment. I would be in favor of that.

Mr. Medalie. I move--

The Chairman (interposing). Before you put that, may I ask this? I do not see why, if "as provided by these rules" means rules of the Supreme Court, there is any sense in copying them, because we might put in such saving clauses in each one of these rules, looking to unimportant changes, and it seems to me to be meaningless phraseology, if it means as I think it means, the federal court rules. Is that sound, or isn't it?

Mr. Holtzoff. I think it is sound.

Mr. Medalie. You mean that if subsequently there is a change of the time limitation in some other rules, you do not need the words "fixed by these rules"--that would take care of that?

The Chairman. That is right. The court would take care of it.

Mr. Medalie. So the amendment we would make here would be limited to district court rules?

Mr. Robinson. Are we justified in changing from the district civil rules?

Mr. Medalie. I was thinking what you said this morning about that. I do not care how you simplify the rules of criminal procedure, the fact is, to a lawyer, however capable, who has had no experience in criminal cases, a terror arises and mystery pervades the court in which the criminal case is to be tried, and if he can afford to have his client out of it, he will, invariably. I recall seeing good counsel--they will

always be afraid of criminal cases if they are not experienced.

Mr. Robinson. They certainly will, for there is a great difference in the two procedures, even as to notice. We cannot do anything about that, but we can, about this.

Mr. Medalie. But there is only one thing that will bring about what you had in mind, and that is, if a larger number of respectable lawyers will take criminal cases. For instance, Martin Conboy ~~Mark Conroy~~ will not be accused of having refused to take a certain appeal. If he were a K. C. over in London he would have taken it, even if he were abused for taking it.

Mr. Robinson. That is an ultimate thing, and these rules cannot contribute to that ultimate end.

The Chairman. Coming back to this for a moment, whether we ought to use "these rules", which I take it we all agree are meaningless, here, just because they are in the other rules, I think we ought not to be bound by that.

Mr. Burke. Mr. Chairman, I move we omit the three words "by these rules", and approve the form.

The Chairman. The motion is to omit the word "by these rules or"?

Mr. Medalie. I should like to amend that motion to add the words "or by the rule of the district court".

Mr. Crane. What does it means, "by order of the court"?

Mr. Medalie. That means in a specified proceeding.

Mr. Crane. You are going to make it read, "unless a different period is fixed by local rules of the district court or by order of the court"?

The Chairman. The motion as made by Mr. Burke would leave the subordinate clause, "unless a different period is fixed by order of the court."

Mr. Crane. That would be very clumsy, would it not?

The Chairman. That is Mr. Burke's motion. Mr. Medalie moves an amendment to that,

"unless a different period is fixed by local rules or by"

Mr. Medalie. "Or by rule of the district court, or by".

Mr. Crane. Now, just a minute, before voting on that. Isn't that a little clumsy? We now have to explain it to ourselves, what it means. "Unless a different period is fixed by the district court." It would be an order of the court. If it is a local rule, it would be an order of court. If it is made in special instances it means the same thing.

Mr. Wechsler. Suppose we said, "by order or rule of the district court"?

Mr. Crane. Yes--"order or rule of the district court."

Mr. Medalie. I would agree to that.

Mr. Holtzoff. I agree to that. I think that is better.

The Chairman. Now we have before us Mr. Burke's motion, and an amendment by Mr. Medalie.

Mr. Burke. I will accept the amendment by Mr. Medalie, "order or rule".

Mr. Crane. "Order or rule of the court."

Mr. Medalie. "Of the district court."

Mr. Crane. "Of the district court."

The Chairman. The vote then will be on the motion as amended.

Mr. Seth. That will permit the district courts to adopt local rules each time, is that the understanding?

The Chairman. That is what it would come to.

Mr. Seth. I am against it.

Mr. Burke. I would be, if I thought it had that meaning, but my impression was the order of court would be a sufficient limitation in itself, but I see no objection to the rule,

Mr. Chairman, because the order of the court would have to be a deciding factor in it anyway.

The Chairman. Perhaps we had better take a vote on it separately. We will first vote on the amendment, which would have the clause reading,

> "unless a different time is fixed by rule or order of the court."

After that, if it is carried, we will vote on the motion as amended.

Mr. Glueck. "Order of the district court."

The Chairman. "Order of the district court."

Mr. Crane. "Unless a different period is fixed by the order or rule of the district court"--is that it?

The Chairman. Yes. Are you ready for the vote on the amendment?

Mr. Youngquist. That includes the original amendment, plus the amendment to the amendment?

The Chairman. That is right.

Mr. Crane. That is the way that reads, now?

The Chairman. Yes.

(The motion to amend was agreed to, with one dissenting vote.)

Mr. Medalie. I would like not to take advantage of an overwhelming majority vote on this, because there must be something definitely in mind in opposing the district court's

power to have the rule, that I would like to know about.

Mr. Seth. I am opposed to doing anything that upsets the uniformity of this practice, Mr. Medalie. The district courts will have rules. They can make orders applicable to particular cases, but standing rules--you do not know whether you are afoot or on horseback in different divisions of the same district.

Mr. Glueck. I would like to raise the question apropos of that, Mr. Chairman, if somewhere at the beginning or in the commentaries it is proposed to mention the fact that in addition to these general rules we reserve the right of local district courts to make special rules as to certain topics?

Mr. Holtzoff. That would be Rule 83.

Mr. Glueck. It is in there?

The Chairman. I had supposed everybody had been through the same sad troubles I was. I happened to be chairman of our local district rules committee, and have had to read the district rules from about twenty different districts. They vary from a small sized book, in the Southern District of New York, to something about 10 or 12 rules in other districts, and I certainly think that the less district rules we get the better.

I agree thoroughly with you, Mr. Seth, on that, and yet you do have to give to the district court some small degree of power in that direction.

Mr. Seth. I was a member of our district court rules and had the same experience, Mr. Vanderbilt, and I want to avoid it. I want them limited to the smallest scope possible.

Mr. Crane. I have had that. I was not sensible enough to read all the local rules. I read all the general rules and

supposed of course they applied. I woke up later when I was sitting as special master to find out there were also some local rules which I did not discover.

The Chairman. In your district, Judge, they are more extensive in words than the general rules.

Mr. Crane. And sometimes a little hard to understand, and I think it is a very confusing thing to have. They are maybe an exception, here, but I suppose when they write the rules for the district court--I am speaking of the civil rules--they are applicable to all the courts, and when you come back to these exceptions, why, what is the good of any local rules? You might as well have local rules, to be done with it.

Mr. Medalie. I am beginning to weaken. I move to reconsider my motion.

Mr. Youngquist. Second.

The question being put, the motion to reconsider was carried, with one dissenting vote.

Mr. Crane. When in doubt, we will leave these to the Reporter.

Mr. Seth. That is right.

Mr. Glueck. That still leaves the question, Mr. Chairman, I take it, that you raised, whether the words of these rules are superfluous, providing "by order of the court".

The Chairman. The matter is open for consideration.

Mr. Glueck. I would like to say a word to an amendment which Mr. Medalie is trying to abandon--his own amendment. I would like to say a word in support of it.

Mr. Medalie. As the minutes go by, I know the abandonment is complete, now.

Mr. Holtzoff. I think so. The thing that bothers me is a practical situation.

Mr. Seth. I think the matter should be referred to the Reporter.

Mr. Holtzoff. It is the situation of courts where it is impossible without changing the statutory terms of having the cases go over the term ~~to give~~ by giving 5 days' notice. I would just like to leave this rule out entirely, but you have got to give flexibility to those courts, which form about 75 percent probably of federal courts in the United States.

Now, that is the reason why I feel that we would be making a grave mistake if we fixed 5-day notice. Now, it is true we will provide for an exception by order of the court, but I take it "order of the court" means an order in the case and not a general order.

Mr. Crane. Now, that is what you think, and that is perhaps so, but it certainly could make an order of court applying to that term.

Mr. Seth. Yes.

Mr. Robinson. Or the next term.

Mr. Crane. Well, make it apply to that term; only going to sit three days; and make it an order of court that motions shall be returnable within a day or so.

The Chairman. What Mr. Seth wants to do is put the burden of deviation on the court.

Mr. Crane. I would just leave it as it is here, "unless a different period is fixed by these rules or by order of the court." Now, you say it is applicable in the particular case, and if the court is only going to sit five days, it could say

so, and therefore the rule would be that the motion shall be returnable in one day.

Mr. Holtzoff. I think that is all right. I would suggest then that there might be comment made by the Reporter that by the word "order" is intended either an order in the case or a general order.

Mr. Crane. An order in the case, or for the term.

Mr. Seth. I would suggest the matter be left to the Reporter for further consideration.

Mr. Crane. Isn't that so? There is no limitation to the court.

Mr. Holtzoff. The matter I have in mind is fully met by the word "order", if it should be construed as meaning a general order and is not to be limited to an order in a particular case.

Mr. Crane. But they do have general orders for the term.

Mr. Holtzoff. I suppose that is so.

Mr. Seasongood. Why can we not just make it--

"unless less time is fixed by order of the court for the defendant or accused"

or--

"unless accused is ordered to plead in a less time"?

Mr. Holtzoff. I do not think it should be only in favor of the accused.

Mr. Crane. No.

Mr. Holtzoff. It should also work in favor of the Government because otherwise a defendant could get the case continued over the term by filing a motion to dismiss.

Mr. Seasongood. "Unless the defendant is ordered to plead in a less time."

Mr. Holtzoff. Oh.

Mr. Seasongood. I know in Kentucky for instance it would be perfectly impossible. Your rules would never be adopted if you were going to say that you had to wait five days, because they go to these small places and are there a day or two at most, and it is better to dispose of most of those cases, most of which are small offences, expeditiously than to have the thing go over six months. That is not a rule for accomplishing speedy justice.

Mr. Crane. I think the court could make an order covering that term, or case, or a year.

Mr. Seasongood. Well, "unless the accused is ordered to plead in a less time by the court."

Mr. Holtzoff. I think the word "order" in connection with the Reporter will take care of that.

Mr. Crane. I think so.

The Chairman. Will somebody make the motion now, so our record will show it.

Mr. Crane. I make the motion that the rule stand as it is, (d), with perhaps a possible explanation, that "the order of the court" be explained so as to apply to the term--such time as the court desires to fix.

Mr. Seth. I second that.

The Chairman. We are leaving out the words "by these rules"? Those are out?

Mr. Seth. Yes.

Mr. Youngquist. "By these rules or".

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The Chairman. Yes, "by these rules or", and the rest stands. All right.

Anything else on section (3)?

Mr. Robinson. No. I have no comments.

The Chairman. If there is nothing further we will go on to Rule 7.

Rule 7. Pleadings allowed; Form of Motions.

Mr. Robinson. In that rule 7 (a) the title should have the words "and Motions" added, I believe--"Pleadings and Motions"--and then follow Mr. Holtzoff's suggestion early this afternoon, if we are going to provide for "an oral plea or by other."

In line 3 I suppose we could say "there shall be a written accusation and an answer either by oral or written plea or motion; there may then be a reply by motion."

Mr. Seth. Shouldn't it be "either answer by plea or by written motion," just the word "written" before "motion"?

Mr. Youngquist. Just a little further down in (b) (1) of the same section, that application shall be by motion, and shall be made in writing, unless made during the hearing and trial.

That might have connection with your suggestion.

Mr. Robinson. There again we may wish to consider putting in "oral or in writing".

Mr. Medalie. I do not understand the last clause of the first sentence. That is where there is a plead or a motion. Why need there be a reply by motion? Of course I can understand answering affidavits and things of that sort.

Mr. Robinson. This is the difficulty, there, Mr. Medalie, and I am glad to put it before you because we want the answer to it. Whatever you put into the rules, it adds to this

proposition of the requirement of notice--the desire that as to certain affirmative pleas, advance notice be given that such pleas are to be made. Now, I have received from some bar associations some rather extensive drafts of how you should draw a requirement for a notice of alibi--it covers half a page or three quarters, on just that one affirmative defense, alibi; and we have received other recommendations from other sources likewise.

The chief requirement of space in cases of that kind has been due to uncertainty in regard to what the Government is going to allege. As we all know, the indictment may recite the defendant committed the offence on July 1, 1940, and then on the trial, as we know, the Government may prove that the offence was committed on any day within the period of the statute of limitations prior to the filing of the indictment or the information.

Now the defendant notices that that indictment or information alleges that the offence was committed on July 1, 1940. He wishes to plead and prove that he was in some place other than the place where the offence was alleged to have been committed on July 1, 1940, so he files his notice to that effect. Now, the Government in fairness to the defendant should be required to tell him, if it is not expecting to offer proof limited to July 1, 1940, the Government should be required to allege the date for which it is going to offer proof, so the defendant will get information from the Government and the Government will get information from the defendant, in order to get together on that.

I think the Advisory Committee would not be willing to

have those details written into the rules at the cost of a page or two of space, and then maybe limited to only one or two of the affirmative defences; therefore the objective of most of rule 7 and a good deal of Rule 8 has been to provide for rather flexible measures not specified in detailed rules, by which such exchanges of information may be made as to permit a fair application of the requirements of the principle that notice should be given in regard to affirmative defences.

Mr. Medalie. Do you not deal with this elsewhere?

Mr. Robinson. Yes, in Rule 8; but you are asking about this matter of reply. Now, the Reporter's difficulty there I think is due to meeting some term which will indicate the successive pleadings or motions by the prosecution and by the defense, some term other than "answer" or "reply".

The terms have not been used with strict legal accuracy in line 3, as is clear, there. Some substitute term probably is needed, and yet what we want is some term which will first represent the Government's plea, the written accusation, then in turn the response by the defendant, either by way of plea or motion, and then in turn what the Government files or presents by way of the next step in the proceeding.

Mr. Dean. What could the Government's response be in a case of that kind, where the defendant was required under the rules to give an advance specification of its defense of alibi? What would the Government reply be? That is what I cannot visualize.

Mr. Robinson. I believe it would work out this way: Here the defendant under the rule would come in and plead or give notice that he plans to introduce on the trial of the

case evidence to show that he was in a certain place other than the place of the alleged offence on July 1, 1940, but if the Government--this is his plea, motion, whatever you wish to call it--but if the Government plans to offer evidence of some date other than July 1, 1940, then he, the defendant, requests that the Government be required to state the specific date on which it is going to offer proof of his alleged offence; that is, the date of the alleged offence which it expects to prove.

Now then, it would be up to the Government you see to give notice of that, I will grant you, but you could talk about bills of particulars as that, to take that place, but I do not believe it should be quite that extensive. I know that bills of particulars in some districts have come to be very seriously abused. I do not think there ought to be, in this situation, with the pleading of affirmative defenses, with the mutual exchanges of information by the Government and defendant, I do not believe that it ought to be possible merely to use the situation as a means of delay and obstruction; and therefore if we could have something a little shorter, a little simpler than bills of particulars, or what is commonly attached to that term in the practice, the methods now used, I think we ought to try the shorter method; and this is here to do that.

Mr. Dean. This is a bill of particulars in reverse?

Mr. Robinson. Well, in brief.

Mr. Crane. Let me ask you this question: How far can you constitutionally go? because a defendant has never got to prove his defense. A defendant has never got to prove his defense. He may offer evidence, but the people have always got to prove everything against him. All he has got to do is create a

reasonable doubt. Now, how far can you go in requiring the defendant constitutionally to set forth his defense? Has that been passed upon by the court?

Mr. Robinson. Yes, sir; it has, in Ohio, in State versus Thayer. That is one decision. Of course, alibi notice is a law in Michigan, Mr. Waite.

Mr. Dean. About eight states now provide for notice of alibi, several on insanity.

Mr. Robinson. I have the states.

Mr. Dean. In California the constitutional question came up on conveying a specification of the insanity defense, and they held it constitutional. You really require him to break down his not guilty plea.

Mr. Crane. It is a statement of fact.

Mr. Holtzoff. There is nothing in the Constitution which would preclude the legislature from saying to the defendant "You shall not be allowed to produce evidence along a certain line unless prior to the trial you will apprise the prosecuting attorney of your intention to do so." That is all this amounts to.

Mr. Medalie. I think we are bringing in this alibi question here unnecessarily. Your subdivision deals with pleadings. I do not think anything that has to do with notice ought to be the subject of a section or subsection dealing with pleadings. I think we ought to deal with it separately.

Mr. Robinson. Let us get back to where out question came up. The question was asked, why should there be any occasion for the Government to file something in the nature of

a reply? And my explanation is what I have given.

Mr. Medalie. The reply then would have to do with bills of particulars, notices of intention to prove a certain thing; therefore would that logically belong in this subsection?

Mr. Robinson. We could of course enlarge the heading of the subsection so far as that is concerned.

Mr. Medalie. Well, would it not be better to keep the subsection purely on pleadings and not create any questions in the minds of practitioners as to what statutes to plead?

Mr. Robinson. All you would have would be simply--

"There shall be a written accusation and an answer either by plea or by motion"?

Mr. Medalie. Then you have got the plea of guilty or not guilty.

Mr. Robinson. Oh, that comes in 8.

Mr. Medalie. You also have a provision that you must get ~~ready~~ rid of your demurrer.

Mr. Youngquist. Before we get through considering rules 7 and 8, we are going to encounter the distinct classes of things we are dealing with. First you have three pleas, of nolo contendere, guilty, and not guilty. Secondly, we have those that we lump pretty much under the particular head of "demurrer". That is another class.

Third, we have substantive ~~offences~~ defenses, such as insanity at the time of the commission of the offence, or justification, which is mentioned here--various things of that class--and, fourthly, we have those matters such as former jeopardy which do not come under the head of demurrer nor under the head of substantive defense, but must be and usually is imposed before

trial; and fifth, what is proposed here, we have notice of proposed defenses such as alibi and insanity, and I think before we are through we must deal with those five classes separately, because they are so wholly different in their natures.

I am just giving you notice of the fact that as we go through these I am going to express views in that direction.

Mr. Robinson. May I ask this--would you say we would have to provide separate procedure for those five classes--what might be called "affirmative defenses"? You say we deal with them separately.

Mr. Youngquist. I think there must be a separate procedure. For instance, plea of former jeopardy on one hand and the notice of intention to claim an alibi on the other. They are so unlike in their nature that you cannot consolidate them under a single provision.

Mr. Holtzoff. One is not a defense. One is an affirmative defense, the other is a notice that you intend to offer certain evidence at the trial.

Mr. Robinson. But that, too, then is an affirmative defense.

Mr. Holtzoff. No, no; alibi is not an affirmative defense.

Mr. Robinson. In a sense it is.

Mr. Youngquist. The first is not an affirmative defense. The first is in the nature of a plea in bar, such as former jeopardy. It does not matter whether he has committed this offence or not, he has been tried and convicted or pardoned. That is one. The other, alibi or insanity, is merely a notice that you intend to set up a substantive defense on the trial.

Mr. Robinson. You see what we are trying to do here is to simplify the procedure and unify it. This is based on a pretty careful analysis of the defenses. I do not have the outline of it here, in which I think you will see that there is a sufficient relationship, in the way of criminal pleading, that would justify our considering them as a unit.

Mr. Youngquist. I am in full sympathy with your form here, and I hope we can work it out, but I just wanted to call your attention to the difference in characteristics of the five different groups we are talking about.

The Chairman. Let us see if we can get somewhere on 7-(a).

Mr. Holtzoff. On 7 (a) I suggest we omit reference to reply.

Mr. Crane. I should think so, yes. I do not want to talk all the time but I was thinking, I do not see how you can take up something you can call a "pleading", if it involves this thing of separate offences and comes in in 8; I think you have to eliminate it.

Mr. Robinson. Couldn't we use some term other than "reply", Judge?

Mr. Crane. I do not see any necessity for it.

Mr. Seth. Couldn't it just be a reply to the motion?

Mr. Crane. That is not a pleading.

Mr. Dean. With the language as broad as it is now it indicates we are creating some such thing as a reply to a reply.

Mr. Holtzoff. Yes.

The Chairman. What is your motion, then, Judge Crane?

Mr. Crane. Just take out for the present, then, that there may be a reply by motion. I do not think you need that.

Mr. Medalie. Second that.

Mr. Robinson. Consent, so far as I am concerned.

Mr. Crane. You are going to have "oral" in there. There should be a written accusation and an answer.

Mr. Holtzoff. (reading)

"There shall be a written accusation and a written or oral plea or motion."

Mr. Crane. Yes.

Mr. Youngquist. No, wait a minute. The motion must always be written.

The Chairman. "Oral plea or written motion."

Mr. Seth. That is right, "oral plea or written motion."

Mr. Holtzoff. I think there ~~would~~ could be an oral motion.

Mr. Youngquist. You require later that the motion shall be in writing, in Rule 8.

Mr. Holtzoff. I can conceive that an oral motion might be made in open court.

Mr. Crane. So can I.

Mr. Dean. Not a pleading.

Mr. Crane. I think you should keep these things separate.

Mr. Holtzoff. I think that is a good idea.

Mr. Crane. If you do not, you get them ambiguous.

Mr. Holtzoff. Rule 8 takes care of your motion.

Mr. Robinson. It is line 6. This takes care of the rest. Then--

"No other pleadings shall be allowed* *"

Mr. Crane. Yes.

Mr. Robinson. (reading)

"and further action in the case shall be upon

motions* *"

Mr. Crane. Yes.

Mr. Robinson. All right. Where would you stop the first sentence?

Mr. Medalie. I would say "other" instead of "further".

Mr. Robinson. You mean on line 7?

Mr. Medalie. On line 7, you mean "other" instead of "further."

Mr. Robinson. Yes.

The Chairman. Let us see if we can get this. Will you read that one as you have it now, Mr. Robinson.

Mr. Robinson: (a) as I have it marked:

"Pleadings and Motions"--

changing the title, here.

"(a) Pleadings and Motions. There shall be a written accusation and an oral or written plea or motion"

Is that right?

The Chairman. I thought your motion cut out--

Mr. Crane. The motion was to make it--

Mr. Robinson. --to leave nothing but "plea", is that right, Judge Crane?

Mr. Crane. Yes.

Mr. Robinson. All right.

"answer and oral or written plea"?

Mr. Crane. Yes.

Mr. Robinson. The written accusation may be an indictment, a presentment.

The Chairman. We abandoned that.

Mr. Robinson. We abolished it this morning--in spite of

you?

Mr. Crane. We left that to you, Mr. Reporter. Why don't you put a parenthesis about that, because while the motion was carried we think there may be something of a question presented, that we had not thought of. We refer it to you. Put a parenthesis around that.

Mr. Robinson. I will bring the authorities to you at the next meeting.

"The written accusation may be an indictment, an information, or a complaint. The plea shall be not guilty, nolo contendere, or guilty."

With nolo contendere we have an issue, probably.

Mr. Crane. It is not an issue. I wrote you about it. I just wanted to state what I said about it. I suppose all of your practice is contrary to mine, but I never thought that was a plea of any consequence. It is absolutely illogical and in my state in a case I had to "write" in we had to determine whether it was a confession or was not, whether he was guilty or not, under the third and fourth offences, which sent a man to jail for life.

Now a nolo contendere of course puts in a plea in which he virtually says "I am not guilty," but he goes to jail. Now, is he guilty or isn't he guilty? It is such a ridiculous thing to my mind that I do not see why it is perpetuated, unless there be, as I think, as I understand there is, a use made of it which I am not accustomed to; but we have guilty or not guilty. A man is either guilty or he is not guilty, and you cannot get away from that.

He says "I am not guilty, but I enter the plea of nolo

contendere," and he goes to jail. The question came up where that happened in our state under our statute, where a man goes to jail for a fourth offence, and he entered that kind of plea in another state. Now, was he guilty of the fourth offence, or wasn't he? He said he was not guilty, but I admitted it in the opinion of the court that I wrote, and the court admitted it, that it was a plea of not guilty in the meaning of our statute, so he was a fourth offender. He went to jail for life.

But it seems so inconsistent, so absurd to say that a man can go to jail for 10 or 20 years on a plea of nolo contendere, yet he says he is not guilty.

Mr. Holtzoff. I do not think nolo contendere means that he says that he is not guilty. I think nolo contendere, as you can translate the Latin, means that he is not going to contest your case.

Mr. Crane. Of course.

Mr. Holtzoff. It is not equivalent to an assertion of innocense, quite the contrary. He doesn't want to formally plead guilty but he says "I am not going to contest the case."

Mr. Crane. That is pretty thin. A man says "I don't want to contest this, but I am perfectly willing to go to jail for 10 years or for 5 years. I am not guilty"--if that is what it means. Now, I understand, and that is the reason I put the caveat to what I am saying, that in the federal practice, in civil suits, especially in these on the question of prosecutions, some of the federal statutes, that plea of guilty can be taken as prima facie evidence against other defendants in the same litigation who were not in the criminal case when it was brought

up, in the civil suits, where some of the defendants who pleaded guilty, that it would be prima facie evidence against some of the defendants in the civil case.

Now that kind of evidence I do not understand, and yet if you put in the plea of nolo contendere then the Government would have to prove the case as against the other defendants in the civil suit. That has been explained to me by federal judges in my State.

Mr. Youngquist. The plea of guilty constitutes prima facie evidence in the subsequent civil suit. The plea of nolo contendere does not.

Mr. Holtzoff. But against the same person?

Mr. Youngquist. Against the same person, in each instance.

Mr. Holtzoff. Not the others.

Mr. Crane. Why should you have such inconsistencies in the law? Isn't it a fiction simply of the spawning thing that we are trying to get rid of, which is legal nomenclature that is so contrary to fact? Why don't we confess the facts as they are and state them?

Mr. Holtzoff. I agree this plea of nolo contendere has no basis in logic, but sometimes it is useful to have illogical things.

Mr. Crane. I agree to that.

Mr. Holtzoff. In the federal courts the plea of nolo contendere is a very helpful plea.

The Chairman. For whom?

Mr. Holtzoff. For defendants as well as for the Government. Now, I think in the Southern District of New York it is very rarely used if at all, because they are accustomed to

the State practice, where the plea does not exist.

The Chairman. Is it not a bargaining plea?

Mr. Dean. Surely.

Mr. Holtzoff. Yes. It is very often a bargaining plea, but at the same time it helps. I think it helps many of the defendants.

Mr. Medalie. I think there is a practical reason that does not arise in a state criminal prosecution, generally speaking. People who are prosecuted in the state courts have committed what people regard as crimes. Now, in the federal courts many people are prosecuted for the commission of acts which are made crimes by Congress. Many respectable people are included in the accusations and are undoubtedly guilty, and the real purpose of the prosecution is to accomplish something else, perhaps to get a consent decree, antitrust cases, cases affecting business, where Congress is putting penalties really that are very very serious, and one of the outcomes of those cases is that people are sued, made bankrupt. The common law rule that a plea of nolo contendere does not carry an admission with it enables these people to get rid of these accusations, to pay the penalty, which is more often a fine than anything else, and then take care of the civil litigation that arises out of it without all of the consequences.

Now, there is another thing to consider there, too. The contesting of some of these accusations is a very costly business. These trials take a long time. The cost to the Government and the accused, think of it. Now, it is illogical, and the Judge is quite right about it, but it is exceedingly practical in getting rid of something which does not ordinarily

involve moral turpitude.

I have seen examples, which I think are rare, of persons being allowed to plead nolo contendere in a mail fraud, that is pretty bad, but in the antitrust litigation or where business agreements are involved it does not outrage the moral sense even though it is not very logical.

Mr. Holtzoff. Then, there is no stigma attached to the plea of nolo contendere that would attach ~~as against the same person~~ to a plea of guilty.

Mr. Crane. Is it a fact that they do not go to jail on such a plea?

Mr. Holtzoff. No, they can go to jail.

Mr. Crane. What kind of stigma is that?

Mr. Holtzoff. Prison sentences are not often imposed on plea of nolo contendere. They are sometimes, but that is an exception.

The Chairman. As part of the federal and local law I do not think we can touch it.

Mr. Wechsler. I wanted to ask only if it is the intention to permit the plea of nolo contendere to be filed without leave of court.

Mr. Holtzoff. That should not be, and I do not suppose that was the intention. The intention is to continue it in its present form, where the court has to exclude or accept the plea.

The Chairman. You mean the court has to be a party to this bargaining business?

Mr. Holtzoff. Oh, yes. The court may refuse to accept the plea of nolo contendere.

Mr. Medalie. Either the prosecution or the court can

refuse it.

Mr. Holtzoff. Yes.

Mr. Medalie. That is common law.

Mr. Youngquist. I think the common law rule is that the plea of nolo contendere may never be interposed except with the consent of the court.

Mr. Holtzoff. And with the consent of the prosecuting attorney.

Mr. Youngquist. I am not so sure of that, but we might write that in. I do not know why perhaps we shouldn't.

Mr. Glueck. Do you want to limit the discretion of the prosecutor as to this and not his discretion as to other features, such as accepting the plea of guilty to a lesser offence than that actually committed, technically? It seems to me if you write this in you open the whole vast field of the extent to which you are going to discipline the discretion of the prosecutor.

Mr. Holtzoff. Of course you do not have the problem in the federal system that you have in the states, because in the states the prosecutor is an independent officer responsible to nobody, elected to office, whereas the United States Attorney is under the supervision of the Department of Justice, and in all districts except one, the Southern District of New York, ~~you~~ he cannot even nolle pros. a case without the consent of the prosecutor.

Mr. Medalie. You saw my correspondence with the Attorney General when one of his deputies undertook to tell me I couldn't?

Mr. Holtzoff. There is a special rule in the Department

as to the Southern District of New York, because of the great volume of business.

Mr. Medalie. I helped make that rule.

Mr. Holtzoff. This case you spoke of does not arise so much because of the fact that the prosecuting attorney is not an independent officer, he is responsible to nobody, as he is in the states.

Mr. Wechsler. There is still a problem there, I should hope we would consider, namely, the problem whether the internal organization of the Department of Justice is sufficient reason for paying no attention to the general issue with respect to the acceptance of pleas. I do not mean to prejudge the question but I think it is now to be discussed fully.

May I suggest, Mr. Chairman, that if the plea of nolo contendere is to be retained that there ought to be in the rules a section defining the circumstances under which it may be used. It occurs to me further that it might be possible at this stage to improve the situation somewhat by articulating the considerations that ought to guide its use.

I think a similar section in connection with pleas of guilty may point the answer to the problem of affirmative defenses that we will come to, a section that will indicate what the plea of not guilty puts in issue and what it does not put in issue; but as a matter of draft technique I suggest to the Reporter that a separation be made, and that a separate provision of each one of these pleas dealing with the consider ations specially applicable to each of them may help to define some of these issues more clearly.

Mr. Crane. Then as I understand, if a man got to plead

not guilty or guilty, it is going to hamper getting rid of him some way easily without trial. Well, it is illogical, and I see the difficulty of course when you have something that is well written perhaps in the practice of states and also in the Federal Government. It might be a very difficult thing to become logical at the expense of overturning a long-established usage, but personally I do not like fiction.

Mr. Youngquist. I think, with respect to Mr. Wechsler's suggestion, if I understand it, this, so far as pleas of guilty and pleas of not guilty are concerned, we need go no farther. That is simply permitting the making of them.

So far as the pleas of nolo contendere are concerned we should at least provide that they may not be made except by consent of the court, but if we try to write into the rules the circumstances under which the court should permit the making of the plea we would get into a job that we could never finish. So if it is to be in, it ought to be in with the simple provision that it shall be made only with the consent of the court, and possibly as some one suggested, with the consent of the United States Attorney; but I am not so sure of that.

Mr. Wechsler. I am not clear that it would not be possible to have a rule which said that the plea of nolo contendere may be filed with the consent of the court when reasonably necessary to safeguard the rights in civil actions.

Mr. Holtzoff. I would not want to limit it to that. I would not want to limit it to that.

Mr. Seasongood. Isn't there a provision--I thought Mr. Seth was going to mention it before--that you have to assess triple damages under the Antitrust Law if you find them guilty, and

and that this is a way of doing it?

Mr. Holtzoff. Yes.

Mr. Dean. That is the particular reason for it--the triple damages under the Antitrust Law.

Mr. Crane. I knew there was some reason for it.

Mr. Seasongood. That is one of the reasons, isn't it?

Mr. Medalie. If we did not have so many of the federal criminal statutes this would not raise the problem.

Mr. Crane. I did not know it was the province of the court to undermine the will of Congress.

Mr. Medalie. You are illogical again. We still have our difficulties.

Mr. Youngquist. I was noticing in one of the books that Thurman Arnold wrote, he said that no business man should feel that an indictment for violation of the antitrust laws was any reflection upon him.

The Chairman. Mr. Strawn has prepared a memorandum on this plea, and I am arranging to have that mimeographed so we may have it tonight, and I think perhaps it would be well to withhold a vote on what seems to be a very useful matter--

Mr. Crane (interposing). Do not misunderstand me, Mr. Chairman. I did not want to put it in the form of any proposal to strike it out. I did want to have us pass upon it, at least, after having us know what it was and what it was doing, and that we were doing it for some useful purpose, if we are going to continue it, because it did seem so illogical.

The Chairman. Now, if I could, I would like to have Mr. Robinson read the 7 (a) as it is, passing for a minute, over this plea of nolo contendere, because I do not think we have

it in form yet. It would be helpful to have it. Will you just read it.

Mr. Robinson. (reading)

"Pleadings and Motions. There shall be a written accusation and an oral or written plea. The written accusation may be an indictment, an information, or a complaint. The plea shall be not guilty, nolo contendere, or guilty. No other pleading shall be allowed, and other action--"

changing "further" to "other"-

--"in the case shall be upon motions presented by the defendant and by the Government."

Mr. Holtzoff. I am wondering--this is a minor matter, but--whether there is a possibility of misunderstanding. "The written accusation may be an indictment, an information, or a complaint. No other pleading shall be allowed." You might have a complaint in a case first and an indictment afterwards, or a complaint first, and an information afterwards.

Mr. Medalie. It would require no pleading. I do not think you would need write anything about it.

Mr. Youngquist. No.

Mr. Medalie. Just the same as you might have an indictment to supersede an indictment and have to have a new pleading.

Mr. Holtzoff. That is right.

Mr. Youngquist. May I raise another question in line 6, "no other pleading shall be allowed." Should that be "no other pleading shall be allowed?" because later we do I think in section 8 refer to pleadings or those motions only.

Mr. Robinson. We have used "pleadings" four times there

from the top of the page on down to the place you mention. Do you wish to have it changed in each place?

Mr. Youngquist. If I am correct in my thought it should be. Wait a minute. You would not want "motions" up there in the heading, would you?

Mr. Robinson. We have "pleadings and motions."

Mr. Youngquist. Oh, yes, that is right.

Mr. Holtzoff. I think "motions" ought to be left out.

Mr. Youngquist. No.

Mr. Holtzoff. The heading, in view of the change of the context.

Mr. Youngquist. No. The last sentence still shows "motions".

Mr. Holtzoff. Oh, yes, that is right. I will withdraw my suggestion.

Mr. Youngquist. That is a matter of detail. I am just calling attention to it.

Mr. Robinson. I think that is a real improvement. After this joint work here it has cut down the paragraph considerably and simplified it.

The Chairman. Let us see if we have disposed of Mr. Youngquist's suggestion. I do not believe we have.

Mr. Youngquist. As this (a) now reads, the only things that are spoken of are the three pleas and motion, outside of the accusation. The first heading is "Pleadings and Motions."

The Chairman. In other words, your thought is that "pleadings" would be a better heading?

Mr. Youngquist. No. I am not quite sure, but I was thinking more particularly of subsection (a), which does not now

deal with pleadings but deals with pleas and motions--the three traditional pleas, and, in addition to that, motions.

Mr. Glueck. But also "accusation"--an accusation plus a plea is a pleading or pleadings.

Mr. Dean. "Pleading."

Mr. Youngquist. It is an accusation.

Mr. Holtzoff. Isn't an indictment a pleading?

Mr. Dean. Oh, just as much as a complaint in a civil suit.

Mr. Holtzoff. I think an indictment is a pleading. You speak of a "criminal pleading".

Mr. Youngquist. I am getting overtechnical I guess.

The Chairman. This then leaves open two questions, one, as to whether the word "presentment" stays in or not, and second, whether the phrase "nolo contendere" stays in or not. Those will come up later for discussion.

Now, we will go on with subsection 1.

(1) Indictment; Waiver.

Mr. Robinson. Subsection (1),"Indictment; Waiver." You notice you do not permit waiver where the indictment alleges a capital offence, but if it is a noncapital but infamous offence there may be a waiver by the person if he

> "informs the court either orally in open court or by a written communication that he waives accusation by indictment and consents to the filing of an information or a complaint against him. In case of such waiver the attorney for the government may by leave of court proceed against the accused by information or complaint."

Mr. Holtzoff. Now right there.

Mr. Robinson. Yes, I was just going to stop there. May I explain it, and then you may have an opportunity. Would you mind? Pardon me.

Mr. Holtzoff. It was just on this next sentence, I was going to make a motion. Go ahead.

Mr. Robinson. Are you going to discuss the complaint?

Mr. Holtzoff. No, I wanted to move to strike out "by leave of court".

Mr. Robinson. All right, we will go back to it. Why don't you go ahead and state?

The Chairman. Line 17?

Mr. Holtzoff. Yes. Strike out the requirement that you need leave of court to file an information. That is an anachronism. I do not see why you should have to have leave of court to file an information any more than you have to have a leave of court to file an indictment.

Mr. Dean. But there is a lot more reason I think in that situation, because you have some check by a grand jury sitting there listening to the evidence, and you have had to go by certain rules, but the information is a very broad power given to the prosecutor. He simply takes it, writes it up in his own way, and he signs his name, and he can use it in some rather serious offences.

Mr. Holtzoff. At least in some of the States all prosecutions are by informations nowadays and the prosecuting attorney does not have to secure leave of court to file the information.

Mr. Dean. In many of those States. California happens to be one--my State.

Mr. Glueck. In Minnesota they do.

Mr. Dean. You have to have a preliminary examination before you can get your indictment, you are bound over to the grand jury following a hearing before a magistrate, so even then you have a chance to make a record.

Mr. Seth. Does not that rule come up under subdivision 2? Those special classes of informations I think ought to have leave of court, where it is an infamous offence, and there ought to be a record of some kind, referring to some of the recent decisions on habeas corpus.

The rule ought to carry a provision for a definite record of the waiver, to be made in court in some way, but when we come on to (2) there is no requirement, the ordinary require ment of any leave of court, as I see it here, but this is just a special type of information.

Mr. Holtzoff. I think it is an anomaly to require leave of court to file any information, because the information takes the place of your indictment, and it is like asking permission of the court to prosecute somebody.

Mr. Medalie. The fact is that informations are filed today in non-infamous crimes by the United States attorney without leave of court, isn't that so?

Mr. Holtzoff. That is right.

Mr. Medalie. Now, nobody has made any objection to that practice?

Mr. Holtzoff. No.

Mr. Medalie. And there seems to have been no injustice that has come to our attention in connection with it.

On the other hand there are situations where analogously to the state practice in certain crimes, though they can be

prosecuted by information, they are in specific cases to be prosecuted by indictment. To give you an example of it, in New York misdemeanors may be prosecuted by information or by indictment, and when the information is filed a defendant sometimes moves that the case be prosecuted by indictment; in some instances the court in the interests of justice makes an order requiring that the district attorney proceed by indictment if he can get one.

What you want to deal with here is that the court shall still have the right to protect the defendant against having to meet an accusation where the district attorney has simply filed an information, and ought to have a safeguard of grand jury supervision. Now probably it would be fair to say to them that the defendant when proceeded against by information ought to have the right to move the court that the district attorney be directed to proceed by indictment if he procures one.

Mr. Holtzoff. That is peculiar to New York State practice I think.

Mr. Medalie. But it is a very just rule, and that is just so it ought to be included in our final form.

Now, as far as the United States attorney filing information against a person for a non-infamous offence, to meet it, you would have to go through a month or two months' trial and go to tremendous expense. Now, under certain conditions they could present facts to the court showing that that was unjust and thereby require an order of the court that an indictment be procured before he is required to meet that sort of thing.

Mr. Glueck. George, in such cases as you have mentioned,

is there a preliminary hearing before a commissioner?

Mr. Medalie. No.

Mr. Glueck. In other words, is there not one sifting already?

Mr. Medalie. No.

Mr. Glueck. There is not?

Mr. Medalie. Today the United States attorney files information in these minor offences without a preliminary proceeding of any kind.

Mr. Holtzoff. Take the Pure Food Law, for example, that is the type of case, or the Migratory Bird Act, where they file on informations. Now, it seems to me--and I may be wrong on it--it is a survival of an anachronism to require a leave of court. In some jurisdictions they still adhere to the rule that the United States attorney has to get a leave of court. Now he gets it pro forma.

Mr. Medalie. I do not think he ought to be required to get a leave of court, but where it appears it would be unjust to proceed against the defendant, simply because the United States Attorney chooses to, and where it is in the discretion of the court, in the opinion of the court, in a proper case, to have a grand jury pass upon it, he ought to get that protection.

Mr. Holtzoff. Well, you suggest we leave the phrase "by leave of court" in this particular case, is that what you mean? Is that what your suggestion is?

Mr. Medalie. "In case of such waiver the attorney for the government may by leave of court proceed against the accused." I don't think you need it. I think "by leave of court" is unnecessary.

Mr. Holtzoff. Well, that is what I say.

Mr. Medalie. And should be used only when there is a particular motion made by the defendant.

Mr. Holtzoff. That is my point. I think "by leave of court" ought to be omitted at this particular point.

Mr. Dean. I should like to ask this question: What kind of showing could you make to a court, why you should be proceeded against by way of indictment rather than by information?

Mr. Medalie. In these cases in New York these two things are pointed out. Of course the court wants to have a notion that you have a genuine defense to the accusation, otherwise his discretion would not be moved, notwithstanding the minor character of the offence; that it seriously affects a man's property rights and business; the fact that he will be subjected to a long and expensive trial.

Now without our saying so that will develop under the common law of this provision as we make it. The courts will begin to find their own good reasons and have a fair unanimity of opinion as to what is fair and when they ought to act.

Mr. Holtzoff. Anyway, you agree to this particular phrase being omitted?

Mr. Medalie. Yes. I do not think it is needed there.

Mr. Holtzoff. I move--

Mr. Seth (interposing) Don't you think it is needed in this class of cases, this class of cases we are considering now that have to be proceeded on by indictment, except where the defendant waives indictment? I think the "leave of court" should remain in that type of case.

Mr. Robinson. I think the Advisory Committee before over-

ruled it. As the law now is, Mr. Medalie, I do not follow your statement. You have in mind the Albrecht case, decided in 1926, in which the Supreme Court held that before a United States attorney can file the information he must first obtain leave of court, and before granting such leave the court must in some way satisfy himself there is probable cause. (273 U.S.)

Mr. Holtzoff. I should like to see that law changed.

Mr. Medalie. Where the leave of court was specifically needed for the filing of the information, is that the rule of the Albrecht case?

Mr. Dession. Yes.

Mr. Crane. It said these cases have to be prosecuted--

Mr. Holtzoff. In some districts they do not seek ~~a rule~~ leave of court, but I think your information always starts out, "The United States Attorney for such and such district, by leave of court," and then he just goes ahead and files the information.

Mr. Dession. That is it.

Mr. Holtzoff. It is a legal fiction.

Mr. Dession. Yes.

Mr. Holtzoff. I think now it is a legal fiction. That is why I want to abolish it, because it is a legal fiction.

Mr. Dession. The judge sometimes examines it. It is up to the court, and in some districts it simply so reads but it has never been submitted to the court at all, because the prosecutor knows in general that that is acceptable. However, there is nothing to stop the court in a particular case from asking for a showing. That is the Albrecht case.

Mr. Holtzoff. That is correct, and I just raised the question whether we shouldn't change the law on that point, but I see the force of your remarks, George.

Mr. Youngquist. Of course what we are talking about here relates to infamous crimes.

Mr. Medalie. Yes.

Mr. Crane. These are cases that you have to prosecute by indictment unless the defendant waives, and I suppose it is only a question of a court checking up on his waiver, that is all.

Mr. Holtzoff. That is all.

The Chairman. Did we have a motion on this point?

Mr. Holtzoff. I move that we strike out the phrase "by leave of court" in line 17 of the first page of rule 7.

The Chairman. Is that seconded?

Mr. Crane. Well, you want to make sure that the waiver is put in proper shape--"unless the person against whom the accusation is to be filed informs the court." There is no question about it then, is there? The court would know it then. "Either orally in open court or by a written communication." Now, a communication to whom? "that he waives accusation by indictment." I think the court should check up on the waiver. That is the only thing I see about it.

I think the court should check up on the waiver. If he files it orally in open court of course there is the check-up, and these pleas of guilty sometimes are forced--there is nothing in that--and the communication, does that mean to the court? If that is so, why that is checking up on it. The written communication, to whom? The prosecuting attorney, I do not

think that would be sufficient.

Mr. Youngquist. No, he "informs the court, either orally in open court."

Mr. Medalie. Orally or in writing.

Mr. Crane. I think the communication should go to the court. The court should check up on the waiver.

The Chairman. It says that, Judge.

Mr. Crane. Yes, that is right.

Mr. Youngquist. I would like it better if it read, "either orally in open court or in writing waives accusation."

Mr. Wechsler. At the appropriate stage, Mr. Chairman, I would like to move that that be confined to waiver in open court. I cannot conceive of any procedure short of that that will provide the protection that Judge Crane pointed out to be necessary.

Mr. Holtzoff. You mean that the letter to the judge from the defendant should not be sufficient?

Mr. Wechsler. Right.

Mr. Holtzoff. I am inclined to agree with Mr. Wechsler on that.

Mr. Medalie. That would be "informs the court"?

Mr. Crane. "Orally."

Mr. Holtzoff. "Orally."

Mr. Medalie. "Orally or in writing."

Mr. Holtzoff. But it ought to be in open court.

Mr. Crane. I think so.

The Chairman. May we have a vote on the motion? The first made is to delete the words in line 17 "by leave of court".

Mr. Wechsler. My vote on that, Mr. Chairman, would be

determined by the action taken on the preceding point. I would favor that if it were "in open court".

Mr. Crane. Yes, so would I.

The Chairman. You want to joint with that a motion to delete the words in lines 13 and 14, "or by a written communication"?

Mr. Wechsler. Yes.

Mr. Crane. Yes.

Mr. Holtzoff. Yes, I will join with him. I will make that a part of my motion, Mr. Chairman.

Mr. Seth. That raises the question, in some of the districts, of bringing the prisoner from a long distant division where he is in jail before a court that is sitting, at a large amount of expense. I do not think it makes any difference whether it is in open court or in writing so long as the judge determines the fact. The marshal might transport a prisoner 200 or 300 miles in my district to bring him before the court and he not do anything when he got him there. He would have to take him back.

Mr. Holtzoff. Ordinarily this will happen when the defendant wants to plead guilty.

Mr. Seth. And he has been held over for the grand jury by the United States commissioner.

Mr. Holtzoff. Yes. Now then, he wants to plead guilty and have the thing over with instead of languishing in jail three months or six months. He writes a letter to the clerk of the court or the United States attorney, "I want to waive indictment."

Mr. Seth. That is right.

Mr. Holtzoff. Now, he ought to be brought into open court so that the judge can be sure that he understands what he is doing, but that would not be a useless trip, because probably at the very same time he will probably also plead guilty and his case be disposed of.

Mr. Seth. Yes, but he ought to communicate in some way that he intends to waive before they bring him in.

Mr. Holtzoff. Of course, he would not be brought in unless he indicates a desire to be brought in for that purpose. Isn't that the way it would practically operate?

Mr. Wechsler. In any event, Mr. Chairman, you face the difficulty the other way that seems to me more serious, because otherwise you face the possibility that if there is the trial the defendant at the trial will claim that he signed the waiver without knowing what he was doing, or that he was coerced, or if he pleads guilty, what is even worse, you will face habeas corpus proceedings in which the basis of the complaint will be that the waiver was either made ignorantly or involuntarily.

Mr. Robinson. That is the reason the requirement for writing is written here.

Mr. Holtzoff. I agree with Mr. Wechsler, the waiver ought to be repeated even if it is made in writing, ~~before~~ in open court.

Mr. Seth. If the marshal transported a prisoner 200 miles without something, he would be disallowed his expenses.

Mr. Holtzoff. That has occurred, but that's the way this would operate. He would not transport a prisoner 200 miles without there being some reason for transporting him.

Mr. Seth. There should be an order of court in advance. I think the determination on final waiver should be in open court. There should be a written request for the prisoner before the marshal goes for him.

Mr. Holtzoff. That is an administrative matter that could be handled between the department and the marshal, but the jurisdictional waiver so far as rules are concerned ought to be in open court.

Mr. Seth. Unquestionably--and it ought to be made of record.

Mr. Holtzoff. It ought to be made of record, of course.

Mr. Waite. Mr. Chairman, could I suggest this? As I understand the purpose of this waiver it is one of expedition. If we require the man to be brought into open court first, somehow or other I do not know how, to signify his desire to waive, and then go through the process of having him brought into open court to declare his waiver, and then wait until we can get an information written up, and then bring him into court again to plead not guilty to that information, you might just as well go through the regulary grand jury process in most districts.

On the other hand I cannot see any serious danger if we do not require his waiver in open court, if we have it in writing. After all, the only difference is that the accusation is over the signature of the district attorney rather than coming from the grand jury, and I cannot see any sound basis for his moving to quash on the ground that he did not know what he was doing when he filed that waiver, because after all it is essentially the same thing, the form and content of the

accusation.

Mr. Youngquist. I think the practical working of that would probably remove those objections. I used informations in circumstances like this under the state law. What happens is this: When the defendant indicates that he wants to plead guilty and not wait for the grand jury, the prosecuting attorney then prepares an information so that he may know what is in it.

The prisoner--with us it was by petition; here it would be simply by waiver in open court--appears then with the United States attorney and with his own counsel, if he has one, in court, knowing at the time what the information contains, because he does not want to waive indictment unless he knows what he is going to be charged with in the information.

He enters his plea of guilty forthwith and is sentenced. That is the way that always worked with us.

Mr. Waite. You mean that the information is drafted before he is brought into court to waive?

Mr. Youngquist. Yes.

Mr. Holtzoff. I think it would generally operate that way.

Mr. Youngquist. And certainly if I were counsel for the defendant I would never let him waive the indictment without his knowing what was in the information.

Mr. Waite. I am not familiar with very many district attorneys. The prosecuting attorneys that I have known I think would be very hesitant about drawing up the information before they were asked to do so, on the strength the man might waive.

Mr. Youngquist. No, no, he asks.

Mr. Waite. Oh, I see.

Mr. Youngquist. He asks for that in advance.

Mr. Waite. Oh. Then he waits until it is drawn up before he asks again in open court?

Mr. Youngquist. Then he waives in open court.

Mr. Holtzoff. He indicates the intention of waiving. The United States attorney draws the information, arranges for the marshal to bring the prisoner into open court, and he then waives in open court. Right then and there the information is filed.

The defendant generally pleads guilty and sentence would be imposed. As to practical operation, it would all be done simultaneously.

Mr. Medalie. The chances are the warden's commitment would be ready for the man who asked for it.

The Chairman. Now, gentlemen, shall we vote? The motion is to strike, in lines 13 and 14, the words "or by a written communication", and in line 17, "by leave of court."

(The question being put, the Chair is in doubt.)

Mr. Youngquist. May I ask a question before we take the other vote? Does this question of waiver arise anywhere else under the rules, Mr. Reporter?

Mr. Holtzoff. No.

Mr. Robinson. No,sir.

Mr. Youngquist. Only here?

Mr. Robinson. I think that is right. I do not believe there is any in 8.

Mr. Wechsler. It arises in connection with counsel. Is there not a provision for counsel?

Mr. Holtzoff. No, waiver of petitioners.

Mr. Robinson. This is the place where it is supposed to

be provided for, waiver of indictment.

The Chairman. Let me get the vote.

Mr. Medalie. I have something troubling me here. I do not like to dispense with the words "by written communication," at least not with the idea there. I think practically you do want to save time, and you would, and the way that is done is to have the defendant sign a waiver which can be filed in court. I do not think we ought to cut this out of the draft.

The Chairman. You are voting No?

Mr. Medalie. Well, I wanted to explain it. I think it is very important. Most of the work that will be done there in the jails will be to have the defendants sign waivers, and they will be asking for them so they can get their cases disposed of speedily.

Mr. Holtzoff. But I think it is important to have the waiver repeated in open court for the record.

Mr. Glueck. Why not say, "unless he indicates in open court," which might mean either orally or written?

The Chairman. May I get the vote on this motion, first?

Mr. Medalie. I do not get the motion.

The Chairman. The motion is the original motion as to which I was in doubt, which was, to delete the words in lines 13 and 14, "or by a written communication," and the words in line 17, "by leave of court".

Mr. Medalie. I think they should be voted on separately.

The Chairman. We can, later.

(The motion is lost.)

Mr. Holtzoff. Then I would like to renew my motion to strike out the words "by leave of court" in line 17.

The Chairman. Is that motion seconded?

Mr. Medalie. Seconded.

The Chairman. Is there any discussion?

(The question being put, the motion is LOST.)

Mr. Glueck. As to the first item, I would move that we substitute for the words there, "or by a written communication," --in fact, substitute for lines 13 or 14, the statement, "indicates in open court that he waives accusation." That would make an indication either oral or written as necessary in individual cases. It would read:

"unless the person against whom the accusation is to be filed indicates in open court that he waives accusation."

Mr. Crane. Wouldn't that be covered by the consent of the court?

Mr. Glueck. Well, that is the issue, whether we should cut out the "written".

Mr. Youngquist. Well, not make them alternative but conjunctive--"inform the court in writing in open court."

Mr. Holtzoff. Suppose the defendant is illiterate? That is not a far-fetched idea, because we get a good many liquor-law defendants up in the hills who may be illiterate.

Mr. Glueck. This is done before they get counsel.

Mr. Youngquist. He may sign with a cross.

Mr. Holtzoff. What is the object of requiring written waiver?

The Chairman. Is there a second to Mr. Glueck's motion?

Mr. Youngquist. I second the motion.

Mr. Wechsler. What is the motion?

Mr. Glueck. The motion is that for lines 13 and 14 the

language be substituted, "be filed, indicates in open court that he waives," leaving out the alternative "orally or by written communication"--"indicates in open court."

Mr. Medalie. Why do you use the word "indicate"? You are going to get deep on that.

Mr. Youngquist. May I offer an amendment--"that he informs the court in writing in open court".

Mr. Glueck. Well, I wanted to avoid that "court" and "open court" construction.

Mr. Holtzoff. Why not say, "waives in open court"? And it could be either oral or written--"waives in open court."

Mr. Seth. Could we not follow the language of the old statute waiving jury trials? First they required a writing, then they amended, "to be entered of record"--"which waiver is to be entered of record."

Mr. Glueck. That is all right. I think that would be all right.

Mr. Holtzoff. I move then we substitute for the phraseology, "unless the person against whom the information is to be filed waives accusation by indictment in open court, which waiver shall be of record, and consents to the filing," and so on.

Mr. Waite. That, Mr. Holtzoff, is again the motion to preclude waiver in writing, is it not?

Mr. Holtzoff. It does not preclude it.

Mr. Waite. I am just trying to find out. Is that the same motion in a different dress?

Mr. Seth. Yes.

The Chairman. Yes, it definitely precludes a waiver in

advance, not in court.

Mr. Holtzoff. In advance, yes.

Mr. Crane. The only thing I had in mind, I do not care how you get it, whether it is oral or in writing, but it is that the court, the judge, should check up on the waiver.

The Chairman. You have that, Judge, in this last clause.

Mr. Crane. Now, the Constitution says "indictment". We are going a little far to get rid of it. My court very early said he could not be tried by 12 jurors. The United States Supreme Court did not follow that, did not approve it, and I think the Supreme Court was right about it.

I do not think we ought to make these things to set forth entirely. It does not work out right, because the principal thing is that the defendant knows what he is charged with, he pleads guilty to it, but I think there should be some check-up by the court on any written communication rather than as to whether or not a man is able to make his mark. They may get a printed form and mark it, it comes in and is filed. The judge may never see it. The information is filed, he pleads guilty to an infamous crime. I think they should be checked up.

Mr. Holtzoff. That would be saved by a provision "in open court".

Mr. Crane. Oh, yes.

Mr. Wechsler. Why not do that? Why not have it read, "unless the person against whom the accusation is to be filed waives accusation by indictment"--period. Then the second sentence, which reads that before accepting a plea on information the court shall satisfy itself that the waiver was knowingly and voluntarily made--which will indicate that at some stage before actual action is to be taken there has been a

determination.that the man knew what he was doing.

Mr. Holtzoff. I venture to suggest that we leave this to the Reporter to redraft, rather than trying to redraft it in committee.

Mr. Wechsler. I think so, too.

Mr. Holtzoff. I think the concensus is known, by this time.

The Chairman. We only have four motions to entertain now, gentlemen, so I think I will entertain one to adjourn until 8 o'clock.

Mr. Holtzoff. I so move.

The Chairman. Hearing no objection, it is carried.

(Whereupon, at 4:45 p.m., the Committee adjourned until this evening at 8 p.m.)

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NIGHT SESSION

The proceedings were resumed at 8 o'clock p. m., at the expiration of the recess.

The Chairman. Gentlemen, I think we came down on Rule 7 to page 2, and then there seemed to be some question raised as to the fourth and fifth words on the top of the page, 18, "or complaint."

Mr. Robinson. Yes, sir.

Mr. Crane. What is that rule?

The Chairman. On page 2 of Rule 7, some question raised as to the phrase on line 18 at the top of the page, "or complaint." What is it, Mr. Reporter?

Mr. Robinson. That word "complaint" represents a possible additional form of written accusation on which I should like to have the views of the committee.

I happen to be familiar with the procedure in one state where a complaint may be filed, sworn to by a private individual, and signed by the private individual, then approved by the prosecuting attorney and filed in a court having either misdemeanor or felony jurisdiction, and carried right on through to a conviction or acquittal. In fact, sometimes a complaint is filed in a committing magistrate's court, and that same complaint signed by the private individual, approved by the prosecuting attorney, serves as the basis for the binding over of the defendant, and then after he is bound over that same complaint is used in the trial court for his trial on the felony charge. The procedure happens to be quite successful in that state. It has been on the statute books there for, I believe,

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thirty-six years, and it has some advantages that I want to mention to you.

I think perhaps I have mentioned one: that is the fact that you may start out in the lowest court with the document, the written accusation, and on that same accusation, without any additional drafting or filing, carry the case on through to completion.

Perhaps that is not as great an advantage as some that we found in using it. If you have the affidavit--that is, the complaint--sworn to by an individual who is the injured party, it has been found that that person is bound to stick to his story and, further, that the jury is likely to give more consideration to the state's case because here it is, filed not by some official prosecutor, but it is filed by a private citizen like themselves, and therefore they are likely to give it a more sympathetic hearing.

Now that is all I have to say about it. I just mention it here as a possible additional form of accusation. It has its objections, but from almost forty years of experience with it in the state of Indiana it has been considered by lawyers, officials there, as being more advantageous than the ordinary information and certainly much more advantageous than the indictment.

Mr. Dean. If you used it, though, would it supplant the indictment when you got up to the court of general jurisdiction?

Mr. Robinson. Oh, yes. Wait a minute. "Supplant"? Now, by "supplant" you mean if you have a grand jury indictment. No, no. If you have an indictment--

Mr. Dean. You would not have any necessity for an indict-

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ment or an information, as I understand, if you started in the committing magistrate's court with the complaint.

Mr. Robinson. That is right.

Mr. Dean. But would you not run right in the teeth of your constitutional provision with reference to indictment?

Mr. Robinson. That is in a federal court. In our state court we did not have it, because by our Constitution there the grand jury system is modified by permitting the filing of such a complaint in a felony court as a basis for a charge there.

Mr. Dean. How could we do it in view of the constitutional provision?

Mr. Robinson. Well, it would have to be used here as a substitute for information.

Mr. Dean. Only for an information?

Mr. Robinson. That is right.

Mr. Crane. The only thing I am thinking about is, Would that not add to confusion? Only one state, I believe, uses the word "complaint": would that not add to the confusion as to what was meant by it, when "information," which simply means something different from "indictment," really covers it?

Mr. Robinson. That is a possible objection, yes.

Mr. Holtzoff. It seems to me there is also another objection going to the principle of the thing. The federal system today envisages a prosecution on the responsibility of the official prosecutor only, whereas if you permit a private

2 individual to file a sworn complaint, even though it has to be approved by the United States attorney, and have that take the place of an information, you are putting the United States attorney in a place where he can sort of shift half the

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responsibility at least for the prosecution, and you are much more likely to have prosecutions based on animosity and for personal reasons than you are when the United States attorney subject to the control of the Department of Justice has to take full responsibility for instituting the prosecution.

Now, I do not see that you gain anything by using such a complaint in lieu of an information. The suggestion that that puts the complaining witness in a position where he cannot back away from his story seems to me can be met by the thought that every United States attorney anyway gets a written statement from the complaining witness if there is one, and it is just as hard to get away from that kind of statement as it is from one that is used in lieu of an information.

Mr. Robinson. Pardon me just a second. On that point I do not quite agree that that is accurately stated in that way, because where it is filed in the court as a document of the court it becomes a much more effective document than a mere paper in the files of the United States attorney, which he cannot introduce directly anyway.

Mr. Holtzoff. Well, an affidavit that the United States attorney obtains from the complaining witness may be used to confront the complaining witness if he reneges on the witness stand; but I think the type of prosecutions we have in the federal courts is entirely different from those in state courts: you do not have so many cases arising out of personal grievances. Most of them are violations of statutes affecting the Government. I do not see that you derive any advantage from this type of prosecution, and you do have the disadvantage of relieving the United States attorney of the moral responsibility for

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instituting a prosecution. I think that is a very important one.

Mr. Youngquist. If I might make this suggestion.

Mr. Robinson. Yes, sir.

Mr. Youngquist. Of course, the United States attorney would have to approve the complaint, as provided by the next subdivision, but in line with what Judge Crane said this occurs to me: In this particular paragraph that we are dealing with we are dealing with infamous crimes only. Those cases that must be tried by the district court ought, I think, be initiated by indictment or by information. Before the committing magistrate we have a complaint as the initial pleading.

Mr. Robinson. Yes, sir.

Mr. Youngquist. And we have also, as I recall it, in the rules as well as in the statutes provision for trial of petit offenses by the United States commissioners, who are the committing magistrates also, of course. Those may be tried on complaint, if I recall it right, approved by the United States attorney.

Why, then, should we not limit to indictments and informations the proceedings in the district courts, which are the ones of the higher grade ordinarily, and also limit complaints to the committing magistrates whether for the initiation of a charge of an infamous or capital crime and also the initiation of the petit offenses that he may try? Would that not be a more appropriate classification and a more appropriate restriction of the use of the complaint?

The Chairman. I am impressed by that argument, Mr. Youngquist. Judge Crane, to attempt to introduce a new classification instead of simplifying this really complicates

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without any definite advantage that I can see to offset the trouble we might get into by it.

Mr. Holtzoff. I move, then,--

Mr. Robinson (interposing). Pardon me. I will withdraw the amendment to the motion. But we do not have the technicality, do we, now, with the information that they used to have at common law where an information had to be based on the affidavit of some individual?

Mr. Holtzoff. Oh, no.

Mr. Robinson. And the prosecuting attorney had to state, you know, that he is basing this information on affidavit.

3 Mr. Holtzoff. Oh, no. No.

Mr. Robinson. That has been one reason, one advantage of the direct affidavit statement I was carrying on.

Mr. Holtzoff. The federal rule does not require it.

Mr. Robinson. Well, I just put that out for your consideration. I shall be glad to knock that word out.

Mr. Longsdorf. You will find the words "information or complaint" in the last line of section 541.

Mr. Robinson. Yes. Section 541 U. S. C. A. Misdemeanors, petty offenses. All such petty offenses may be prosecuted on information or complaint.

Mr. Holtzoff. Well, that refers to--

Mr. Youngquist. Petty offenses.

Mr. Longsdorf. Yes, only.

Mr. Holtzoff. There are three places where the word "complaint" occurs.

Mr. Robinson. In other words, Mr. Longsdorf, your point is that the term "complaint" already is used?

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Mr. Longsdorf. Yes, it is used, whatever it may mean.

Mr. Robinson. I think the point was worth bringing to your attention. I should like, then, just to withdraw it, but with the idea that is in our minds, and in case we do see some use for the idea later, we can.

The Chairman. Now, that goes out in lines 18, 19, and 22.

Mr. Longsdorf. "Complaint"?

The Chairman. Yes.

Mr. Glueck. Lines 18, 19, and 22.

Mr. Robinson. And 23, it is.

The Chairman. Well, I am just sticking to the one section.

Mr. Robinson. Yes, sir.

The Chairman. Then, is there any need at all for that last sentence of this subsection, beginning on line 21?

Mr. Youngquist. Yes.

Mr. Longsdorf. Yes.

Mr. Youngquist. One relates only to capital offenses.

The Chairman. That is the first sentence on lines 9 and 10.

Mr. Youngquist. Infamous offenses.

The Chairman. Which may be by indictment or information, and then that is exactly the situation which is applicable to non-infamous offenses.

Mr. Youngquist. But you might want to deal with a non-infamous offense in the district court, and there you do it either by indictment or by information.

Mr. Holtzoff. Yes. I think that is surplusage because you have three classes: You have the capital offense,--

The Chairman. Which must be by indictment.

Mr. Holtzoff. --the infamous offense, and noncapital, which

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must be by indictment unless there is a waiver, and noninfamous, which may be either by indictment or information.

The Chairman. Without waiver.

Mr. Waite. Mr. Chairman, may I interject at this point a question of definition on which I confess I am frightfully confused: the matter of infamous crime. I have spent a great many years trying to find out what it means, and I have not a definition yet, or rather I have too many definitions, and it is used here apparently in a significance with which I am not familiar. From the fact that lines 21 and 22 provide that where it is not an infamous crime an indictment is not necessary, it apparently is meant to indicate by "infamous crime" the kind of crime which is not covered by the jury trial provisions of the Constitution. Well, that is the most important or one of the most important provisions of the Constitution. Well now, it seems that is a most unusual definition of "infamous crime," and I think we should have it defined one way or the other.

Mr. Holtzoff. The term "infamous crime" as used in the constitutional provision has been defined by the Supreme Court for the purposes of the constitutional provision as meaning any crime which may be punished by imprisonment in the penitentiary or at hard labor, and that has really become a word of art so far as federal criminal law is concerned, I believe.

Mr. Glueck. It has been more than that.

Mr. Dession. One no longer knows what hard labor is.

Mr. Holtzoff. There is no more hard labor, but the line is drawn as between a crime that may be punished by imprisonment in the penitentiary and a crime that may not be punished by imprisonment in the penitentiary.

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Mr. Crane. For a year. A year in the penitentiary or not

4 more than a year in the penitentiary.

Mr. Seth. Over a year.

Mr. Holtzoff. Not more than a year.

Mr. Crane. A year or less. If it is more than a year--

Mr. Holtzoff. It is a penitentiary offense.

Mr. Robinson. A felony.

Mr. Crane. It is a felony, then, so far as this goes, the indictment. We adopted it in the state of New York.

Mr. Holtzoff. Yes. Now, the Constitution uses the words "infamous crime" in connection with the grand jury provision, and the Supreme Court has defined "infamous" as meaning a crime punishable by imprisonment in the penitentiary.

Mr. Waite. Now you are not suggesting that under the Constitution a crime which is not punishable by imprisonment in the penitentiary does not need indictment?

Mr. Longsdorf. That is right.

Mr. Holtzoff. That is right, because it is not an infamous crime.

Mr. Seth. That is the federal rule.

Mr. Glueck. I thought the test was whether or not hard labor was attached, in the Moreland case.

Mr. Holtzoff. No. They dropped the phrase "hard labor" in a recent statute, and the Supreme Court has held that any imprisonment in the penitentiary is included.

Mr. Crane. Just as a matter of interest, we had a difficult problem because we adopted the same rule--it has always been such--that any crime laid by the legislature punishable by imprisonment in the penitentiary limited to a year be tried at

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a special session; that is, without indictment, and that was the rule. Then came along these welfare statutes, the reform statutes, which tried to discipline by control, and they said that they could send these special sessions prisoners to the penitentiary for an indeterminate sentence, which might last three years; and the question then happened: What about this? If they went to the penitentiary for more than a year they could go for three years under this reform. That is, they have tried to be reformed, not imprisoned. Another one of those things that kind of stick in your crop: you hate to do it. But we did it. We said that it was perfectly legal to prosecute by information at special session because like nolo contendere they were reform measures. So he was just tried, not imprisoned: he was not in jail; he was being schooled. So this question is coming up all the time in some form or other, but we have to take them as we get them.

Mr. Youngquist. Well, we have now a definite definition of "infamous crime."

The Chairman. I should like to explain, Mr. Waite, that this morning we tentatively agreed, following the wise formulators of the civil rules, that we would not define any.

Mr. Waite. I am afraid I do not quite understand that.

The Chairman. We tentatively agreed on it, I said.

Mr. Waite. We surely are not going to use words of uncertain definition. Now, I ask for my own information: Is it agreed that the federal courts have defined "infamous crime" in such a way that under the provision requiring indictment for capital offenses and infamous crimes an indictment is not required if the offense is not punishable by at least a year in

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the penitentiary?

Mr. Holtzoff. An indictment is not required if the offense is not punishable by a penitentiary sentence at all. Now, under the statutes, however, only sentences for over a year may be served in a penitentiary. The statute does not permit a person to be sentenced to a penitentiary unless the term of imprisonment is at least a year.

Mr. Dession. There have been some statutes since, though, that authorize the Attorney General to put any federal prisoner in any institution he chooses and put him at road work and levee work. I do not believe that makes any difference.

Mr. Holtzoff. None whatever under that statute.

Mr. Dession. I know you do not, but the court has not construed it yet. I do not think there is any doubt about it, but I think you have the choice between using the term "infamous crime," leaving it to construction as time goes on, or using the word "felony," which is probably synonymous so far as one can make out.

Mr. Wechsler. There is still another drafting possibility that seems to be before you, and that is to refer to this one

5 case in which the Constitution does not require an indictment, and let the actual content of that formula be determined from case to case as the problem arises. I take it that is our purpose in using the phrase "infamous crimes," and we are not wedded to any particular definition of that phrase. If the court is to change that definition at this next term, we would want to get the benefit of that change.

Mr. Holtzoff. Is not that the purpose in using the word "infamous," because the word "infamous" is the term used in the

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Constitution? And if the Supreme Court should change the definition of the term "infamous," the rule is adjusted following that

Mr. Seth. We cannot define it in any binding way, in any event. That is a subject of law.

The Chairman. Now are there any further questions on this section?

(There was no response.)

The Chairman. If not, we shall go on to subsection 2.

Mr. Robinson. "and Complaint" comes out of line 23, so we would have:

> "(2) Information; Signature and Approval. When the written accusation is an information it shall be signed by the United States Attorney."

Strike out the next sentence. That is subject to what we may do in our special section on the provisional or supplementary proceedings; when we come to what may be done before the United States commissioner we may want to extend complaints there.

Mr. Glueck. Strike out the next two sentences.

Mr. Seth. Save all the rest.

Mr. Longsdorf. Before we pass that may I put in a suggestion: Your method of procedure on private complaint, it seems to me, although it begins at a little earlier stage, is very much like the present English one.

Mr. Robinson. The present what?

Mr. Longsdorf. Very much like the present English method by which private complaint is lodged, and a court officer examines to see if it is conformable to law. If he so finds he

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signs it, and then it is an indictment in the terms of the English statute. That is the statute of England of 1933, which abolished the grand jury entirely, but they still have indictments.

Mr. Holtzoff. I think we ought to bear in mind the way the prosecuting machinery of the federal courts operates; it is somewhat different from the states'. Suppose a private person comes in to a United States attorney and makes a complaint of a mail fraud. No United States attorney would be allowed under the practice to base a prosecution on that. He would be required, or he would turn that over to the federal investigating agency to make an independent investigation. In the case of a mail fraud violation it would be the post office inspector; in another case it would be the F. B. I. And after he gets a report of the investigation, then on the basis of that report he starts his prosecution. So that the complainant plays a very small part in the prosecution in the federal courts.

Mr. Crane. I doubt if there are very many private complainants in federal court matters.

Mr. Holtzoff. I think that is one reason, of several, why we get such a large percentage of convictions in federal courts.

The Chairman. All right. Are there any questions on (b) (1)?

Mr. Robinson. In line 33, in view of our previous section, there should be added "shall be made orally or in writing."

"An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made"--well, I suppose the "unless" clause should be left out.

Mr. Seth. Did we agree to have motions orally and during

the trial? I thought it was only pleas we agreed to have oral.

Mr. Robinson. Prior to trial?

Mr. Seth. Yes.

Mr. Longsdorf. We have another rule over here which provides that notice of the motion shall serve as a written motion as well as the notice thereof, have we not?

Mr. Youngquist. 7 (1), I think.

The Chairman. Going back to your question, Mr. Robinson, that "oral," that should not need to be there in view of the proviso in line 32, should it?

Mr. Robinson. "An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made"--perhaps not. I suppose that is not required by the previous section.

Mr. Medalie. Well, I have in mind that many--not many but occasional motions are made orally.

The Chairman. At the trial?

Mr. Medalie. No. Even on a calendar call, without provision for pretrial practice or anything else, the district attorney rises on calendar call and says, "I move to sever this case as to Jones and Brown."

"Motion granted."

Mr. Robinson. Would there be any advantage in having that motion in writing?

Mr. Medalie. None.

Mr. Holtzoff. No. That would be extra work for the United States attorney.

Mr. Medalie. On the other hand, when that is done another defendant gets up and says, "I move that be severed as to me."

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The court says, "Denied."

But the motion is made, and on occasion the district attorney may consent. It has occurred. The district attorney says to counsel, "All right. Now, your client is a nice fellow; he has given us lots of valuable information; and when the case is called tomorrow you move to sever and I won't oppose or I will consent."

No reason; why should they not?

Mr. Youngquist. Could that be taken care of, Mr. Medalie, by making it "unless made in open court"?

Mr. Medalie. Yes, certainly.

Mr. Youngquist. That includes your open court.

Mr. Medalie. Well, of course ex parte will not do. I think we are getting too rigid when we are trying to say a motion may be made only in writing.

Mr. Robinson. Here again, Mr. Medalie, are we not getting ready and have we not been proposing to take care of affirmative defenses later?

Mr. Seth. We have to take care of those.

Mr. Medalie. That is something else. But take severances, consolidations. Motions for consolidations are frequently made very informally, certainly by the district attorney. I cannot recall a single consolidation motion that I made that was granted that was ever done in writing, and on the calendar call--isn't that how it is done all over the country?

Mr. Holtzoff. Yes. Oh, yes. I think that criminal practice is much more informal than civil procedure, and I do not think we want to make it any more formal or any more difficult. I think our aim should be to simplify it rather than to compli-

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cate it.

Mr. Medalie. What is the harm in granting motions without papers?

Mr. Holtzoff. None at all.

Mr. Medalie. I mean, let us take something else. The defendant gets up and says through his counsel, "We need some particulars."

Some judge who likes to cut corners says, "What particulars do you want? Do not waste time making your motion. Tell me what it is, and I will tell the district attorney to give it to you if you are entitled to it." Occasionally that happens.

Why papers? We want to encourage judges and counsel to do things speedily and informally, and that too fits in with your civil practice, with the vogue that is beginning to develop to do many things quite informally and without papers.

Mr. Youngquist. Would it be enough if we said "unless made in open court"? That includes a hearing or a trial, and it would also include the opening of the term that you speak of.

7 Mr. Seth. Why not limit it, "Except those specified in section 8 may be made orally"?

Mr. Holtzoff. I think even those motions could be made orally occasionally.

Mr. Medalie. Yes.

Mr. Holtzoff. A motion to dismiss an indictment for insufficiency might well be made orally.

Mr. Medalie. Yes. A judge can pick up an indictment and say, "That does not look good to me."

Mr. Robinson. In a great many states your motion to quash, of course, has to be in writing, has to follow the language of

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the statute: that is, state some statutory ground. I cannot quite imagine a motion of that sort being made merely orally.

Mr. Holtzoff. Oh, yes.

Mr. Robinson. In a great many states under the statutes, Mr. Holtzoff?

Mr. Holtzoff. That is why the federal criminal procedure is so much more effective, because it has gotten away from the state technicalities.

Mr. Medalie. I do not think we ought to inject into the new procedure we are trying to establish any additional formality.

Mr. Robinson. I do not either.

The Chairman. May I suggest that we leave this proviso in 32 with a note to the Reporter to keep it in mind and give us the appropriate language after we have disposed of Rule 8. It seems to be tied up with that.

Are there any other questions on (b) (1)?

(There was no response.)

The Chairman. If not, we shall go on to (b) (2).

Mr. Robinson. That is self-explanatory, I believe: (reading)

> "The rules applicable to captions, signing, and other matters of form of pleadings apply to all motions and other papers provided for by these rules."

Mr. Holtzoff. I wonder if we need in these rules any provision as to the captions of documents, and so forth. You do not need all that formality with papers in a criminal case. You do not have it now.

The Chairman. Taken from the civil rules.

Mr. Holtzoff. Oh, it is taken from the civil rules, but I feel as Mr. Medalie does, that we do not want to inject technicalities and formalities that do not now exist.

Mr. Robinson. Do not let us use epithets like "technicalities and formalities."

Mr. Holtzoff. Well, I think we should try to simplify it rather than to complicate it.

Mr. Robinson. It is a question whether they are or not.

Mr. Holtzoff. I think we should try to simplify rather than to complicate it.

Mr. Medalie. You know, today federal criminal practice, except perhaps in a few districts, is virtually no practice. In other words, all that people believe about criminal law is just a lot of nonsense; it just is not so. The practice of criminal law, so far as practice and procedure go, is virtually nonexistent except that here and there someone looks up some ancient procedure.

I remember a dozen years ago I raised a question of double jeopardy of a defendant. I formally filed a plea. My very competent predecessor in office did not know what to do next, and I advised him that the old common law procedure required the filing of a replication or a demurrer. Well, if I had not injected that unnecessary learning--which, by the way, was not my own, but one of my young men happened to have looked it up--we would have brought that on just on the paper that I filed, and the judge would have said, "Well, let us have a hearing," and nobody would have minded, and everything would have run very smoothly, and the decision would have been rendered on that.

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Now, we can get more formality into these things than we need. If the established practice is to be exceedingly informal and simply to have things before judges as nearly as possible, I think in our procedure we ought to have it, so long as the judge is there to pass on it.

Mr. Robinson. May I ask this question on that: In the civil rules and I take it in these rules also we are trying to avoid as much as possible unnecessary hearings and trials and trying to keep dockets as clear as possible. Is it not reasonable to think that we might accomplish that by pleadings, by written papers? For instance, you speak of filing a motion or a defense of double jeopardy. Why would a hearing be necessary if you would file a paper setting out the judgment and giving citation to the docket where it is entered; I suppose that you were defending, of course, on that, and then the state would come along; and, since your pleading or your motion would adequately show that you did have a good defense on that score, why could not the state concede your position and avoid the necessity of a hearing?

8 Mr. Medalie. They disagreed with my conclusion. They admitted that that was the proceeding but said that it did not constitute double jeopardy, and that was something for the court to pass on.

Mr. Robinson. Well, a hearing would be necessary, but now in another case it might be possible that the matter could go off on the pleadings, could it not, or on the papers?

Mr. Medalie. Yes, but in view of the fact that the Government had indicted in that second case, it is pretty clear that they thought that the prior proceedings did not constitute

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jeopardy, so all the court required was that it be told what the proceeding was and have the papers before it in the prior proceeding and read the indictment in the instant case.

Mr. Youngquist. I was going to say, I note that this particular provision merely says "rules applicable to captions, signing, and other matters of form," and rules shall apply to all motions and other papers. It cannot well apply to oral motions of the kind we are talking about. If we insert the word "written" before "motions," I cannot see any objection to having provisions relating to captions, signatures, and other forms applicable to motions.

Mr. Holtzoff. I should like to see all provisions as to captions and so forth stricken out. I think they are unnecessary, and if they are stricken out this likewise would fall.

Mr. Medalie. What of the prior--

Mr. Youngquist. They are uniform, are they not?

Mr. Medalie. What are the prior provisions on this about captions, signatures , and so forth? There aren't any, and they do not cover the whole thing.

The Chairman. Is there any objection to entitling the case and the name of the paper and the name of the court and the name of the moving party and the name of the defendant? I mean we do not want to get like the lawyer from Texas, a lawyer who said, "Don't call me Mister. Just call me Jones." That was written at the top above his letterhead. We do have to have a little form, such as the name of the court and the names of the parties.

Mr. Medalie. Well, where is your prior proceeding as to caption, your prior provision as to caption?

Mr. Robinson. Of course there isn't any specification in

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the federal law now.

Mr. Holtzoff. We have not come to that yet.

Mr. Robinson. Some of the rules.

Mr. Holtzoff. We have not come to the rule relating to captions.

The Chairman. Is not this subsection (2) quite harmless?

Mr. Holtzoff. Oh, yes, it is harmless.

Mr. Youngquist. I think so.

The Chairman. I do not think this is going to interfere with the old tradition of oral pleading.

Mr. Youngquist. Certainly not, if you put "written" before "motion."

Mr. Robinson. I think that is a good suggestion.

The Chairman. Are there any further suggestions with respect to this section: subsection (2)?

Mr. Longsdorf. With respect to (c) I have a suggestion that the word "formal" be inserted before "demurrers" and following the catch line, because I think we do not mean to imply that the substance of demurrers, pleas in abatement, to the jurisdiction, and so on, is abolished, but only the formal.

Mr. Holtzoff. Well, that relates to the civil rules, and the motion to dismiss is used under the civil rules in lieu of a demurrer.

Mr. Longsdorf. And it is a demurrer under another name.

Mr. Holtzoff. Yes, but this rule is used in the civil rule, and it is understood that only the form is abolished.

Mr. Youngquist. After all, your demurrer is based upon defect. In one instance you set out a defect in your demurrer, and in the instance of an indictment you set it out by motion.

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Mr. Longsdorf. Well, which are we abolishing, the form or substance?

9 Mr. Robinson. The form.

Mr. Youngquist. The name, after all, is only the form, and if we would say "motion" in place of "demurrer," we would accomplish the same purpose.

Mr. Medalie. Well, what is really back of the whole business is that we want the public to think that there is nothing in the way of mystery about the practice of criminal law.

Mr. Youngquist. Yes, that may be an advantage.

Mr. Robinson. It may be part of it, but in addition to that Strine and Peterson have been doing quite a bit of research work on this, and they have found a certain amount of diversity in the federal courts of the country in the way of bringing up defects that the defendant wishes to allege. In one district you may have a demurrer used, in another a plea in abatement, and a great deal of time may be consumed in the court in deciding whether or not it should have been the other thing when it is really filed as that one.

Mr. Holtzoff. Is not a great deal of time taken up learning to know when you should use a motion to quash and when you should demur and when you should use a plea in abatement? Now, if you abolish all three and substitute a motion to dismiss, I think you simplify matters.

Mr. Dean. Should you not in the same way delay matters earlier?

Mr. Medalie. Fancy words. I think the public does not like something mysterious.

Mr. Robinson. I do too.

023

Mr. Holtzoff. I think you ought to insert "motions to quash."

Mr. Robinson. Yes. In line 41 after "pleas to jurisdiction" insert "motions to quash"?

Mr. Holtzoff. "Motions to quash." I do think you ought to leave out--

Mr. Robinson. "Motions"?

Mr. Holtzoff. You ought to leave out in line 42 "exceptions for insufficiency of a pleading." That is a term taken from old-time equity pleading; it does not exist in criminal law.

Mr. Robinson. Yes, but it is designed to take care of something that may be taken care of later on, namely, abolition of exceptions to rulings holding that a--

Mr. Holtzoff (interposing). That is covered by another rule.

Mr. Robinson. I think it is. I have no objection to that going out: "exceptions for insufficiency of a pleading." Every word you can save us safely, of course, ought to be saved.

Mr. Crane. Well, you see, motions to quash are still in order, are they not?

Mr. Robinson. Yes, sir.

Mr. Crane. Do you not think you are going to include them here?

Mr. Holtzoff. Well, you include them here and substitute a blanket omnibus motion to dismiss. Later on you will find that in the draft.

Mr. Robinson. By "still in order" I thought you meant there present practice.

024

Mr. Dean. They could still be used under this paragraph.

The Chairman. What is that?

Mr. Dean. Motions to strike as well as other motions to quash, I mean.

Mr. Medalie. There are no motions to strike in criminal cases.

Mr. Dean. Oh, yes.

Mr. Medalie. Are there?

Mr. Dean. Surely.

Mr. Medalie. What, for instance?

Mr. Dean. You may move to strike testimony; you may move to strike an allegation from the information.

Mr. Medalie. I was talking about the indictment.

Mr. Dean. I am thinking of the information.

Mr. Medalie. I am talking about the indictment.

Mr. Dean. I am thinking of the information. There is no reason why you may not move to strike an allegation of an information or a part thereof, but that would be to the indictment, of course, because you would be amending the grand jury's work as to that.

Mr. Youngquist. But you can when you move to strike, I mean.

Mr. Dean. Prejudicial language: for example, where someone has set forth facts obviously not germane to anything in the case, and you know the document is going to be read to the jury, and you want it out.

Mr. Youngquist. That would not be included in this exception for insufficiency of pleading?

Mr. Holtzoff. No.

025

Mr. Youngquist. That comes under a different category?

Mr. Holtzoff. That would come under a different category.

Mr. Dean. Well, it is a defect in the pleading.

Mr. Waite. There is something here I do not see at all. (b) (1) says an application to the court for an order shall be by motion. Would that not automatically exclude demurrers and pleas in abatement?

Mr. Robinson. Not for some lawyers. It would not be interpreted that way, would it, to rely on that?

10 Mr. Waite. I should suppose it would be mandatory, exclusive.

The Chairman. I think logically you are sound, but I wonder whether by reason of the existence of the similar provision in the civil rules under 7 (c) we would not be met by some people coming along and making the argument that all trials on the subject must be--

Mr. Longsdorf. Lost.

Mr. Waite. What worries me is that if we lose (c) and leave out some particular motion, I had not thought of a motion to strike until Mr. Dean referred to it; by expressing some in (c) will we not be strengthening the idea that those which are not expressed in (c) may be used despite the first part of (b) (1)?

Mr. Robinson. I think Mr. Dean's suggestion, that is, the motion to strike, is the only one which is not included.

Mr. Seth. (a) (2) covers it pretty thoroughly.

Mr. Medalie. I wonder whether this would cover: "Proceedings directed to the sufficiency or validity of an indictment or information shall be only by motion."

026

Mr. Longsdorf. Where is that?

Mr. Medalie. In "Proposed."

Mr. Dean. New proposed.

Mr. Medalie. In lieu of (c).

Mr. Seth. What is the matter with just what is here as to motions that are made and you wipe them out?

Mr. Holtzoff. I think you ought to make it clear that you are abolishing demurrers and pleas in abatement and motions to quash.

Mr. Crane. Those are words of art that have been used right up to the present time, and you just simply say you are not going to use them any more; we are going to take "motion to dismiss." You have done that in New York. I was a member of the Judicial Council of New York for a great many years, and we did away with that practice, and the state writ, we just abolished the name, but you make a motion now as to all these different state writs, and it is a good thing, too.

Mr. Orfield. Would a motion in arrest of judgment do it?

Mr. Holtzoff. No; I think you should keep a motion in arrest of judgment because that goes to the defendant's substantial rights. It might be undesirable to abolish that.

Mr. Seth. It does not come under our jurisdiction anyhow.

Mr. Youngquist. We are not abolishing motions by this anyway.

Mr. Holtzoff. No.

Mr. Youngquist. We are abolishing demurrers and pleas and exceptions.

The Chairman. Now will you read the (c) as it presently stands?

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Mr. Robinson (reading). Line 40.

"(c) Demurrers and Certain Pleas Abolished. Demurrers, pleas in abatement, pleas to the jurisdiction, motions to quash, and special pleas in bar shall not be used."

The Chairman. What about this motion to strike that Mr. Dean referred to?

Mr. Robinson. Well, we certainly would not want to supplant that by motion to dismiss.

Mr. Longsdorf. I do not think so.

Mr. Holtzoff. I do not think you ought to include that.

Mr. Medalie. I do not think you need to abolish motions to quash because every motion directed to an indictment for the purpose of getting rid of it is a motion to quash.

Mr. Crane. Use the term--

Mr. Youngquist. "Motion to dismiss."

Mr. Holtzoff. "Motion to dismiss," in order to abolish a technical motion to quash as distinguished from demurrers and pleas in abatement.

Mr. Crane. The same motion with a different name; that is all.

Mr. Medalie. No.

Mr. Holtzoff. Of course, "motion to quash" today is a word of art that can be used only for certain purposes; it has a lot of barnacles attached to it.

Mr. Youngquist. All we are doing is repeating names.

Mr. Holtzoff. That is right.

Mr. Youngquist. In (c).

The Chairman. All right. If there is nothing further

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suppose we pass on to Rule 8.

Mr. Waite. Mr. Chairman, before we do that may I ask the Reporter if there is anywhere else a provision that the court may decline to accept a plea of guilty, as there is in most states now?

Mr. Robinson. No, there is none.

Mr. Waite. If not, I should like to suggest that we con-
11 sider that matter in bringing in the new draft. I think myself we ought to give the court power to refuse a plea of guilty if he thinks wise.

Mr. Robinson. I did not get that last sentence.

Mr. Waite. To give the court power to refuse to accept a plea of guilty if he thinks proper.

Mr. Robinson. You say he should have the power?

Mr. Waite. It is a conventional practice.

Mr. Robinson. What did you say, Judge?

Mr. Crane. I should think the court had the inherent power, Mr. Waite.

Mr. Waite. I assume it does.

Mr. Crane. I do not think you ought to put that in. That really has been done right along.

Mr. Waite. But after all, we are putting in here a great many things which the court has inherent power concerning.

Mr. Crane. Certainly.

Mr. Waite. And it is a common practice, and we find it in a great many codes.

Mr. Crane. I think you will find that the court will do a lot of things that are not in this rule. There are certain inherent powers of a judge that he has to exercise anyway.

029

Mr. Robinson. You remember the Capone case in Chicago, Mr. Waite, where I think it was Judge Wilkerson, was it not, who refused to allow Capone's plea of guilty to stand?

Mr. Waite. Oh, it is a very common practice. I am just suggesting that because it is a common practice we ought to express it here.

Mr. Youngquist. I had a lot to do with that. It was entered, and then he was permitted to withdraw his plea.

Mr. Robinson. Yes, but that amounted to the same thing, did it not?

Mr. Youngquist. Would not accept it.

Mr. Robinson. The Judge told him,"We refuse to permit your plea of guilty to stand"; was that not the substance of it?

Mr. Youngquist. Oh, no; it was quite different. He entered a plea of guilty and thereafter changed his mind--with just cause, I thought; and he moved for permission to withdraw his plea, and the United States Attorney agreed that he should be permitted to withdraw his plea, and Judge Wilkerson allowed it. That is what happened there. I have good reason to remember that.

Mr. Holtzoff. Of course the court has inherent power to refuse to accept a plea of guilty.

Mr. Crane. Surely.

Mr. Holtzoff. If the court feels that the defendant is, say, a moron or mentally deranged, and that is not infrequently done. I do not think you have to cover it by rule. That is inherent.

Mr. Crane. Certainly.

Mr. Wechsler. But the point is that there are definite duties that fall upon the court at the time when a plea of guilty

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is offered. They are defined by the Supreme Court in the Kercheval case in 274 U. S., and I think that they ought to be protected. They ought to be articulated here, because there are some courts, as I know from sad experience, that have failed to abide by that duty, with serious consequences thereafter. I do not see what the criterion for inclusion and exclusion is if things that are so important that they are inherent are to be omitted. By the same token you might say that there is no need to state that prosecutions shall be taken by indictment because the Constitution says so.

Mr. Crane. A great deal that a judge does at a trial may never be put in any rule. I know that a plea of guilty was put in for a man once, and they came to find out upon questioning him that he could not understand even the interpreter who attempted to interpret for him,from which he entered a plea of guilty. Of course the plea was withdrawn. That is, the court struck it out and entered a plea of not guilty. Those things arise from incidents that you cannot cover by any rule. And even some of these rules here may not work in a certain given case, but a judge must have some discretion to do the sensible thing, and I should not think any judge would feel that he is bound hand and foot, because these rules are for the general application, not for circumstances which we cannot foresee; and if you are going to try to make a judge move every step by a written letter or by letter, of course you lose all initiative: he is not a judge.

Mr. Robinson. Of course, but as to the plea of nolo contendere, Judge, I believe we at least tentatively have decided that if it is to be permitted to live it shall be filed

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only by permission of the court. Now here, too, maybe Mr. Waite's suggestion could be carried along with it, that a plea of nolo contendere or of guilty may be filed only by permission or by leave of the court.

Mr. Crane. These are general rules anyway, general rules of practice.

The Chairman. Why do we not leave that point that Mr. Waite raises open and see if it fits in with some other proposition?

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Mr. Youngquist. May I ask one question with respect to this (c) that we are on? We speak of pleas in abatement. They are abolished. I do not know whether there is a difference between a plea in abatement and a plea in bar.

Mr. Holtzoff. There is.

Mr. Youngquist. I suppose that a plea of double jeopardy or of former jeopardy would be a plea in bar rather than a plea in abatement.

Mr. Holtzoff. Yes.

The Chairman. Yes.

Mr. Youngquist. So might we not here say, "pleas in abatement and in bar," or "pleas in bar"? What I am afraid of is that, since we specify these particularly, we might overlook, we might still leave alive, a plea of former jeopardy rather than a motion to dismiss.

Mr. Holtzoff. Well, we have to enumerate pleas in bar.

Mr. Youngquist. Where? Oh, I see. "Special pleas in bar."

The Chairman. Yes, sir.

Mr. Robinson. But you have double jeopardy, you see.

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Mr. Holtzoff. The word "special" perhaps is not necessary.

Mr. Youngquist. I overlooked that. Then there is a question, as Mr. Holtzoff says: Why "special"? Is not "pleas in bar" a wider term? Is not that what we want?

Mr. Robinson. You would rather strike off "special"?

Mr. Holtzoff. I think that is right. There would be confusion, because it seems to me indicated there that there are some pleas in bar that are not abolished.

Mr. Robinson. What about a plea of not guilty?

Mr. Holtzoff. That is not a plea in bar.

Mr. Robinson. No?

Mr. Longsdorf. I think you will find that the books generally--and I suppose the lawyers have read them at times--have pretty studiously classified as special pleas in bar the plea of former acquittal or conviction or former jeopardy because they do not touch or raise the general issue.

Mr. Robinson. Pardons.

Mr. Longsdorf. That is a plea in bar. A plea of pardon is a special plea in bar. Now, do we want to keep that term because it is understood, or dispense with it because it is not understood?

Mr. Holtzoff. Such a matter as a pardon would be raised by motion, according to one of the later rules that we come to.

Mr. Longsdorf. If you did not have record evidence you would have to try it as an issue of fact, and even if you did have evidence the issue of fact would be decided by the production of a document.

Mr. Youngquist. A plea of former jeopardy would have to be tried, too; that would fall in the same class as a plea of pardon.

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Mr. Crane. They are all coming up as motions.

Mr. Longsdorf. Yes. You have some motions that go off on issues of fact and some on issues of law.

Mr. Youngquist. They are all included in the motions that are provided for in Rule 8.

Mr. Longsdorf. Only, one kind of motion shoots one way and the other shoots another.

The Chairman. Now, I am not certain as to what is the wish of the committee. Does the word "special" stay in line 49 of Rule 7 or does it go out?

Mr. Robinson. I should like to leave it in until we are a little more certain about it. I think it does have definite meaning, as Mr. Longsdorf says, and as set forth in Blackstone.

Mr. Glueck. Should you mention general pleas in bar? Is it not better to leave out any qualification?

Mr. Robinson. I am not sure what would be included in "general pleas in bar".

Mr. Holtzoff. Anything but a plea of not guilty, I suppose.

Mr. Seth. I think the reporter had better look it up and report later.

Mr. Longsdorf. I agree.

Mr. Robinson. Further.

Mr. Crane. You ought to have a wastebasket.

Mr. Robinson. All right.

The Chairman. Rule 8.

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RULE 8

Mr. Robinson. You will notice in passing to Rule 8 that the pages indicating the recommendations from the bar are quite heavy under 8, just as they have been under 7. We have taken care of them under 7 where they dealt especially with the matter of waiver of indictment. Now, under 8, we have lots of recommendations of the short form of indictment. I think

cyl 13 those are the three principal topics, numerically at least, that we have had recommendations on: that there be a short form of indictment adopted and that the defendant be permitted to waive indictment in specified cases, and another point we shall come to later. So the effort has been made to decide what the answer is to "short." Just what is your short form of indictment?

Mr. Crane. The specifications. There are ten specifications; if any one of them is not in the indictment it is fatal. What is the matter with just stating, just a statement of facts constituting the crime?

Mr. Robinson. Yes. Well, then the question would be, What are the facts constituting the crime?

Mr. Crane. I know. This is no criticism.

Mr. Robinson. I understand.

Mr. Crane. Of course not, because it may be all right. I am only speaking of possible objections. You get so much written law, you arealways giving an opportunity for a come-back. You have, of course, ten things. The ten things have got to be there, any one of which being out is fatal. You can say "a brief statement of facts constituting the crime"; it covers all these and yet leaves some liberality. But this is stiff. I think

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this is a little bit too stiff.

Mr. Robinson. Oh, I think what you say ought to be followed now, and if there is any one of these ten that can be spared it ought to be done.

Mr. Holtzoff. I thinkyou ought to strike No. 7.

Mr. Robinson. Well, now, just a minute, Mr. Holtzoff.

Mr. Crane. You could specify the crime and the facts constituting it, and what is the matter with that statement itself? Specify the crime and the facts constituting it.

Mr. Medalie. Judge Crane, you have in mind, and I do not remember the language, the latest provision of the New York Code of Criminal Procedure with respect to the simplified indictment.

Mr. Crane. A simplified indictment I think says you should simply specify the crime: you need not state the facts, because there they say you can get the facts by a bill of particulars. Now, this is what New York has done, and I do not like it, but we had it before that specifying the crime. Of course, the trouble is that that does deal with a specified crime against individuals. Now, so much of the federal practice has to do with conspiracy and things of that kind, but we do have it specifying the crime: arson, murder, assault, whatever it is, and the facts constituting the crime: that in the night so-and-so John Jones entered the house so-and-so, such a place, with an intent to steal, committed burglary or larceny or both, whichever it was.

Now, that specifies the crime and specifies the facts constituting the crime, and you cannot imagine anything that is specified in the congressional act or the legislative act that

b6

constitutes a crime as to which you could not specify the facts bringing it within it without putting it in a mold that you cannot always fill, perhaps. And that leaves the attorney general or the district attorney to state the thing that really occurred, and you have got it. It is simple and yet it has got the whole thing.

Mr. Glueck. Judge, does your suggestion cover the problem of the court's jurisdiction?

Mr. Crane. Oh, yes. Of course you have to have that. That would be the place where it occurred and the time and within the court's jurisdiction.

Mr. Robinson. I have set out the American Institute proposal for forms of indictments under Rule 8, page 14, the left. You notice there that they do not state the time or the place.

Mr. Crane. No, but you have to have your statement of facts constituting the crime to get that.

Mr. Robinson. That is an alternative.

Mr. Crane. I cannot imagine stating the fact. You would not state it. I should think, as requiring things, it is in the very nature of things to be stated, and they have gone so far in adopting the New York rule somewhere else--it did not originate in New York; it is an idea I think from Pennsylvania--that they just state the crime, that so-and-so committed murder in the first degree, and then require a bill of particulars. And that is not right; I do not like that at all.

14 Mr. Holtzoff. Judge, my recollection is that many years ago the district attorney in Kings County on his own motion started to use a short form of indictment.

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Mr. Crane. Yes.

Mr. Medalie. The simplified form of indictment.

Mr. Holtzoff. Yes, where he would allege that the defendant murdered John Smith by a fatal gunshot wound.

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Mr. Crane. Yes, sir, it was a man named Cropsey.

Mr. Holtzoff. Yes, Judge Cropsey when he was district attorney, and it worked very well indeed. That is the same idea.

Mr. Crane. I myself think that we should have a statement of the facts, but I do not like to say how the facts should be stated. There are so many different facts, but when you state these facts you know that when they are true that a crime has been committed.

Mr. Holtzoff. You mean you would ~~admit~~ read item 6, 7, 8, 9, and 10 and substitute the facts constituting the crime?

Mr. Crane. Yes.

Mr. Robinson. May that form that is at the indictment on page 23 to the left compare with that specimen from Massachusetts on page 25? You have set out in this indictment United States against Ball, and we have also some photostatic copies of the present-day indictment. This happened to be for murder. That is rather unfortunate because murder is not a very good offense on which to compare an indictment. It is very unusual in federal jurisdictions.

Mr. Holtzoff. There still you would have the old form of "did languish, and languishing did die."

Mr. Medalie. They do not need that.

Mr. Robinson. Well, some are afraid not to put it in.

Mr. Medalie. Some are and some are not. Cropsey did but Charles Perkins in New York County still used the very ancient form, the common-law form. You may permit a simple indictment under your rules, and there will still be people in the Department of Justice who will want to mystify the defendant attorneys.

b2

I would let the scared-to-death practitioner draw up his elaborate indictment, but I would give the good progressive practitioner who wanted to draw a simple one some simple rules.

Mr. Holtzoff. The civil rules have forms which operated very well, and I think that when the time comes we could have an appendix to compare some specimen forms with. If you do that that will encourage these United States Attorneys who may have a little hesitancy.

Mr. Medalie. You can get some simple forms of indictment for the Department of Justice to exercise its persuasion in convincing some United States Attorneys, especially district attorneys where they do not do that kind of thing.

The Chairman. In my district there is one man who is making long indictments, but he has convinced other lawyers that he is the only man who can do it. If you put simple forms in, it would just about wreck that man's life work.

Mr. Medalie. He draws a ten-page indictment which might take one sentence?

The Chairman. Judge Crane, would you look at this indictment on page 25 to the left. Doesn't that practically have just what you want? It states specifically the facts with perhaps just a little nonsense under point 4, which could be omitted.

Mr. Crane. I suppose it does. Aren't they all included? Could you think of any one of them being left out when you say "State the facts constituting the crime"? Can you think of any of them being left out? You can't imagine a district attorney drawing an indictment that would not show that the court

b3

had jurisdiction, or that the occurrence showed that it did give the court jurisdiction, or if it did not totally occur there that at least part of it took place so as to give the court jursidiction? I suppose that even in mail fraud cases you have to draw them showing where the mail was posted and so stating the facts as to what the mail was, stating that it was fraudulent and why it was fraudulent and giving the facts.

It says here, "State the name of the defendant." You would not leave that out, would you?

"State where this occurred." Of course, why would you leave that out? Then it states that you name the territory and the state and the venue. Why leave them out? It seems as though it must be an indictment which might just as well state that you must use the English language and use the following letters of the alphabet, A, B, and C. You do not have to state that. You might just as well state that they should be drawn in the English language and in letters that everybody can read. There are some things, however, that you just take

2 for granted. I am not arguing that point; I am just stating my thought.

The Chairman. I think we could have one or two specimen forms, Mr. Robinson.

Mr. Crane. The venue; then the name; then the territory; then the term. Then the name of the defendants. You can't imagine leaving them out. Then the time and the place. Of course you would. Then the act.

As far as criminal intent is concerned, as for example with intent to murder, you have to have intent to get your degree, I

b4

suppose. You have to state that.

Then the act, by shooting him in the bodywith a loaded pistol. Well, youcould not shoot him in the body without a loaded pistol. That is obvious.

Then the name of the person injured, and "against the peace of said commonwealth, and contrary to the form of the statute in such case made and provided."

These are all essentials, but you can state the facts constituting the crime and you have the same thing.

Mr. Robinson. How would the indictment be changed when the stated facts are different?

Mr. Crane. Why give the form of the indictment?

Mr. Robinson. You say "State the facts." You agree that these are essentials?

Mr. Crane. Well, take for instance: it happened in New York County on the night of July 12. John Jones, the defendant, shot and killed James Smith with intent to kill him, showing first-degree murder, and that constitutes the crime of murder in the first degree.

Mr. Robinson. That is what is in this.

Mr. Crane. You do not have to say that he shot with a gun.

Mr. Medalie. Let me say this: You can talk about murder. That is a simple form, but I would like to draw your attention to mail fraud, to antitrust prosecutions, and to conspiracy. If you want to draw a simple form of indictment, if you could get some forms on that it would be very nice.

Mr. Crane. Leave the forms out; just state the facts constituting the crime. If you cannot state them, you cannot

b5

prove them.

Mr. Robinson. But some of these people address the question, "How can you provide a short form of indictment for mail fraud or for antitrust prosecution?"

Mr. Crane. A short form does not mean that you have to make it short. I mean a short form of rule. You can have that. You need not have a short form of indictment. If you have 50 defendants on a charge of conspiracy you have to state the facts, and it may take a lengthy indictment, but your rule can be short.

Mr. Medalie. You have the same situation as in modern equity pleading. In our code states it is provided for the complaint giving a simple and concise statement of the facts constituting the right to release. That is all that is necessary. Some lawyers do it, but they are scared to death when they do it.

To this day, notwithstanding the simple code of pleading, the average complaint calling for equitable release in any pleaded state of facts is a virtual pamphlet. Even the leader of the New Jersey Bar will tell you that.

Mr. Crane. Why limit it to the New Jersey Bar?

The Chairman. Because we have the shortest bill of ~~pleading~~ complaint in the world.

Mr. Medalie. I think that if you just have a rule such as you have in the civil practice acts and codes of criminal procedure where simple, nontechnical forms of pleading are provided for by saying, "a concise statement of facts constituting the offense," that is sufficient. That gives ample power to the court. That is the simple indictment showing the elements of the alleged act. That is the simple form of indictment

b6

instead of the short form which names only the offense. I understand that the sentiment is against simply naming the offense and later giving the particulars.

I think that a short, concise statement of facts constituting the offense would get rid of all the complexities and technicalities of common-law pleading in criminal cases, assuming that there is today any judicial requirement to that effect, and I know there is not.

Mr. Holtzoff. Right there, Mr. Medalie, let me say that the civil rules, under Rule 8-A, requires a short and plain statement of the claim showing that the pleader is entitled to relief . We could adopt that language and require a short and plain statement of facts constituting the offense with which the defendant is charged.

Mr. Crane. Say "a concise statement of facts."

Mr. Youngquist. I like the word "plain" because it eliminates these technical forms.

Mr. Crane. You want to state that he is charged with the crime first, and then you state the facts.

3 Mr. Holtzoff. Yes.

The Chairman. May this be a fair solution of the problem, to adopt the language of the corresponding section of the civil rules for this purpose and then in a note indicate what would be some of the different elements that would be specified.

Mr. Crane. I was thinking, Mr. Chairman, that so far as we are concerned--and I mean here and now--that as far as the rule goes, if we say that he is charged with a crime, you state the crime, giving a concise statement of the facts; then you have written a complete rule. Then there cannot be any fault

b7

found with the rule. If the indictment does not measure up to that, then it is not the fault of the rule. The rule is perfect. You cannot find any fault with the rule because the defendant is first charged with a crime or a violation of some statute, and then you have a plain and concise statement of facts constituting the crime. If anything is left out of the indictment, it is not the fault of the rule.

The Chairman. I agree with you, but I have in mind other things that we should keep in mind. First of all, this will go to the bench and bar generally. After that it will go to the Congress and they will want to know what you meant by it. They will say, "Give us a sample." If we have some notes down somewhere it will save us a lot of explaining all through the country. A little explanation will help a great deal.

Mr. Crane. They have law schools to teach them law. You are not going to teach Congress law, are you?

Mr. Holtzoff. I think if you have the benefit of some sample forms, it may be very useful.

Mr. Medalie. Are you going to have some on counterfeiting, some on mail fraud, and some on conspiracy?

Mr. Robinson. Let me observe the way this Rule 8-A is drawn. You see it is based on page 25 to the left, which Judge Crane read a minute ago. That is the constitutional form. That is the form that was used in the Sacco-Vanzetti case.

Mr. Medalie. I still do not know why it would be necessary to give that "It was against the peace of said Commonwealth."

b8

Mr. Robinson. That is the constitutional form.

Mr. Youngquist. It is a constitutional question.

Mr. Holtzoff. I think our simple form of indictment should omit that.

Mr. Robinson. On page 25 lines 20 and 21 knock out "willfully, feloniously, and maliciously."

Mr. Crane. You do not want to use those things. You are going forward, not backward.

Mr. Youngquist. I think that in Massachusetts the constitution requires that it shall be against the peace of the commonwealth.

Mr. Crane. Is that in the constitution?

Mr. Youngquist. Yes. It was adopted around 1858.

Mr. Holtzoff. There was a case ~~cited~~ decided in Missouri some years ago where there was a similar constitutional provision where a murder case was reversed because the typist made a mistake in omitting the word "the" in "contrary to the peace and integrity of the state."

Mr. Medalie. And Governor Hadley wrote an article about it and made it the subject of a speech before bar associations for about 60 years.

Mr. Youngquist. Well, that takes us down to the end of the first sentence, Mr. Chairman?

The Chairman. Yes.

Are we generally agreed that it is sufficient on this first page of Rule 8 to provide a paraphrase corresponding to the civil rules?

Mr. Seth. I would like to see what is in there.

b9

The Chairman. What is that?

Mr. Seth. I would like to see most of the points in here left in. I see no harm in leaving them in. There is enough in there about what is required, but I do not see why they should not be in the rule. A great many district attorneys might be helped so they would not leave out something.

Mr. Youngquist. You mean put in a few forms?

Mr. Seth. I do not think you could get enough forms to do any material good.

Mr. Youngquist. All they need is a sample, I suppose.

Mr. Dean. I wonder if this is a complete enumeration. If you cannot have a complete one, what is the advantage of enumerating them?

Mr. Robinson. You will find you have to have the complete allegation. You have to have the act; you have to have the intent; you have to have the jurisdiction.

Mr. Dession. Sometimes you need some other things which would not be enumerated.

Mr. Robinson. Yes, along the lines of what Judge Crane said.

Mr. Medalie. Let me say here that there is some trouble with federal indictments. You can look up the law books and you can find the statutes and still wonder why they indict. There is often a very good reason and that is that there is a departmental rule which nobody knows about and which was legally promulgated. If they do not tell you what that rule is in the indictment you would never find it out. That is quite a problem in federal indictments.

b10

The Chairman. That is administrative process.

Mr. Robinson. You are speaking for point 10 when you would supplement it by showing the statute or the administrative rule.

The Chairman. Or the regulation adopted.

Mr. Holtzoff. I am opposed to point 10. Many United States Attorneys cite the statute in their indictment and many do not. I do not think you should be required to cite the statute.

Mr. Medalie. I can practice law without your citing the statute, but I cannot practice it unless you cite me the departmental rule, because I do not know how to find one unless they tell me what the rule is that we are violating.

Mr. Robinson. I see objection to citing the statute or regulation. If the indictment states any public offense or under one statute or another, that should be sufficient.

Mr. Medalie. It should be sufficient except for the fact that for all practical purposes a man wants to know what he is indicted for. It is not enough for a lawyer to find out whether he is indicted but what he is indicted for and under what rule. He would like to know that.

Mr. Holtzoff. Suppose a man is indicted for sending threatening communications. You would want to state the nature of the physical facts. That is all the defendant needsto know.

Mr. Medalie. But suppose you come to some agricultural provision. In New York in the Eastern District or thelower end of the Southern District, they would not know much about agriculture. When the product reaches New York we may be violating

b11

some statute, some rule which was promulgated far in advance, and I am asking this in behalf of the modern lawyers who would like to be advised.

I know practically what usually happens. You say to the district attorney, "What is the rule? What is the departmental rule that you are relying on?" And, being a good fellow, he tells you. He gives you a copy, and a printed one at that. However, that does not always happen.

Mr. Robinson. We are talking about the fundamentals. As it is, our indictment would cover that.

As you know, the reason for the prolixity of the common-law indictment was that all indictments had to state all of the legal elements of the offense. It had to have all those felonious and unlawful things because the common law was so indefinite that it was necessary to state all those elements. Thus, in every indictment you had to write each common-law requirement for the offense plus the alleged facts.

Now, Holzworth, Kenney, and Stevens have pointed out that we have our offense defined by statute and it is not necessary to have a long recital of detailed legal elements of the offense. Why should we carry all those words in our indictment? They can be very easily omitted as long as we cite the section or the departmental rule, and when we do that we fulfill the requirements without any unnecessary wording.

Mr. Crane. Coming back to your short form I have no objection to citing the statute, but I see that the American Law Institute adopts the short form.

Mr. Robinson. A very short form. Mr. Waite is here and can tell us about that.

b12

Mr. Crane. This says, "The grand jurors accuse A. B. of poisoning an animal contrary to Section 31 of the Penal Code and charge that (here the particulars of the offense may be added with a view to avoiding the necessity for a bill of particulars.)"

Mr. Youngquist. Do they contemplate a bill of particulars?

Mr. Crane. You get them anyway.

Mr. Robinson. I don't know.

Mr. Youngquist. Isn't that to avoid the necessity for a bill of particulars?

Mr. Crane. No. It says, "Here the particulars of the offense may be added with a view to avoiding the necessity for a bill of particulars." You can get them.

Mr. Robinson. The English Indictment Act of 1915 was very successful. They had to set out in the English indictment all the facts and the elements of the offense and cite the statute. Then they set up a permanent rules committee that keeps on providing new rules as they are necessary.

Mr. Crane. Well, you state the facts. We are not speaking of rules as though they were drawn up for school boys. Indictments are drawn up by people who are lawyers just like prescriptions are drawn up by doctors. You do not draw up prescriptions so that the man on the corner can read them. When you have an indictment it is supposed to be drawn by people familiar with the rules of procedure. They are not drawn by laymen. They are drawn by skilled men in our profession.

Mr. Robinson. Then a lot of time is lost because of the dispute in court about the sufficiency of the indictment.

b13

Mr. Crane. If you have a statement of facts you cannot have any dispute about it. You simply charge what the crime is; then state the facts. You cannot have any dispute about that.

The Chairman. There seem to be two schools of thought as to this first page of Rule 8. I suppose we had better have a decision on it. One seems to be content with a mere statement of facts, and the other wants something longer.

Mr. Medalie. I suggest that you do not decide this now. You are dealing with one of the most fundamental questions that you are going to decide here. I think it is good to discuss it today and then discuss it on some other occasion before we come to a final decision. I think we should do a lot of thinking about it.

Mr. Youngquist. Ask the reporter to submit the other form which was discussed here.

Mr. Robinson. No. The suggestion is that you keep one.

Mr. Dean. Has any attempt been made to draft other forms of typical federal indictment?

The Chairman. I will put that question to Mr. Holtzoff.

Mr. Holtzoff. I think it could be done.

Mr. Dean. I think if we try a hand at doing that either tomorrow or the next day we might have a better basis for determining what we want in this rule.

Mr. Crane. As it is here, this is all leading up to this short form. Yet it is hard to move others who have a different idea. You cannot find fault with that, but I think you will find that the process has been toward the short form. It is

b154

the same story and less difficult. Certainly you can get the thing stated, and the substance of the indictment is all you have to have. You charge the defendant with the crime; assault; guilty or not guilty. If you do not have all the facts you get a bill of particulars, but all this paper work in the courts is something that is tremendous. Either this paper work in the courts has got to be less or the courts will be swamped. We thought we had done a great deal with the short form and the pretrial, and I notice that you have some pretrials also. Up in Buffalo they are looking for work. They have a constitutional provision for increasing the number, but they are looking for a constitutional provision so that they can decrease them.

Mr. Medalie. I think that with respect to congestion that in many districts it is due not to the amount of work on criminal cases, to the number of them, but due entirely to the fact that a handful of them take a long time to try. Isn't that a fact?

Mr. Holtzoff. Yes.

Mr. Medalie. I have sat through a number of these trials, eight-week trials, and during that time hundreds of short cases could have been disposed of. They could be disposed of if the court was not tied up with one long case. They are not the cases in which any ordinary criminal is concerned, but some important person is involved in them.

Mr. Holtzoff. Mr. Chairman, Mr. Dean asked whether an indictment has been drawn up under a typical federal criminal statute. Suppose you take the Stolen Property Act. The ~~case~~ offense there consists of transporting stolen property in interstate

b15

commerce of the value of over $5,000, knowing it to be stolen. It seems this would be a sufficient indictment if it stated that the defendant transported certain property, to-wit, certain bonds to the value of $6,000 from New York City, State of New York, to the City of Washington, District of Columbia, and said property had been stolen, and the defendant knew the same to be stolen.

Wouldn't that be a sufficient indictment under the statute? Of course, you would have the fact that the grand jury makes the accusation.

Mr. Youngquist. You would have to tell when, because there may be the statute of limitations.

Mr. Holtzoff. Yes. On a specific date.

Mr. Dean. I think that is sufficient but I was wondering about the bill of particulars on the bonds.

Mr. Holtzoff. The court will take care of that.

Mr. Robinson. It probably would?

Mr. Medalie. No, it never would.

Mr. Holtzoff. Specifying what issue of bonds?

Mr. Medalie. You would not get the specification of place other than, say, the Eastern District of New York, but you would get the particulars on the bonds.

Mr. Glueck. It seems that not too great harm would be done in leaving the statement of this in there and merely adding a few sentences. If these items exhaust the specifications necessary in the simpler indictments, then I would prefer some such statement as this because, as was suggested, it would be a guide to Assistant United States Attorneys at least. That would still result in short, simple, and nontechnical indictments,

b16

but it would afford an opportunity to check up item by item with whether or not the relevant data was contained in the indictment.

Mr. Holtzoff. I am inclined to agree that the items which should be omitted from this are item 7 and item 10. Item 7 raises the presumption that you have got to allege the intent and all that verbosity about intent.

Mr. Glueck. You just mentioned that in your sample indictment,"knowing them to be stolen."

Mr. Holtzoff. That is not intent.

Mr. Glueck. That is the element.

Mr. Holtzoff. That is not intent.

Mr. Crane. What I had in mind was this, and the same thing is in the indictment. That is one way to express it. Why should there be any objection to this if this is perfect and accurate? Yet when you have a page of detail you are liable to have so many things in there that you may be in doubt about the interpretation of words. You have the criminal intent with which the defendant is alleged to have committed the offense.

So someone says the intent must be stated and has not been stated when there is no question of intent necessary?

As it says here:

> "Any other fact or allegation which may be necessary because of special requirements, statutory or otherwise, for notice to the defendant and to the court of the act and offense of which the defendant is accused."

That is all right, but what are the circumstances? What does it mean? You have so many words. There may be something you cannot foresee. I do not see the necessity for that. Just

b17

make a statement of facts constituting the crime. Then you have got everything that there is.

Mr. Glueck. You could take the form and the commentary would give the additional information.

Mr. Crane. My suggestion is not to take the words that I am using. I am not suggesting that.

The Chairman. Well, take some special form.

Mr. Glueck. Yes, an illustrative form.

Mr. Crane. Yes, you save yourselves from putting something in there that is not necessary.

Mr. Holtzoff. You have civil rules which have been in effect for three years, and they have worked out very well.

Mr. Robinson. Here is one place where the civil rules and the criminal rules are different. You are stating the grounds for putting a man in the penitentiary. There is nothing comparable to that in the civil rules.

Mr. Holtzoff. I think that if you have a statement of the facts that is all that any defendant is entitled to.

Mr. Robinson. I think that what Judge Crane is doing is saying that we simply take No. 9 and make it the rule.

Mr. Glueck. You mean that No. 9 is a sort of extra catch-all?

Mr. Robinson. Yes. That is just generally what Judge Crane is doing, suggesting we make that the rule. That is why I object to it.

Let me say this: There is one other thing, and that is the fact that these rules are just not simply for federal courts alone. We know that about 15 or 20 states have rule-making powers. Many of these states are watching this committee to see

b18

whether the rules as proposed by this committee will serve as models for them. Judges of the Supreme Court have told me that. While that is not argument, it is a fact. To a certain extent we can be general and state the points briefly and concisely because you cannot state all the details. I think, however, that to the extent that we can be specific rather than general we are serving not only the federal rules and the federal courts but the state courts also.

The Chairman. Haven't we pressed this issue about as much as we can? The issue is pretty clear: either to have the rule stated in substantially the same form as it is now or alternatively to have it made in paraphrase with the civil rules corresponding to it with an accompanying annotation by the reporter giving it substance plus some specimen forms in an appendix?

Mr. Medalie suggests that we do not have a vote on it, but should not we think about this issue and perhaps see a revised form of the rule in a form suggested by Judge Crane, and then tomorrow proceed to come to a tentative decision on it?

Mr. Wechsler. Before we leave this topic I would like to ask one question on this issue. Is there any intention by this rule to affect such rules of pleading as the following: the rule that you can charge a substantive offense as in the case of robbery and charge the robbery as if the defendant had actually stolen the money with a gun in his hand and sustain that charge by proving that he was an accessory before the fact and the robbery committed by somebody else? I merely wanted to know whether it is the purpose to affect such rules as that or

b19

whether it is the purpose to leave such rules unaffected and perpetuate them.

Mr. Holtzoff. I think either version of this rule would change that because you would have to state the alleged acts constituting the offense.

Mr. Medalie. It is the intention to eliminate all short cuts which practice has developed and require a specific statement of what Judge Crane calls the essential facts of the crime.

Mr. Holtzoff. It is intended to omit all this verbosity such as we have.

Mr. Medalie. I understand that.

Mr. Waite. I rather disagree with Mr. Holtzoff thatthis would change that. The Constitution provides that the defendant shall be informed precisely of the nature of the accusation against him. That has been interpreted as being specified by allegation that he committed robbery and proving that he was an accessory.

Mr. Holtzoff. If you take the civil rules, you can say "a plain and specific statement of the facts constituting the offense with which the defendant is charged", then paraphrase the civil rule.

Mr. Waite. The Constitutional provision is that he shall be informed of the accusation against him. That is not as specific as this.

Mr. Holtzoff. I do not think it is.

Mr. Waite. Well, I cannot see the difference.

Mr. Holtzoff. If you take the present rule, Rule 8, in item 6 it requires:

b20

"The act or acts or the omission of legalduty by which the defendant is alleged to have committed the offense."

We want to do away with that fictitious form of pleading.

Mr. Robinson. I would like to answer Mr. Wechsler's question that there is no intent, so far as I know, to change the rule as far as accessories before the fact are concerned.

Mr. Holtzoff. Under this you allege the person is a principal.

Mr. Robinson. Well, we are not going to change criminal law.

Mr. Holtzoff. This is a rule of procedure, and this rule would change the present law.

Mr. Waite. I disagree with you on that.

Mr. Dean. I think it is a serious question whether it would change the law.

The Chairman. Why shouldn't it be changed?

Mr. Holtzoff. Yes, it should be, because there you can charge a principal by indictment and then prove him to be an accessory, which is not fair to the defendant.

Under item 6 you have to allege the act or acts or the omission of legal duty by which the defendant is alleged to have committed the offense.

Mr. Crane. The same question arises under the rule as written here.

Mr. Holtzoff. No, I do not see how, because you have to allege it.

Mr. Crane. The same question Mr. Wechsler has raised now would be raised under this present one.

b221

Mr. Holtzoff. No, I do not believe so, because under this you have to allege the acts to be proved.

Mr. Crane. No. I think you misunderstand me. Under the short form or the long form here the same question would arise.

Mr. Wechsler. There may be a lot of rules about an indictment of that sort which a study of the decisions would reveal. It is hard to measure the text as to the merits of it as to what the indictment should contain unless you are put on notice as to some of the issues of that sort. That may be affected by formulation one way or the other. I raised the question because I was thinking of the difficulty of facing the point without further information.

Mr. Crane. That is covered in our practice, but whether you have the long form or whether you have the short form, it is a question in the defendant's mind whether he is charged as a principal or an accessory, but he can get it by a bill of particulars. The bill of particulars is given in every criminal case. He can go to the court for it and ask for it. He can go to the court and ask for the bill of particulars as to what the facts are.

Mr. Robinson. If you have A, the defendant, and B, another defendant, charged with killing C, when you charge in the indictment that A and B killed C, you allege the facts and you show them if they can be proved as substantially true. Why should you begin alleging that A was the accessory before B or B before A?

Mr. Holtzoff. Suppose the other fellow died.

Mr. Robinson. Then go ahead and allege the same thing.

b22

Mr. Holtzoff. You would have to allege what the accessory did, wouldn't you?

Mr. Wechsler. Suppose he became an accessory by words of encouragement. Would you have to allege what the words of encouragement were?

Mr. Crane. The same question arises every day. The same question arises in any state. I think it is covered in those states where they have bills of particulars. I never heard of a defendant going to trial where his lawyer did not know or could not obtain the charge against him with a specified showing of exactly what the facts were. I never heard of any court which prevented a defendant from knowing what he was charged with. I cannot imagine a casebeing tried where that is not done, and I do not know of any instance where that has not occurred, because I cannot imagine that a defendant could not

8 find out in some way with what he is charged, whether he is charged as an accessory or as a principal or an aider and abettor or whatever else it may be, it is always possible to get a statement of the facts. Then these forms should be sufficient.

Mr. Wechsler. The moral I am disposed to draw from this is rather like the one suggested, because I think when you try to be more specific in a situation as complex as this you are very likely to overlook one thing or another and settle it by inadvertence.

Mr. Crane. I do not want you to think that I had thought of it. I had not thought of it.

Mr. Seth. The civil rules on that as drafted in some particular provisionsset out alternative sections, do they not?

b23

Isn't that a fact?

The Chairman. Yes.

Mr. Seth. We should bear that possibility in mind on some of these rather important provisions in these rules.

The Chairman. Now, may we go on to page 2 of Rule 8?

Mr. Longsdorf. Do you want to break a paragraph in line 26 of Rule 8, page 2, before the words "bill of particulars"?

The Chairman. I think so. I was going to suggest one in line 36.

Mr. Robinson. Correct that typographical error in line 31. "Offense" should be "defense".

Mr. Medalie. Should we have a provision here concerning defenses? At any rate I do not think it should be under Rule 8, subsection (a), "The written accusation." I do not think that anything relating to defenses should bein there at all.

Mr. Robinson. That is more related to bills of particulars. You know what happens in some jurisdictions. I am not sure about the federal rules, but many districts follow many different rules, but it is quite common when the government gives a bill of particulars its proof is restricted to that bill of particulars rather than to the indictment. That should be controlling. Here we are talking about bills of particulars in line 29. I think my suggestion would be that since you bring in bills of particulars here you have to say as much as is stated here.

Mr. Dean. The question is, Should it be in there at all?

The Chairman. From line 26 to 36 it deals with bills of particulars and it clarifies it to some extent.

Mr. Robinson. But there is no other civil rule which deals with bills of particulars. That civil rule was not drafted

b24

yet.

I want to get your views on that first. Do you want to segregate them?

The Chairman. Do you want to note that?

Mr. Robinson. I will note that as a possibility.

The Chairman. Are there any other suggestions on this page?

Mr. Youngquist. May I ask about the preceding page?

The Chairman. Yes.

Mr. Youngquist. Is the complaint included in the written accusation?

Mr. Robinson. Yes.

Mr. Youngquist. Then should not we say that instead of saying "namely, the grand jury or the United States Attorney" on the first page and say a person may do it, because a complaint may be made by an individual?

Mr. Robinson. That can be taken care of by saying "unknown to the grand jury or the United States Attorney or to the complainant." That could be worked in there. I hesitate to drop the words "unknown to the grand jury." They are quite common.

Mr. Dean. May I ask a question?

The Chairman. Yes.

Mr. Dean. I gather that in lines 34 and 35 that your intent is that the bill of particulars, when furnished, should not restrict the proof. I would like to know what the policy is on that.

The Chairman. Well, what does the reporter say about that?

Mr. Robinson. I would like to hear what Mr. Dean has to

b25

say.

Mr. Dean. I think it certainly should restrict the proof. It is a specific limitation on the indictment in order to know what the real issues are.

Mr. Holtzoff. I think the proof should be restricted to it; otherwise what is the bill of particulars for?

Mr. Robinson. If it is restricted, then the bill of particulars takes the place of the indictment.

Mr. Burke. It is supplemental to it.

Mr. Dean. The only function of the bill of particulars is to make the indictment clear and specify the acts with which the defendant is charged, giving the man notice of the particular issues involved.

Mr. Holtzoff. It is certainly not fair when you have a bill of particulars calling for certain details and then be allowed to prove other details than those alleged in the bill of particulars.

Mr. Robinson. This is based on a certain complaint which has been made stating that a very unfair use of it was made by defense counsel asking for bills of particulars and then insisting on the bill of particulars and then restricting the government to it in cases, to the allegations of the bill of particulars where there is no prejudice.

Mr. Medalie. It is due to the sloppy way in which the bill of particulars is gotten up without any true sense of responsibility, and then they blame the defendant for holding them up.

The Chairman. Do you want to make that motion?

9 Mr. Holtzoff. Yes. I move we leave out the sentence

b26

which comes at the bottom of page 2, beginning with line 32 and ending with line 36.

The Chairman. Do you want to state the contrary rule?

Mr. Holtzoff. No. I do not thinkyou need it. That is what a bill of particulars is for.

Mr. Wechsler. There is another proposition. Where you cannot amend the indictment, you can permit the bill of particulars to be amended. There may be occasion to do so, and there is opportunity to grant just such an amendment.

Mr. Robinson. Would you permit the amending of the bill of particulars and approve of it during the trial?

Mr. Holtzoff. If you gave notice.

Mr. Crane. You do not have to amend the bill of particulars after the trial. Do it before the trial or at the trial. What is the object of amending the bill of particulars after you have the evidence in?

Mr. Wechsler. Not after the evidence is in.

Mr. Robinson. Would that be during the trial? You would permit the amendment of the bill of particulars?

Mr. Holtzoff. I think so.

The Chairman. Isn't that in the discretion of the trial court?

Mr. Crane. May I ask a question about something that I do not know? You assume that you can require a bill of particulars from a defendant. Can you?

It says here:

"A bill of particulars likewise may be supplied by the defendant voluntarily or by order of the court if additional details are necessary to give notice to the government of

b27

the defense which the defendant is asserting."

Can the court require the defendant to disclose his evidence? Would the court ever require him to disclose his evidence?

Mr. Robinson. That is a different thing.

Mr. Crane. Can you require him to give his evidence?

Mr. Robinson. Well, there are certain things he can be required to doin advance of trial.

Mr. Crane. Are you sure? I think you should look at that carefully, because you cannot require him to testify against himself, can you?

Mr. Robinson. No. That is right, but he would not be testifying against himself. He pleads not guilty.

Mr. Crane. But you have to prove him guilty, and if he does not take the stand you have to prove his guilt just the same. He may refuse to take the stand. That is his privilege.

Now, can you make him disclose by a bill of particulars what he refuses to disclose if he does not testify? I am asking you now what you think about it.

Mr. Robinson. What I think about it is this, to take a specific example. You have to get away from logic once in a while, as was stated before.

Mr. Crane. But we do not want to get away from the Constitution.

Mr. Robinson. Here is the situation. I have this case in which Douglas MacGregor, district attorney of Houston, Texas, had the experience with a defendant on trial recently bringing in alibi evidence, and the only person by whom the evidence really could be met was somewhere in the Platte River Valley

b28

section, and what MacGregor had to do was to use about $1,400 of government money in long-distance telephone calls over the highway garages and filling stations and finally using airplanes to get this testimony to trial in time in order to combat this defense evidence.

That is the kind of experience you also have sometimes at trials by the defendant in insanity cases in places where it is not required that the defendant make an advanced defense of insanity.

That type of procedure is very unfair to the government and so unfair that it has tobe met in some way. Therefore, in these alibi and insanity cases, if the defendant is going to put on that kind of defanse, certainly the government should know in advance of the trial what that type of defense will be, so that the government may have a fair chance and not be taken by surprise.

Mr. Crane. I can see that, but here you have something else. Now you are asking for a bill of particulars.

Mr. Holtzoff. May I add this? Under the Constitution you cannot ask a defendant to testify or give any information against himself, but there is nothing in the privilege against self incrimination which prevents the government from saying that you are going to notify them in advance as to what evidence you are going to give.

Mr. Crane. But when you get to a bill of particulars you are requiring him to give his evidence so that you know in advance what he is going to produce. Can you require him to name the persons and places and other evidence that he is going to produce?

b29

Mr. Holtzoff. I don't think that goes to the constitutional provision. That applies to the application of the rules.

Mr. Crane. It says here:

"A bill of particulars likewise may be supplied by the defendant voluntarily, or by order of the court if additional details are necessary to give notice to the government of the defense which the defendant is asserting."

c10 I think we get into rather dangerous ground. I am just a little hesitant about it.

Mr. Longsdorf. Is alibi an affirmative defense or a negative defense?

Mr. Robinson. It is generally chosen as an affirmative defense. It is equivalent to denying it. You are really saying that it is impossible that he could have done it because he was insane or because he was somewhere else.

Mr. Crane. We are suggesting rules which the Supreme Court says should be adopted. Everything we settle here precludes them from holding it not to be all right.

Mr. Robinson. Oh, no.

The Chairman. They did not do that in the civil rules in the case of a physical examination.

Mr. Crane. It would be very hard not to take the rules we adopt and then call them unconstitutional.

Mr. Robinson. They did not do that with the civil rules.

The Chairman. That did not bother them.

Mr. Seasongood. That was the provision in the rules that you could compel an examination by the plaintiff in a damage suit. Four of those judges said it was an interference, and those four will be in the majority now and they may rule

b30

differently than when they were in the minority.

Mr. Dean. Isn't this language too broad to provide for insanity and alibi defenses?

The Chairman. That is not the only purpose. It is not limited to that.

Mr. Dean. That is the way I read it, that the court may order it in any case of any kind where the court sees fit. That is what I am afraid of.

Mr. Seasongood. Let the reporter make some more study on that.

The Chairman. What sound reason can be urged against it?

Mr. Dean. You are interfering with his constitutional privileges.

The Chairman. He is not being called upon to testify. He is being called upon to plead.

Mr. Holtzoff. The constitutional privilege is only against self incrimination. There is no constitutional privilege which entitles the defendant not to disclose his defense in advance of trial. There is nothing in the Constitution which guarantees him the right to throw in evidence at the trial without giving notice in advance.

Mr. Dean. I am not arguing the constitutional question. I think it may or may not violate the privilege against self incrimination.

The Chairman. The motion is limited to the bill of particulars sentence beginning with line 29 and ending with line 32. All those in favor of that motion say aye.

(There was a chorus of ayes.)

The Chairman. No?

b31

(There was no response.)

The Chairman. The motion is made to strike out the sentence, lines 32 to 36. Any further discussion of that motion?

(There was no response.)

The Chairman. Those in favor of the motion say aye.

(There was a chorus of ayes.)

The Chairman. Noes?

(There was no response.)

The Chairman. It is carried.

Mr. Seasongood. I notice that you allow an amendment to that.

The Chairman. What is that?

Mr. Seasongood. You allow an amendment to the written accusation or bill of particulars? That is page 2. That encouraged me to hope that you would reconsider what you struck out of Rule 4, page 4, in allowing amendment of process. I will hope that you will consider whether you want that in. I was thinking of the amendment of the written accusation or bill of particulars in your amending of process.

The Chairman. Will you hold that and bring it up at the end?

Mr. Robinson. Let us hold that.

The Chairman. Let everyone please make a list of these items so that we can dispose of them later.

That brings us to the last sentence on page 2 and the beginning of page 3.

Mr. Dean. The court may cause the written accusation to be amended.

b3332

Mr. Holtzoff. I think we should make it clear that you are not trying to permit the indictment to be amended.

Mr. Crane. Yes.

Mr. Seasongood. Add the words "except the indictment".

Mr. Medalie. All you need to do is take out "written accusation" in line 37.

Mr. Holtzoff. You should be allowed to amend the information.

Mr. Glueck. Why not say "information"?

Mr. Robinson. Leave it as wide as you can.

Mr. Medalie. Why conform to the evidence?

Mr. Seasongood. That is usual, isn't it?

Mr. Medalie. He has the bill of particulars.

Mr. Holtzoff. I do not think that in criminal cases it is customary to conform to the proof or to amend to conform to the proof.

Mr. Seasongood. When the evidence has gone in and it is not pleaded you should surely be allowed to amend to conform to the evidence that has gone in without objection.

The Chairman. I think so.

Mr. Robinson. That protects the defendant on the plea of double jeopardy.

Mr. Seasongood. How does it protect the defendant where he had secured a bill of particulars and the facts are set forth?

Mr. Robinson. We are talking about amending the information.

11 Mr. Dean. I am thinking about amending the pleading. I think it is highly dangerous to a defendant.

Mr. Seasongood. Suppose that the evidence has gone in. Would you let him make the point of surprise that it was not pleaded? Suppose the evidence has gone in without objection against him.

Mr. Medalie. You do not need that.

The Chairman. When the evidence is there? Is it all right?

Mr. Robinson. He has a chance to object on the ground that it is not relevant.

The Chairman. Is it right to let him stand by and let the case be proved, a different case than the one pleaded in the bill of particulars and then at the end of the case let him have his objection?

Mr. Robinson. Then at the end of the case the government moves to make the bill of particulars conform to the evidence that is in.

Mr. Medalie. You never need those things. For instance, take the case of a man killed upon a certain date. The crime is dated July 1. You prove the crime was the date of July 3. The defendant raises a howl about it and the court ignores it. There is no point to anything about that. It was substantially proved. You need no amendment.

Mr. Robinson. That gives the defendant protection against a later prosecution of the same charge when you make the date July 3.

Mr. Medalie. I don't think that you need any amendment to protect him.

Mr. Robinson. There are two objects in doing that: One is to give notice to the defendant, and secondly to protect him

b34

against double jeopardy.

Mr. Medalie. Well, you charge that a man stole $60 and you prove that he stole $6. You do not need any amendment.

Mr. Glueck. Suppose you charge larceny and you prove merely joy-riding, where they have a joy-riding statute.

Mr. Medalie. That is a substantial variance, because you have not established your case.

Mr. Waite. Take a stolen bond case. The government proves that the bonds were stolen, but the government falls down on the number. There you have to amend.

Mr. Robinson. Yes.

The Chairman. That is a good example.

Is there anything further on this sentence?

Mr. Wechsler. Is there a rule on variance?

Mr. Holtzoff. I do not believe so.

Mr. Wechsler. In that connection I would like to suggest that the reporter consider Section 184 of the Institute Code, which provides for amendment of the indictment where immaterial errors are found.

Mr. Robinson. The Institute Code was dealing with an ideal situation. Here you have something different.

Mr. Waite. The Institute Code says specifically that the indictment may be amended as far as immaterial errors are concerned.

Mr. Holtzoff. The Institute Code was not confronted by the constitutional objection.

Mr. Waite. Yes. It says "indictment."

The Chairman. It was intended to be a state code, not a federal code.

b35

Mr. Waite. But you have the same problem of amendment in the state courts as you have in the federal courts. It does not grant that you may amend the substance of the indictment, but to take care of immaterial variations which some courts have held some doubts on.

Mr. Holtzoff. I doubt the constitutionality of that because the indictment is something found by a grand jury, and I do not see how the prosecutor can amend the indictment of the grand jury.

Mr. Waite. Perhaps if you read that section you can get my point. I am only suggesting that the reporter consider it in the future.

Mr. Robinson. Please consider ex parte Bain, in which the federal courts have held that you cannot amend the indictment.

Mr. Waite. Read 184 and see my point.

Mr. Robinson. Yes.

The Chairman. We have covered this sufficiently for this evening and we will adjourn. The suggestion was made by one or two of the members that tomorrow morning they would prefer to start at 10 o'clock and then work up to 9:30 by Monday morning.

Mr. Crane. That is standard time?

The Chairman. Yes.

Mr. Longsdorf. How long will this take?

The Chairman. I should think that we would take about four days, unless our speed increases.

Mr. Medalie. What are the prospects with respect to the rules upon the subjects which do not appear to be covered? Do we have another draft?

b36

The Chairman. At the conclusion of the discussion of these rules we go over them and then pick out additional suggestions with respect to these rules and then take them up by paragraph and list up then the new matter that the members have thought of which should be included in the rules and get the benefit of the counsel and advice of each as we can and then leave it to the reporter to finally prepare these rules.

Then the chairman of the committee and the reporter will be confronted with two tasks: No. 1, to revise the rules with respect to the subjects we have covered; No. 2, to prepare a new set of rules with respect to those subjects which we have not covered.

That would probably necessitate a second meeting of the committee, which I would anticipate would be held around a month or a month and a half or two months from now. We hope that we may be able to get a complete set of rules in the hands of the court for the purpose of authorizing distribution sometime early in the year. Then we can have a general discussion when we meet here again in the latter part of June with the idea of incorporating such of these rules in final form.

It was the experience with respect to the civil rules that those rules needed some sort of revision after this criticism period was gone through. Then what will happen will be that the rules will be turned over to the courts, federal and state, during the summer so that when the court reconvenes in the fall next year they may pass our rules, if they approve them with the suggested changes, so that we would have time to get them in shape so that they may be submitted to the Congress at the opening of the session of 1943.

b37

Mr. Longsdorf. I would like to say something about that. I gave Mr. Holtzoff a suggestion to get this draft when it finally comes out not only into the hands of a lot of lawyers but to direct it to the attention of a great many of them who would not ordinarily receive copies of the draft. I do not know just how we can do it. I do not suppose that the Supreme Court wants to circulate 125,000 pamphlets, but I do not think that is necessary. If you can arouse some curiosity, that may help a lot of them. Perhaps the bar associations can do a great deal.

Mr. Medalie. They can help, yes.

The Chairman. W e have committees appointed for that.

Mr. Longsdorf. I know, but in our district there was no local committee appointed when I left except the one appointed by the bar association. They encouraged the state bar, and our senior district judge talked to me about the possibility of having a local committee appointed.

The Chairman. We had two letters from Chief Justice Hughes and followed by letters from others. I do not know what more we can do with the district judges.

Mr. Longsdorf. I believe it should be done.

The Chairman. Mr. Tolman said the committee has been appointed. He received the letter today.

Mr. Longsdorf. As far as the committees are concerned, they really get going when they have something to shoot at, and the best thing for them is a draft.

(Thereupon, at 10:20 o'clock p. m., the committee adjourned until 10 o'clock a. m. Tuesday, September 9, 1941.)

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RETURN TO FILES

CRIMINAL RULES COMMITTEE
207 United States Supreme Court

Copy for Mr. Alexander Holtzoff, Secretary.

Tuesday, September 9, 1941.

Hearing Before the

ADVISORY COMMITTEE ON RULES OF CRIMINAL PROCEDURE

UNITED STATES SUPREME COURT

WASHINGTON, D. C.

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C O N T E N T S .

Tuesday, September 9, 1941.

Rule, 8 ---------- 240

Rule, 9 ---------- 338

Rule,10 ---------- 338,355

Rule,20 ---------- 394

Rule,21 ---------- 405

Rule,28 ---------- 457

Rule,29 ---------- 458

Rule,30 ---------- 458

Rule,34 ---------- 465

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ADVISORY COMMITTEE ON RULES OF CRIMINAL PROCEDURE

UNITED STATES SUPREME COURT

WASHINGTON, D. C.

- - -

Tuesday, September 9, 1941.

The Advisory Committee met at 10 o'clock a.m., in room 147-B, Supreme Court Building, Washington, D. C., Arthur T. Vanderbilt presiding.

Present: Arthur T. Vanderbilt, Chairman; James J.Robinson, Reporter; Alexander Holtzoff, Secretary; George James Burke, Frederick E. Crane, Gordon Dean, George H. Dession, Sheldon Glueck, George Z. Medalie, Lester B. Orfield, Murray Seasongood, J. O. Seth, Herbert Wechsler, G. Aaron Youngquist, George F. Longsdorf, John B. Waite.

The Chairman. All right, gentlemen. Let us proceed.

I believe we are on Rule 8, page 3, sub-heading (b).

Mr. Holtzoff. I have a question as to the phraseology of that. When you speak of filing one of the following notices, pleas, or motions, that seems to convey the impression, which probably was not intended, that there must be a written plea, because you cannot file an oral plea.

Mr. Youngquist. I have the notation to make it, "Enter or file."

Mr. Robinson. Is "enter or file" satisfactory?

Mr. Youngquist. Yes. That is the suggestion I had.

I had another suggestion. Might we not just say, "A defendant may or shall, as provided hereafter, enter or file one or more of the following notices, pleas, and motions"?

Leave out "for his answer, and defense, to the written accusation."

The Chairman. Could you substitute the word "make" for the words"enter or file"?

Mr. Holtzoff. You cannot make notice.

The Chairman. Would you read your language again, Mr. Youngquist?

Mr. Youngquist. In line 40 strike out the last four words. In line 41 strike out the first five words. Insert after the word "rule" in line 42 the words "enter or".

Mr. Crane. Can we have that read?

Mr. Youngquist. "A defendant may or shall, as provided hereafter in this rule, enter or file one or more of the following notices, pleas, and motions."

Mr. Holtzoff. I do not understand the significance of the phrase "may or shall." It should be either "shall" or "may," not both.

Mr. Robinson. The meaning there is that sometimes it is permissive, sometimes mandatory, according to the substantive provision.

Mr. Holtzoff. Shouldn't you just say "may"? "May or shall" is a little bit confusing.

Mr. Robinson. No, because the "shall" is modified by "as provided hereafter in this rule."

Mr. Youngquist. Theoretically, is not a pleading of guilty or not guilty mandatory?

Mr. Holtzoff. He can remain silent.

Mr. Youngquist. If he does, the court enters a plea of not guilty.

Mr. Holtzoff. I was wondering about the words "may or shall." They give rise to a question in my mind. I may be captious.

The Chairman. I would feel a little more comfortable with the word "may."

Mr. Robinson. Beginning in lines 44 and 45, he shall file a motion, and then on the next page, line 59, he shall enter a plea either of not guilty or a motion to dismiss.

The Chairman. That simply confirms my argument made, because you say in the introductory that he may do some of these things, but later you say he shall.

Mr. Robinson. In line 97 is where the "may" begins.

2 The Chairman. In other words, "may" indicates choice, but when it comes to certain things, he shall do them. It seems to me we are trying to be a little too meticulous.

Mr. Robinson. Well, maybe I am wrong.

The Chairman. Maybe I am wrong.

Mr. Holtzoff. I move that we strike out the words "or shall" and just leave "may."

The Chairman. Is there objection to that? Just say "may."

The section then reads:

> "A defendant may, as provided hereafter in this rule, enter or file one or more of the following notices, pleas, and motions."

Sub-heading (1), Mr. Reporter.

Mr. Robinson. Now, this, of course, has to do with counsel. Naturally, back of our minds is the case of Johnson v. Zerbst and other indications by the Supreme Court that the matter of providing counsel for a defendant in a criminal case

is a jurisdictional matter.

I think, after reading it, you will see what the object is in preparing it as it has been prepared, and therefore it will help us in obtaining that object either by disagreeing aboutputting the provision here or by agreeing with it.

Mr. Holtzoff. I want to make the suggestion that this ought to be perhaps modified considerably. This paragraph puts the burden on the defendant to file a notice that either he has counsel, and if so who that counsel is, or that he does not desire counsel. I do not think a defendant ought to be required to do anything except plead.

As a result of the case of Johnson against Zerbst the Department and the courts have worked out a procedure which had previously been used in some districts but not in others, whereby upon arraignment every prisoner is asked whether he has counsel. If he says no, he is asked whether he can afford to hire one. If he says no, he is informed that the court will appoint one for him if he wants one. He is asked whether he does want one or not. In a great many cases they say no and they waive the right of counsel, and that is made a matter of record.

I suggest that we substitute some such provision as that, requiring the court, in open court, to apprise the defendant of his right to counsel and requiring the court to appoint counsel for him unless he expressly waives such right, which waiver should be made a matter of record, instead of leaving it in this form, which is now putting the burden on the defendant to file a notice in court, where many of them would not be able to prepare a notice.

Mr. Medalie. Isn't this what youreally want? "If at any time the court is satisfied that the defendant is unable to provide himself with counsel or hire counsel or employ counsel, and he is in need of counsel, the court shall appoint one."

Mr. Holtzoff. No; just a little bit more than that.

Under Johnson against Zerbst, which was decided three or four years ago, the Supreme Court went further. The Supreme Court made it the duty of the court to appoint counsel for the defendant unless the defendant expressly waived such right, and therefore the Department worked out, with the aid of the administrative officers of the courts, a procedure whereby each defendant is affirmatively interrogated on arraignment in open court. The court does not wait, as used to be done in some districts, for a defendant to ask for counsel.

Mr. Medalie. The practice in the State of New York has been for years that when a man is arraigned, in nine cases out of ten -- anyway, in a good many cases -- his counsel appears with him when he pleads, but if there is no counsel, it is the judge's duty, required by statute, to inform him that he is entitled to counsel, and that if he has not the ability or means to employ counsel, the court will assign him counsel. That is made a matter of record by the clerk who is there in the court, and it is part of the court record.

Mr. Holtzoff. In the rural Federal courts you will find probably that nine-tenths of the defendants when arraigned have no counsel, and each one of them has to be asked this.

Therefore, I move that we substitute for Rule 8 (b) (1) a provision based on Johnson against Zerbst requiring the court, when the defendant is arraigned, to apprise the defendant of

his constitutional right of counsel and that counsel will be appointed for him if he desires one and is unable financially to secure one, and that counsel will be appointed unless the defendant expressly waives such right in open court.

Mr. Wechsler. I should think that, rather than pass on that motion,we ought to suggest to the reporter the desirability of drafting a section on arraignment, which I do not recall finding in these rules.

Mr. Holtzoff. No, there is not any.

Mr. Wechsler. Which I think should be there, and which would include as part of the procedure on arraignment the appropriate action with reference to counsel.

I direct attention to Chapter 8 of the Law Institute Model Code, the provisions of which I think are reasonably satisfactory for this purpose.

Mr. Holtzoff. If that is so, I am inclined to agree with Mr. Wechsler. Then this provision should just be stricken out.

The Chairman. Or transferred to that.

Mr. Holtzoff. No, because I do not think there ought to be any provision requiring the defendant to file a notice.

3 The Chairman. The section you are proposing would be transferred to the section on arraignment.

Mr. Holtzoff. That is quite correct, and this section should be stricken out.

The Chairman. This would be, in any event, if your motion were carried.

Mr. Longsdorf. Mr. Chairman, may I ask something for information that is closely related to Johnson against Zerbst.

They know that case pretty well out in the Northern

District of California. The practice in California is laid down in the provisions of the penal code, and what Mr. Holtzoff described is specifically required by statute, but it is also required by statute at the preliminary examination.

Now, the practice in the Northern District of California at the present time, and instructions have been given to the commissioners and they are required by the court to follow it, is to inform the prisoner of his rights and to make note of it and to return in the certificate that that has been done, so as to have a record that will frustrate any more affairs like Johnson against Zerbst.

At the arraignment the same thing is done. That is done all the way through. So that, as they follow the practice now in that district, the record always suffices to show that the prisoner was informed of his rights and either had counsel or an opportunity to provide one.

Mr. Glueck. Mr. Chairman, that raises a question as to how far back in the procedure a prisoner should have counsel in order to be protected. For instance, there may be all sorts of dirty business on the part of the police before he is even brought in for a preliminary examination.

Mr. Longsdorf. Yes. Well, there is another reason why our state practice has that provision. Under a relatively recent amendment of the statutes, the complaint, the original proceeding, if it contains enough, may stand as an information, to which a plea of guilty may be entered, and the committing magistrate, if such a plea is made before him, certifies it to the superior court, which imposes a sentence according to law. We think it is a pretty good sort of a method and cuts short a

lot of prosecutions.

Mr. Holtzoff. I do not think you would want to have the United States Commissioners clothed with that authority, because a good many of them are not lawyers and most of them are just part-time officers.

Mr. Longsdorf. That is all right, but the complaint never stands for an information until it has the O.K. of a district attorney. If the certificate goes out with an insufficient complaint, the sentence is not passed, but the case goes on for trial.

The Chairman. We have two motions pending now, one by Mr. Holtzoff for the modification of this section, and another by Mr. Wechsler for making it part of the new section on arraignment.

Mr. Holtzoff. I am willing to accept Mr. Wechsler's motion as an amendment to mine.

Mr. Wechsler. I offered it as such.

Mr. Robinson. Before you speak of a new section, it might be well to consider it being in this rule here --

The Chairman. It might be a new section of this rule.

Mr. Robinson. I think in the new rules they call (a), (b), (c) paragraphs, and the (1), (2), (3),(4) are called subdivisions.

The Chairman. We understand what you mean.

All those in favor of the motion as amended say "Aye."

Mr. Medalie. What is the motion?

Mr. Glueck. What about the question I raised about furnishing counsel farther upstream?

The Chairman. That is a different question.

Mr. Medalie. What is the motion?

The Chairman. The motion by Mr. Holtzoff is to recast Rule 8 (b) (1), summarizing it, to provide that the court shall apprise the accused of his right to counsel.

Mr. Crane. At the time of the arraignment.

Mr. Youngquist. I assume that the reporter has included this for the purpose of having on file with the case a signed statement by the defendant that he waives counsel; and when we come to read it, might it not be well to provide that in case the defendant does waive counsel he shall sign that waiver, in order to overcome the Johnson against Zerbst case?

I am simply throwing that out as a suggestion to be considered when we reach that decision.

Mr. Holtzoff. Where the waiver is recorded in open court, there is no trouble. All these troubles arise in cases which were tried before the Zerbst case.

Mr. Crane. I think you will find that if the judges are required to inform him of his rights at the arraignment, the clerk makes a record of that, and if there is no clerk, they are required to make a record of it anyhow. He does not have to enter a written plea. He pleads orally, but the clerk enters it.

The court says, "You have a right to have counsel. If you haven't counsel, we will appoint counsel."

He is informed of his rights. He can tell the court he does not have counsel. We have been assigning them by droves in the city.

Mr. Holtzoff. Or he can say he does not want one. I do not think he should be required to have one.

Mr. Robinson. This provision is based on the recommendation of the United States Attorney in Baltimore and also on experience I had in New York in the latter part of June.

The United States Attorney in Baltimore states that following Johnson v. Zerbst there is a lot of difficulty with lawyers appearing or purporting to appear for certaindefendants without authority to do so.

4 The United States Attorney told me that he knew of cases there where higher-ups among the defendants had arranged in some way that counsel selected by them should come into court and act as counsel for lower-down defendants, so to speak, although failing to represent the interests of the subordinate defendants and really representing the interests of the more active people, more in control of the defense.

Then, two weeks ago, I was sitting in court up there at an arraignment proceeding and a defendant came up, and the judge asked him if he was represented by counsel, and he said no.

A lawyer who was sitting there at the bar came forward and said, "Your Honor, I thought I was representing this defendant, but, of course, if he wishes to dispense with my services, I will do so."

There was something of a dispute between a lawyer and a defendant at the bar, and finally other arrangements were made.

Because of those two things it seems that it would be desirable to have a written statement by the defendant that John Smith is his lawyer and is representing him in this case. It would foreclose any later disputes about whether or not the defendant was represented, and would make a record which I think would be desirable.

It would be perfectly all right, however, if the Committee passes the present motion.

Mr. Crane. I think what you say is all right, but it does not fit in with the facts as I know them in the Greater City of New York. There are still many hundreds of people who cannot read or write, and a mass of people who cannot speak English, and there is a mass of lawyers 30 per cent of whom ought never to have been admitted to the bar.

You get the same question: Who is representing them? Nobody, if he hasn't any money. If he has, they all scrap over it.

Now, in open court, with the judge there, he speaks, and if he is not satisfied with the lawyer, he gets out and somebody else gets in.

Mr. Holtzoff. You get somewhat similar conditions in the Southwest and the mountain country. There are a lot of
5 Mexicans in the Southwest. Some of the mountaineers cannot sign their names.

Mr. Crane. Thirty or forty-five years ago, when I was holding criminal court in New York, a defendant's lawyer got very impertinent. I told the captain of the court attendants to give him his hat and put him out in the hall. I appointed the lawyer for him. It is drastic, but that is what you have to do sometimes. It is not like the civil end of it. It is rough business, much of it, in these great big cities. You get a lot of lawyers who are as bad as the defendants.

Mr. Seth. I was delayed, Mr. Chairman, and I did not hear the discussion, but I hope the idea here will not be entirely discouraged. If possible, the selection of counsel

should be arranged before arraignment. If not, and the counsel is to do the prisoner any good, there has got to be a second arraignment. Counsel has got to confer with him and possibly talk with witnesses.

Out our way we have a lot of Mexican immigrants who are prosecuted so often for coming across the line from Mexico, and it has created a havoc. They keep them on the border in jail, and the judge goes down there, and they plead guilty, and they put them in jail. There are Indians who cannot sign except with thumb marks.

If counsel is to do any good to indigent defendants, he has got to be given time, and in these places where there are only four or five days of court, I think the idea carried here, possibly with some modification, will really expedite the business by having the counsel proposition arranged before the formal arraignment in some manner. Otherwise you are going to have two arraignments.

Mr. Holtzoff. Of course, what they actually do is this. When the defendant is arraigned and he is asked whether he wants to have counsel appointed and he says yes -- in the majority of cases they say no, but those who say yes -- the court selects a lawyer in the courtroom, and he has him go into the chambers and consult, and maybe an hour or two later he calls the case again, disposing of the docket in the meantime.

Mr. Glueck. Apropos of that, I understand that the Attorney General's office has been recommending in the Federal courts a public defender system.

Mr. Holtzoff. Yes, we have.

Mr. Glueck. Can you tell us the progress of that?

Mr. Holtzoff. Successive attorneys general have been recommending the provision for the office of public defender in the Federal courts. Attorney General Cummings initiated the recommendation. It was followed by Mr. Murphy and by Mr. Jackson. We have drawn a bill to provide for such an office. Bills are pending both in the Senate and the House.

The Senate Judiciary Committee at one time held a hearing on one of these bills, but no favorable action has been taken.

That is really perhaps beyond the scope of this Committee because it is a special office that would have to be created by an act of Congress; but I do hope that we will get that office, because that would solve a good many of these problems.

Mr. Seth. Could not we put in the rules something about "If there is no public defender"?

Mr. Holtzoff. I beg your pardon?

Mr. Seth. Could not we put in the qualification, "If there is no public defender this would happen"?

Mr. Holtzoff. We could put in the provision that if there is a public defender he shall be designated.

Mr. Medalie. Why should he, if the court can find a better lawyer for him? The case may be important enough to pick out one of the best counsel in the district.

Mr. Holtzoff. You can say he may assign the public defender.

Mr. Youngquist. If there is no public defender, the court will assign one.

Mr. Holtzoff. This would have the moral effect of bringing it to their attention.

Mr. Crane. We do not want to write something here that will encourage legislation. We want to write rules that they

will use tomorrow. I do not think we want to put in something as though we are encouraging something of that kind.

Won't the legal aid societies in these big cities help you? I ask because I am on the board of the Legal Aid Society.

Mr. Holtzoff. Not in all cities, because most of them confine themselves to civil matters.

Mr. Medalie. In New York they have a voluntary Legal Aid Society. I am associated with that. The work done there is done in the state courts, in the General Sessions Court.

Mr. Holtzoff. In ~~some~~ the Southern districts of New York isn't it the practice for judges to assign former assistant United States attorneys as counsel for indigent prisoners, so that they do get well represented?

Mr. Medalie. In the Southern District of New York the judges assign men who are regularly around that courthouse, who are men of experience, and although they specialize in the practice of the hit-and-miss criminal case, they are very good counsel. The judges have said all the time that they do a pretty good job for these defendants, and they are very conscientious and they are men whom the judges respect. That is the experience in that district. I do not know how it is elsewhere.

That is due largely to the fact that you have in the Southern District developed, over the last fifteen years, at least, judges who encourage good relations with the bar, and if you act decently with the bar, the bar develops decently. If you treat them like riffraff, they act like riffraff.

Mr. Crane. We have probably had fifteen or twenty first degree murder cases in the Court of Appeals a year. I suppose nearly everyone who was tried had counsel assigned, unless it is

some case where they have some money, which is rarely so, and those counsel are exceptionally good.

They allow counsel $500 for the trial and they get another $500 in the Court of Appeals, so that is $1,000.

Mr. Glueck. Well, I agree with you, Judge Crane, that it would be improper to include that in the rules, but it seems to me that it might be mentioned in the commentary that there are advantages in this kind of system.

Mr. Crane. I do not object to that.

Mr. Youngquist. I myself am not convinced on the public defender idea.

Mr. Longsdorf. It seems to me that if we mention public defenders and if Congress provides for a Federal public defender someone will ask which one they are talking about. We have such a system in some states.

The Chairman. It creates an office, and that is not within our jurisdiction.

We have really three matters pending now: Mr. Holtzoff's substitute for this section, Mr. Wechsler's accepted amendment to make it a paragraph in that section, and Mr. Youngquist raises the question whether or not that carries with it the idea that it should be in writing.

Mr. Youngquist. That was not intended as a motion.

The Chairman. May we get the view of the committee on that before we put the question? What is the view of the committee as to whether or not the waiver by the defendant should be in writing?

All those who take the view that it should be in writing say "Aye."

(There was a chorus of ayes.)

The Chairman. All those opposed, no.

(There was a chorus of noes.)

Mr. Glueck. That means that there still would be a formal entry?

The Chairman. Oh, yes.

Mr. Wechsler. It might still be desirable to have administratively such a thing in writing, but in open court the question will be gone into.

Mr. Crane. And a written entry made.

Mr. Holtzoff. That can be left administratively, as he suggests.

Mr. Medalie. There is another thing to be considered in connection with assignment of counsel. Even if the defendant waives, there are times when the judge sees a necessity for appointing counsel. The court should not be required to dispense with counsel simply because the defendant stupidly waives.

Mr. Holtzoff. This would not require the court not to appoint counsel.

The Chairman. This would not bind the court. It would merely bind the defendant.

With regard to the motion made by Mr. Holtzoff and amended by Mr. Wechsler, all those in favor say "Aye."

(There was a chorus of ayes.)

The Chairman. All those opposed, "No." (Silence.)

The motion is carried.

Now, the motion as to the assignment of counsel prior to arraignment.

Mr. Wechsler. Again it seems to me that it is largely an

issue of merger as to whether the rules will go into such matters as the preliminary hearing in general, if there is a preliminary hearing, or to provide for one where there now is not. That problem is not touched by this draft, but it seems to me very important that it should be considered as a whole, and the special question of counsel will be one of the questions that will arise in the course of that consideration, just as I felt that arraignment should be considered as an inevitable incident.

Mr. Holtzoff. Of course, this draft is not intended to be complete --

Mr. Wechsler. No. The point of my remark is directed to the most helpful way to put this suggestion, and it seems to me that it is to point to a process in the trial which the reporter has not yet come to consider and suggest that as a particular point to be considered at the time when he reaches that subject.

Mr. Holtzoff. I agree with Mr. Wechsler that perhaps we could postpone the question of assignment of counsel prior to the arraignment until we come to consider rules for preliminary hearing before commissioners.

Mr. Longsdorf. Furthering Mr. Wechsler's suggestion, the order appointing this Committee does not mention anything about proceedings before commissioners for preliminary examinations, but the Enabling Act of the Supreme Court does mention that. Now, where does that leave us?

Mr. Robinson. The appointment of the Committee expressly incorporates the Enabling Act, does it not?

Mr. Longsdorf. I think so, but I am not sure.

The Chairman. I think we need have no question about that.

Mr. Longsdorf. I have no serious question. I simply want to call it to the attention of the Committee.

The Chairman. Mr. Wechsler, do you make a motion that we have a section or rule dealing with preliminary hearing?

Mr. Wechsler. I do.

Mr. Holtzoff. I second the motion.

Mr. Medalie. Does that mean hearings before the commissioner?

Mr. Holtzoff. Yes.

The Chairman. Preliminary hearings before a commissioner, to make the matter more exact.

Is there any discussion?

Those in favor say "Aye."

(There was a chorus of ayes.)

The Chairman. Opposed, "No." (Silence.)

It is carried.

I take it that the question that you raise, Mr. Glueck, will come up --

Mr. Glueck. May I make a general suggestion to the reporter, Mr. Chairman, to consider, and that is that I think that most of us visualize this whole business as an orderly process, having certain traditional steps, and I think it might help if less emphasis wereplaced on a numerical comparison of the sections of this draft with that of the Civil Code and some stress were placed on a chronological order of the subjects.

Mr. Crane. I agree with that.

Mr. Holtzoff. I do not think, when we have the final draft, we need follow the numbering of the civil rules. I think it was helpful in the preliminary draft for comparison.

The Chairman. I was thinking about that last night a bit, and it seems to me we can very well accomplish what the reporter had in mind by appending to our rules parallel numbers of the civil rules, without burdening ourselves with an artificial order. That is a matter to come up when we come to the redrafting of this whole set.

I think we are ready to come to page 4, Section (b) (2).

Mr. Glueck. It now becomes (1), doesn't it, Mr. Chairman?

Mr. Holtzoff. Suppose we use the number that we have.

The Chairman. We will use these numbers. We will leave it to the reporter to renumber it if necessary.

Mr. Holtzoff. Mr. Medalie called my attention to the fact that the words "affirmative defense," used in paragraph (2) and elsewhere later on, are words that perhaps are not suitable to criminal procedure, because, strictly speaking, there is no such thing as affirmative defense in criminal law, and there ought to be some other word used, the theory being that the prosecution has the burden of proof on every issue.

Mr. Crane. You do not have to say "affirmative defense." If it is affirmative defense, you have to prove it. If it is simply "defense," it would raise reasonable doubt.

Mr. Holtzoff. Did you have some term in mind, Mr. Medalie?

Mr. Medalie. No. I am not inclined to go along with this idea of the defendant having to tell everything that he wants to prove, where the prosecution has not been called upon to do it, notwithstanding the belief that the prosecution tells you everything. In fact, he tells next to nothing.

Let me put it this way. It is claimed in a case that a defendant committed the crime of robbery, that he robbed a bank.

20

That is all he says. The prosecution may have a theory that someone else did the actual robbery and that, in some remote way, in order to acquire the possession of some bonds or money or anything else, the man in the courtroom had some connection with it that is built up with some circumstantial evidence.

The prosecution does not state that in its pleading and does not give a bill of particulars to that ordinarily. The

7 defendant is not apprised of details of proof or the important elements of proof.

In connection with conspiracy, no matter what the crime is, whether it is mail fraud or extortion or anything you please, outside of stating what generally was done in the way of a scheme for mail fraud, how the defendant carried out the scheme or what the Government claims was his connection with it is never stated.

There is a lot of talk to the effect that the Government tells you everything and the defendant tells you nothing. Common experience is that that is poppycock.

Mr. Glueck. When you are representing a defendant you somehow manage to find out.

Mr. Medalie. That is something else.

Let me say this in that connection, and I have made this remark before. If the case is well prepared on both sides, the Government has a pretty good idea of what defense counsel is going to do in the case or is likely to do or can do, and reasonably forecasts it, and the defendant's counsel is in about the same position with respect to the Government, even though the indictment does not tell him very much, or even if the bill of particulars is calculated to mislead him. It does not make

very much difference.

Now, this business of affirmative defense in criminal cases is based on the argument that the Government tells the defendant everything and the defendant tells the Government nothing.

Mr. Holtzoff. There are certain things that the defendant has to raise especially, matters that he raises by pleas in abatement and matters in special plea~~ding~~s in bar. The defendant does give notice.

Mr. Medalie. A very comprehensive catalogue of these things has been prepared by the reporter. Actually, about the only thing that the defendant is required to bring up in advance of a trial, even though he may bring up many of the other things or matters, is improper constitution of the grand jury or improper conduct in the grand jury, including the fact that he was compelled to testify against himself when he objected to doing so.

Outside of that, he does not need to bring up anything else. Former jeopardy he does not have to bring up.

Mr. Robinson. I think our question begins just where you left off so far. On former jeopardy, is not that an issue that would well be determined before trial in many cases?

Mr. Medalie. It can be.

Mr. Robinson. We are supposed to be considering possibilities. At the present time it is true that perhaps it cannot be, but is that the best plan? Is it wise for the Government and the defendant to subpoena to court any number of witnesses, a lot of jurors, have them ready here for trial, and then spend hours or days of time arguing questions, probably largely

questions of law in regard to the legal sufficiency of the issue of double jeopardy, which might well have been disposed of before trial without all this expense and delay?

Mr. Medalie. In the first place, I think you enlarge unduly on the amount of time that such an issue would take.

Mr. Robinson. You would not say that it is impossible?

Mr. Medalie. No, but, generally speaking, it takes very little time. Generally speaking, too, it comes up only on occasion.

Now, time does not need to bother us, because I have not seen much time wasted on these things. Prior jeopardy, statute of limitations -- the statute of limitations never takes time --

Mr. Robinson. Alibi, notice of insanity details are often left to trial. Now, is that the best plan, or can we devise a plan which would make a trial a trial and allegations met by issues or denials.

Mr. Medalie. Let me take them one at a time.

Mr. Robinson. All right.

Mr. Medalie. I think the attempt to separate the issue of insanity from the issue of a defendant's guilt, leaving insanity out, is a perverted way of trying the issue of a man's guilt, because the issue of insanity enters into the character of his act to a great extent -- intoxication, for example. It is part and parcel of the case, and it ought not to be chipped up there.

Mr. Holtzoff. How about former jeopardy?

Mr. Medalie. That is routine.

Mr. Holtzoff. I think he certainly ought to be given

notice by a defendant, especially if it is double jeopardy.

Mr. Medalie. You say double jeopardy. Would you say statute of limitations?

Mr. Holtzoff. Yes.

Mr. Medalie. Well, I think it is part and parcel of the case.

Mr. Holtzoff. Well, that is true, because it depends on the date of the prosecution.

Mr. Medalie. No matter what date they give. I can give you a case where if the Government never tries it that issue can come up; that is, whether a subsequent act after the main transaction was part and parcel of the main transaction. If it was, then the claim that the statute runs falls. If it was not, it does, and the case cannot go to the jury and the statute has run.

How are you going to separate that?

Mr. Holtzoff. You cannot.

Mr. Wechsler. May I ask what Mr. Medalie said about the insanity issue? I did not hear the position you took on that.

Mr. Medalie. One of the questions in a criminal case is his intent, not simply the capacity to commit the crime. It is not easy always to segregate intent and insanity or intent and intoxication.

Mr. Robinson. Mr. Dean is familiar with the California practice, in which they do that very thing. They separate the insanity issue. I would like to hear from him on that.

Mr. Dean. In California, if you are going to set up insanity as a defense you must put in a special plea by reason of insanity. If that is your only defense, you rest on that

plea. If you want to plead not guilty, you may put in both pleas.

8 If you plead not guilty, you may plead not guilty by reason of insanity and not guilty. Then you have a separate hearing in advance of your main trial on the general issue, in which the only issue is, Was the man insane at the time the act was committed?

If that is determined adverse to the accused, then he goes on and has a regular trial on the not guilty plea.

Of course, under that procedure there is one big difficulty. You really must try the case two times, because it is very difficult to tell the circumstances of the crime as they reflect the mental elements that are necessary in the first hearing from the whole factual story you get when you are putting the case on the general issue.

Mr. Wechsler. I have examined the California cases and I am unable to discover, on the basis of the examination, any merit whatever in the separation, because they are all homicide cases to begin with, and the circumstances of the homicide are inescapably detailed in the course of the trial on the issue of insanity,and the ultimate adjudication seems to me to be precisely that which you would have gotten had the prosecution tried its case first and then the special circumstances with reference to the defendant been put in as a matter of defense.

Mr. Holtzoff. In other words, the prosecution has to present its proof twice, practically.

Mr. Dean. That is right.

Mr. Medalie. So has the defendant.

Mr. Waite. Mr. Chairman, I wonder if we could not expedite

this discussion by some explanation from the reporter as to just how he is planning to get this affirmative defense brought forward.

Now, I myself am highly in favor of some revelation of the defendant's defense, if we can work out a practical scheme to do it. That was before the Law Institute Code Committee.

Most of us agreed that it was a desirable thing -- not all of us -- but we could not work out any process by which we could compel the defendant to reveal it.

Now, as I read this, in (2) (c), the defendant, if he wants to assert that not he but somebody else committed the crime, shall file a motion to dismiss the indictment.

I do not see how we are possibly going to work that plan out. He says, "It was Tom Jones who committed the crime and not I, because I was in Akron and not in Cleveland at the time," and he files a motion to dismiss.

Now, suppose he says, "It was Tom Jones and not I, because, though I was present at the place of the crime, I was temporarily paralyzed."

It is exactly the same type of defense. Its only difference is in the character of the evidence.

Or suppose he says, "I was there, and I was not paralyzed, but all the world knows that I stood motionless while Tom Jones committed the crime."

I fail to see the difference between the defense of alibi and the defense of paralysis and the defense that "I did not do it, but somebody else did," and I do not see how he can raise those particular defenses on a motion to dismiss.

Mr. Robinson. Of course, you come from Michigan, and you

have there --

Mr. Waite. I am talking about raising it on a motion to dismiss.

Mr, Robinson. I think it will help the committee if you tell us how you do it in Michigan.

Mr. Waite. I said, to start with, that the Code Committee could not work out any practical scheme.

Mr. Robinson. That is the A. L. I. Code?

Mr. Waite. Yes. All I am saying is that though I think it is a very desirable thing to produce that statement from the defendant if we can, it cannot be done under a motion to dismiss. If you are talking about affirmative defense, that comes under motion to dismiss, and that is very confusing.

Mr. Holtzoff. Why couldn't that be done by requiring that the defendant shall serve notice if he is going to offer evidence to establish alibi? Isn't that in effect in the Michigan and Ohio statutes?

Mr. Waite. He is precluded from putting in evidence unless he has given notice.

Mr. Holtzoff. And you do not have to do it by motion to dismiss.

Mr. Dean. It is not raised by pleading.

The Chairman. We have heard an expression from Mr. Dean and Mr. Wechsler on that California statute. I would like to get Mr. Longdorf's opinion.

Mr. Longsdorf. I have not any experience in criminal practice, which raises a good deal of doubt as to whether I ought to be here, but I live in California and my impression is that that measure which Mr. Dean referred to, making a double-

barreled plea, has not been entirely satisfactory.

The Chairman. Then we have a consensus on that proposition.

I wonder if we could get from our two Michigan members an expression as to whether or not your insanity statute works.

Mr. Waite. It is generally assumed that it works rather well in this way. What happened before that was that the defendant would spring upon the prosecuting attorney an allegation of insanity or witnesses to the effect that he was not at the scene of the crime, and the prosecution had no chance to
9 counter that, had no chance really to have the man examined as to his mental state. He had no chance to look up the witnesses who appeared for the alibi.

We simply picked out two particularly obnoxious types of surprise and required advance notice of them, but it does not come under motion to dismiss --

Mr. Holtzoff. But you do not have separate hearing on insanity?

Mr. Waite. No. It simply precludes the defendant from giving evidence on those two particular lines of defense unless he has previously given notice.

The Chairman. Does that work satisfactorily?

Mr. Waite. Fairly so, yes. There is some consideration -- it has not gotten very far -- of extending it to requiring him not only to give notice if he is going to set up alibi, but give notice of what particular kind of defense he is going to give, which is what I take it the reporter is driving at here.

Mr. Robinson. Yes.

Mr. Medalie. Do you know of any cases where the prosecution has been surprised by an insanity defense?

Mr. Waite. I do not personally.

Mr. Medalie. I do not believe there can be any substantial number of them or any appreciable number of them.

Mr. Waite. I am told by men who have been in office that it happens not infrequently.

Mr. Robinson. It has happened that on the day of trial he would come in with an array of witnesses and alienists, and the prosecution was not prepared.

Mr. Medalie. It surprises me to hear that said, because I cannot imagine any place in the world whichtries more criminal cases than New York and Kings County, and I do not recalla single case when I practiced law where insanity was sprung.

The Chairman. Alibi has been.

Mr. Medalie. I grant you that.

The Chairman. What harm can there be in requiring the defendant to say that "Among my stock in trade I have one little insanity"?

Mr. Crane. I think that comes under separate trial, which we have not come to yet.

Mr. Medalie. That is another question altogether.

Mr. Crane. There is one separate hearing that you do not want to abolish and that you all recognize, which should be stated here, and that is the separate hearing as to whether or not the defendant is sufficiently sane to go on with the trial. That requires a hearing, of course.

Mr. Medalie. The defendant himself raises that. He may prefer to go to the state hospital.

Mr. Crane. They are not all fakes.

Mr. Youngquist. I think this discussion gives point to

what I was trying to bring out yesterday, that we have got to segregate these various affirmative defenses,as they are called. We just cannot treat them all together, because some of them, like former jeopardy, I think are properly disposed of before the trial of the general issue.

Another, notice of alibi, it cannot be a motion to dismiss, because it merely advises the prosecution that this defense will be interposed at trial.

We have just got to segregate and classify the groups into proper compartments.

Mr. Waite. I think this is complicated by the fact that this motion to dismiss raises an issue on the separate hearing--

Mr. Crane. That is the point.

Mr. Waite. I would like to move, therefore, just to bring it to a head for discussion, that the provision be made to read, in substance -- I am not particular about the form of it now -- that if the defendant proposes at the trial to give evidence that he was insane at the time of the commission of the crime or that he could not have committed the crime because he was not at the place of the crime, he must give notice in advance of that fact.

That does not raise an issue. It simply advises the prosecutor what to expect.

The Chairman. That is in lieu of subsection (2) on page 5?

Mr. Waite. Yes.

Mr. Holtzoff. The first sentence would have to stand. This would be a substitution of the second sentence.

Mr. Waite. Yes.

Mr. Holtzoff. I second the motion.

Mr. Wechsler. Is the operative date the date alleged in the indictment or information?

Mr. Waite. Suppose we separate the two motions. I can see a lot of discussion on that alibi proposition.

The first motion is that if he intends to set up the defense that he was insane at the time of the commission of the act, he shall in some proper way give notice thereof.

Then I will make the second motion if we settle this one.

Mr. Robinson. The Michigan statute puts them both in the same section of the statute.

Mr. Crane. Of course, you are taking out the motion to dismiss in the second sentence. They cannot dismiss an accusation on the question of fact.

Mr. Holtzoff. There will still be a motion to dismiss for insufficiency in lieu of the present demurrer.

Mr. Crane. That is a legal question.

Mr. Holtzoff. So that you have to keep the term "motion to dismiss."

Mr. Crane. I was speaking of the motion to dismiss which was included in what Mr. Waite just said. On these issues of fact, you cannot do that.

Mr. Youngquist. The motion to dismiss, when it is provided for, will not include those issues of fact.

Mr. Wechsler. I would like to ask two questions on the insanity problem, Mr. Chairman.

I would like to ask first whether there are any cases in the Federal courts in the last twenty years in which the defense of irresponsibility by reason of insanity was imposed.

Mr. Crane. What?

Mr. Wechsler. Whether there are any cases in the Federal courts where that defense was interposed. Are there a few capital cases?

Mr. Holtzoff. There are quite a few cases. Of course, you had the Harriman case.

Mr. Medalie. That was raised on the ground that he was in such mental condition that he could not consult counsel.

Mr. Holtzoff. There are cases where the defense of insanity has been imposed in non-capital cases.

Mr. Wechsler. I take your word for it, but I have looked for them and not been able to find them.

Mr. Holtzoff. They may not be in the reports. They may

2-1 be unreported cases.

Mr. Wechsler. Assuming that there are such cases, what is the Federal procedure with reference to civil commitment of such persons who raise that defense and who have been found to be insane?

Mr. Holtzoff. There is no Federal procedure. The Federal courts have no authority, except on Federal reservations, to make a civil commitment. All that the Federal court can do is to acquit the defendant if it was found that he was insane at the time that he was alleged to have committed the offense.

Mr. Medalie. Why should not we have provision for that in these rules of procedure?

Mr. Holtzoff. I think that would be a rule of substantive law.

Mr. Medalie. No. That has to do with apprehension and detention of defendants.

Mr. Crane. But the question is, Where would you send them?

Mr. Dean. We have a very adequate one in Springfield.

Mr. Holtzoff. Springfield is used only for those prisoners who become insane while serving a sentence for the crime.

The Chairman. The question is, Do you have capacity?

Mr. Medalie. Could St. Elizabeth's take care of all the cases that could possibly arise in all of the United States?

Mr. Holtzoff. We have the Springfield institute for defective delinquents.

Mr. Medalie. Ordinarily a code of criminal procedure contains a provision of that kind. I have forgotten whether the Institute Codes contain a provision of that kind, but the New York one does.

Mr. Crane. That is part criminal and part civil.

You take any person who is acquitted because he is insane. You do not let him go. The State will take him and commit him.

Mr. Holtzoff. I was going to suggest that we do not need any procedure. We would rather turn them over to the State institution.

Mr. Crane. Two doctors examine them and they are committed inside of twelve hours.

Mr. Medalie. These are the situations that arise. A defendant is unable to consult with counsel because he is insane. The court so finds.

The New York Code of Criminal Procedure provides for his commitment, and he stays until cured, if ever cured, and when cured he is brought back to trial. That has a sense of decency and is a protection to the public.

The other situation arises when, having been acquitted for insanity, he should not be at large. If the State is going to

take care of him under those conditions, well and good.

In New York they do not wait for the physicians to come and certify after his acquittal because he is insane. The jury has said so. Since he has committed a crime, they will take no chance with his being at large. He has to prove later that he is sane. One murder is enough. They do not certify that he is cured unless they are pretty sure he is safe.

Now, a complete code of criminal procedure requires that provision be made for both of those situations.

Mr. Holtzoff. It seems to me that in that second situation if the defendant in a Federal court is acquitted on the ground of insanity it should be the State's responsibility to commit him to an institution, and that is the way the thing is done to day. We would notify the state authorities and turn him over to them.

Mr. Medalie. There is only one trouble with that kind of commitment. A man acquitted on the ground of insanity in New York goes to the State Hospital for the Criminal Insane. He does not belong in one of the state hospitals for the general run of people who are temporarily or permanently mentally ill. He does not belong there and should not go there.

If we really want to make a contribution to criminal law, outside of its legal provisions but in the public interest, we ought to make a provision of that kind, and if our provision in these rules is inadequate, Congress can go ahead and supplement it properly.

Nevertheless, the most important thing to consider is that when you have a man who is insane and is charged with a crime, you just do not turn him loose, and the responsibility for

keeping him in custody is the Federal Government's.

The Chairman. May we hold this issue until we dispose of Mr. Waite's motion, which is to set up a separate sentence in lieu of the second sentence of subsection (2), to provide for notice by the defendant of the defense of insanity.

Are you ready for the question?

All those in favor say "Aye."

(There was a chorus of ayes.)

Opposed, "No." (Silence.)

The motion is carried.

Mr. Medalie. I want it noted that I am going along with it tentatively.

Mr. Wechsler. I do, too.

The Chairman. Do you want to make a motion that the reporter be directed to prepare a rule covering disposition of defendants found to be insane by the jury?

Mr. Medalie. I would like to cover both insanity prior to trial and the case of an acquittal on the ground of insanity and commitments --

Mr. Crane. You have got to deal with them separately, because simply because he is acquitted on the ground that he was insane at the time he committed the crime is not sufficient to keep him in jail.

Mr. Medalie. It is under our code.

Mr. Crane. No. You have to have a finding that he is also insane at that time. A man might be acquitted on the ground that he had his tempestuous insanity, that he shot the girl or shot the man,and that he was perfectly sane when the case came to trial.

A man who is perfectly sane when he goes to jail is not put in the insane asylum because he was insane two years ago when he committed the act.

Mr. Medalie. It has been stated in our decisions that a man may be insane and yet capable of conferring with counsel. Commitment made prior to trial of a person who was insane is a commitment solely on the ground that he cannot consult with counsel. He may be perfectly sane otherwise.

Mr. Crane. When a man's trial comes up the defense may be that he was insane at the time he committed the act. Experts testify that he was suffering with --

Mr. Glueck. Manic depressive insanity.

Mr. Crane. Yes; that at the time he was just crazy, that he did not know what he was doing, but in a month it was all over, and in a month he is perfectly sane.

The finding of the jury is that he was insane at the time he committed the act, that it was not the act of a sane man.

The burden is always on the United States to prove that he was sane at the time he committed the act. If any reasonable doubt has been created, that is all the defendant has to do.

So when you come to the question of a trial happening two years or a year afterward, the jury is not going to pass upon that unless it is required by statute -- as to whether or not he be insane at the time of the trial -- because you can only put a man in the insane asylum who is insane at the time you put him there.

Mr. Glueck. A man does not go to an institution because of acquittal, because that is anomalous. He has been proven not guilty and, theoretically, the second proceeding is required

to determine whether he is insane.

Mr. Medalie. Is that the New York Code?

Mr. Holtzoff. Under the New York Code the judge has to make a finding that the man is insane at that time.

The Chairman. All that is before us now is the suggestion that the reporter prepare such a rule and submit it. Let us not have argument.

Mr. Holtzoff. In my opinion, that ought to be the State's responsibility, rather than the responsibility of the Federal Government.

Mr. Wechsler. I would not like to decide that question.

Mr. Waite. You are familiar with the three different types of state statutes covering that situation.

Mr. Glueck. Apropos of that, may I say that, regarding Mr. Medalie's suggestion, if there is no Federal institution at present available, it seems to me we have no right to draft a rule which envisages such an institution, so may I make a suggestion that this proposed rule contain a provision that upon the acquittal of a person on the ground of insanity, on the ground of irresponsibility by reason of insanity, that fact shall be certified to the appropriate state authority so that they will receive notice, and then they can proceed with civil commitment proceedings.

Mr. Wechsler. It may be desirable for them to have the further adjudication made by the Federal court.

Mr. Glueck. By the Federal court?

Mr. Wechsler. Yes, if it is jurisdictionally possible to do so.

Mr. Glueck. That is the question.

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Mr. Wechsler. There is a question of jurisdiction, yes, but if it is jurisdictionally possible, obvious litigation may be avoided, particularly if the defendant has been examined by alienists during the course of the trial, and if the evidence at the trial bears upon his present condition. That is something for special investigation and a problem to be worked out.

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11:15

Mr. Medalie. May I ask whether later in these rules there is provision for acquittal on the ground of insanity?

The Chairman. No.

Mr. Medalie. I think that should go in, to conform with the State practice.

Mr. Waite. Mr. Chairman, before I am asked to vote on any of these motions I want to make an observation about a thing that we all know but none of us has mentioned as yet, and that is that the Federal courts have absolutely no prerogative jurisdiction of wardship. Perhaps Congress might do it. We will not go into so big a discussion as that, I hope.

Mr. Holtzoff. I agree with Mr. Longsdorf on that. I do not think the Federal court has any jurisdiction to commit a person on insanity today.

The Chairman. Suppose we develop this line of thought and then get the rule determined.

Mr. Waite. Mr. Chairman, if it is in order, I should like to make a second part to my motion.

The Chairman. May we have a vote on Mr. Medalie's motion that a rule be prepared on this and submitted by the reporter.

(The motion was agreed to.)

The Chairman. Now, Mr. Waite, will you proceed?

Mr. Waite. I do not care just where this shall come, but my motion is that there be a provision to the effect that if the defendant intends to defend on the ground that he could not have committed the crime because at the time he was at some other place -- in other words, the so-called defense of alibi -- he shall give advance notice of that intention.

Mr. Holtzoff. I second the motion.

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The Chairman. Is there any discussion?

Mr. Seasongood. Mr. Chairman, there are several of these defenses. I do not know why we single out these two.

Mr. Waite. I was going to suggest the others later on. I was trying to do it piece-meal because some of them become so complicated. But I had in mind putting in, in our discussion here, everything that is covered in subparagraph 4 of (c).

Mr. Seasongood. That is what I was going to suggest. If notice is given of certain defenses, I understand whether it is in the civil rules or simply by the general practice of the court, the court can determine these things if it wants to in advance of trial. For instance, there might be the defense of settlement in a civil case, and I have known of cases in which the court determined that question in advance of trial, and it is left to the discretion of the court whether he thinks this separate issue can be tried separately so as to save the trial of the whole case.

It was my thought that if we enumerate these different defenses of which we give notice, then the court would have the discretion to try them before trial, if it seems to the court advisable to have that done.

The Chairman. The reporter wishes to check up on that.

Mr. Medalie. The New York provision --

Mr. Seasongood. If that is what Mr. Waite had in mind -- and I judge that it is -- I think we might lump the whole lot of them, rather than to pick out particular ones, and leave it to the discretion of the court whether it should be tried separately to advantage, rather than have all of them in the trial of the whole case.

Mr. Crane. Certainly constitutionally the court cannot try anything as a question of fact outside of the trial of the case; and what bothered me about this was the matter of separate trial on such issues. I suppose when it comes to a matter of a formal plea or a question of law the court could pass upon that, the same as a demurrer. But if there is any question of fact I think there cannot be a separate trial.

The motions being put have not involved that. It simply gives notice.

Mr. Holtzoff. This is only giving notice before trial, and not of a separate trial.

Mr. Crane. Yes; so I understood. I am with him on that.

Mr. Dean. I should like to make a separate motion. In most of the State statutes it is provided -- and I move that it be amended so as to read -- that upon failure to submit advance notice the court may in its discretion exclude the alibi evidence.

The Chairman. Is that agreeable to Mr. Waite?

Mr. Waite. I accept that. That was intended to be implicit in mine.

The Chairman. Does that also apply to the motion on notice in advance?

Mr. Waite. Yes; I understand that.

Mr. Wechsler. I should like to hear from Mr. Waite a justification of the statement. It is a classic issue in the literature, and it has been debated pro and con many times. I think he would be willing to make such a statement.

Mr. Waite. The only justification is the effort to do away with surprise. I have in mind the case of Heime Martin, who

fled to Pennsylvania. They went to Pittsburgh in an effort to extradite him, and he said he could not be expedited because at the time of the murder he had been, so he said, in Pittsburgh, and he brought innumerable witnesses who testified to that effect. The Cleveland authorities got tired of waiting, and they just kidnaped him, and did not wait for the extradition proceedings. He was tried, and at that time he brought out the defense that he did not commit the murder; but he did not set up the alibi that he was in Pittsburgh, but instead set up the alibi that he was in Akron at the time, and he brought in innumerable witnesses to show that he was inAkron. The prosecution had been warned to a certain extent, and it brought in witnesses to testify that he was in Pittsburgh. The jury, having testimony that he was in both places, decided that he was in neither, and convicted him of the murder in Cleveland.

Mr. Wechsler. What is the situation with reference to the date? Does the date in the document determine the date?

Mr. Waite. There you get the difficulty of the thing. I think the reasons for it are plain, and it is desirable if we can feasibly do it. That is why I separated the motions.

Are you going to require a statement as to where he was at the time, and what time, and a statement of the witnesses by whom he expects to prove it? If you just require a statement that he is going to set up the defense that he was not there at the time, and nothing more, you have not gotten very far.

Mr. Wechsler. Is the prosecution then limited to the date alleged in the indictment, and no other, if the defendant serves that notice?

Mr. Waite. I think it is a desirable thing if we can work

it out, but I am not a proponent of it.

Mr. Holtzoff. Why could we not provide that if a notice of alibi evidence is given by the defendant, that limits the evidence to the date given in the indictment unless the prosecution notifies the defendant that it will rely upon some other date? That would be fair to both parties.

Mr. Wechsler. Of course, all this presupposes a crime that is alleged, or an act, committed on a single day; and what raises the largest question to my mind is that the Federal offenses are to such a great extent continuing offenses, in which the specification of time is not required at all.

Obviously this would not work in a conspiracy case or a mail fraud case.

Mr. Holtzoff. No; this would apply to such cases as bank robbery or transportation interstate of stolen vehicles on a certain date.

Mr. Wechsler. It would apply to very few Federal offenses, and I should think that robbery and kidnaping would be about the only important ones.

Mr. Waite. Would it not apply to any offense in which the particular date was important?

Mr. Medalie. In the States having alibi defense statutes there must be some experience as to just what cases require alibi defense notice. Obviously they cannot exist in cases in which the crime is committed over a period of six years, or like one that I recently tried in the Federal court, the McKesson & Robbins case, where the alleged mail fraud was committed over a period of twelve years, and had there been an alibi statute they would not have done anything about it.

Mr. Waite. It is given as a matter of course regardless

of whether they put in any evidence to that effect or not.

Mr. Wechsler. My feeling is that on this stage of the motion such a provision would do infinitely more harm than good, and therefore I shall oppose it unless a memorandum is prepared which indicates that it would be a feasible thing in view of the realities of Federal procesution.

Mr. Holtzoff. It is feasible in respect of all the crimes -- and there are any number of them -- which are committed by commission of a certain act: bank robbery, transportation of stolen property in interstate commerce, kidnapping, and so forth. Of course, alibi would not be used in a conspiracy charge. In other words, wherever the evidence of alibi would be suitable, under the proposed rule you would be required to give notice of it. But in the cases you have in mind the defendant would not use evidence of alibi because it would not be appropriate.

Mr. Medalie. In a conspiracy case, for instance, suppose that one overt act is important -- you need only one, but they allege eight or a dozen: Would you be required to file alibi notice, on your theory as to the overt acts?

Mr. Holtzoff. I suppose you would, just on the overt act, but not on the conspiracy itself.

Mr. Glueck. Would the prosecutor be bound by the one overt act?

Mr. Medalie. Whatever overt act he relied on he would have to prove, or his case would fail.

Mr. Crane. I do not see how this comes up at all; because the defendant would not plead a date unless he was prepared to show that on that date he did not commit the crime. And if he

were going to offer it it would be because of evidence he had in mind showing that he was not there at the time alleged. I do not see how this interests the people. He gives it only as a date he had in mind on which he could not commit the crime if he were not present. He only gives the notice. He is not required to do anything more unless he wants to plead alibi.

Mr. Medalie. I think by this time there must have been enough experience in the various States to give us adequate information as to how this works, and I think we ought to have the benefit of it.

Mr. Holtzoff. Michigan and Ohio have these statutes.

Mr. Dean. There is an article published two years ago-- I do not recall all the details of it-- in the Texas Law Review.

The Chairman. I have it here.

Mr. Dean. It was written by two people down there. They made a canvass of the States having alibi statutes on the statute books, and they made a canvass as to how successful it had been. They also asked how many cases there had been in Texas in the course of a year or two in which it would have been helpful to them. The result, as I recall it, was that the Texas prosecutors did not think such a statute would be helpful to them, but in the case of the States having such a law on their statute books the prosecutors thought it would be helpful.

Mr. Crane. I think we will be influenced somewhat by the attitude of the lawyers generally, and there seems to be some demand for notice of this kind. I do not think, personally, that it is going to do any good, but that is not of any consequence. I think it cannot do any harm. If you are going to

give notice to the defendant, if he does not want to give it, all right. If he does, so much the better. It cannot do any harm. There is nothing unconstitutional about it. I do not see any harm in it.

Mr. Holtzoff. The Attorney General of the United States has for a number of years been recommending legislation requiring notice of alibi.

Mr. Medalie. But the question is how well informed they were when they did it; and we would like to have the benefit of that information; because much of that material has come up in the course of irresponsible newspaper editorials.

Mr. Robinson. We have had every statute in the United States on this subject, and have abstracted the cases, and we have the article of which Mr. Dean speaks. I happen to be familiar with it because I drew the alibi statute for Indiana. That is what it really is. Because if you try to frame a statute to meet all possible developments the statute will have to run about a page and a half. The Michigan statute is quite brief, but it has been criticized for the reason Mr. Wechsler states: It does not give the defendant, on the face of the statute, much of a chance; and it has been criticized on that account.

If you do take into consideration the protection of all the defendant's rights, you will have a rule of a page and a half. Of course we cannot devote a page and a half to the rule on alibi, and another page and a half on insanity, and so on with all the rest of them.

Our problem is how to get this matter organized in such a way as to deal with it rather briefly and compactly, with dis-

cretion in the court, as Mr. Seasongood suggested.

Mr. Crane. Of course you also must be able to meet the emergency which happens only once in a life time -- that a notice may be amended in the discretion of the court, giving proper and due time to the district attorney to meet that change.

These notices are not hard and fast. They are all in the discretion of the court, and they can be met. The only thing we have to be careful about is that we do not soften the thing so that it is not liberal enough to give every one a chance to assert his rights in case of mistake.

Mr. Wechsler. Has any attention been given to the reverse of this matter -- whether the defendant is definitely informed of the position in which the prosecution intends to put him on this when they get to the state of the proof?

Mr. Robinson. It is in the jurisdiction of the court. That is the essential thing. But in our provision we had tried to be fair with the defendant.

Mr. Wechsler. Of course the jurisdiction of a court is only a minor phase of it. The location may come up a hundred times.

Mr. Medalie. The rule provides that the defendant may be given an opportunity to get up a bill of particulars.

The Chairman. Are you ready for the question?

Mr. Longsdorf. Are we dealing with insanity? May the motion be restated?

The Chairman. No; this is alibi alone.

(The motion was agreed to.)

Mr. Waite. Mr. Chairman, prompted by Mr. Seasongood, I should like to make the rest of the motion, which is intended to

cover what the Reporter already had in, but to bring it up on a basis of information rather than on a basis of a motion to dismiss. My motion is this: If the defendant intends to defend on the ground of coercion, self-defense, infancy, or intoxication, he shall give proper notice thereof.

I am not using the words that I hope will appear, but simply am trying to give my idea, when I say "shall give proper notice".

"If he does not give such notice the court may in its discretion refuse to admit evidence of the particular defense."

Mr. Holtzoff. I should like to make an amendment to the motion: to strike out "self-defense" and "intoxication" -- for the reason that I do not think self-defense is affirmative matter. Self-defense is part and parcel of the transaction.

Mr. Medalie. It deals with contributory negligence.

Mr. Holtzoff. Yes; it is part and parcel of the transaction, of the charge the Government makes against the defendant. Of course I think it goes to criminal intent as a matter of evidence rather than affirmative matter. Of course it is not defense except as it denies the presence of ~~reason~~ intent.

Mr. Crane. The same thing can be said as to every one of the others; and so far as a rule on this notice business is concerned -- which is new -- I think if we follow the middle ground, and not the whole, we will be doing a wise thing.

Mr. Robinson. That is right.

Mr. Crane. These rules can always be amended; but let us let the court see how this notice works out. If it works out we can always include these others. Why should we go the whole business, with the result that perhaps none of it is adopted?

They may adopt it for alibi and insanity because experience has taught, as Mr. Waite says, that sometimes that does catch a prosecutor. But the others have been in every case from the time of the commencement of criminal prosecutions down to date: coercion as to admissions, for instance. In every criminal case tried there is a plea that it is an admission but it has been extorted, that the man has been beaten up, or something of that sort -- some true and some false.

I am not against it, but I am saying it is a wise thing to go part way at a time. Insanity has been recommended and talked about by the bar journals and others. Alibi has been recommended by the Attorney General. But I think it is wise to go slowly and see if it works well.

Mr. Medalie. It seems to me that at least three of these items are matters on which no notice is needed for the protection of the prosecution. Of course, self-defense is one of them. The prosecution proceeding in an assault case is prepared for every possibility. Infancy is another -- the question of whether a person is under fourteen years of age. That is all infancy amounts to in Federal courts; and the district attorney is on his guard and knows that he is dealing with a young person whose age he ought to prove.

Intoxication is a variable thing. A man might have been drinking and it might have affected his intent, without his being intoxicated.

If it is a specific act like robbery or assault, the prosecution is prepared to meet everything that comes up with respect to his condition at the time. Notice is not necessary for the protection of the Government.

Mr. Glueck. I am inclined to agree with both the gentlemen who just spoke -- and for the reasons given -- and I think if we examine experience we shall find it is largely in the alibi situation that there have been abuses. I cannot conceive of it in an insanity situation because the prosecutor can always ask for a postponement if he is surprised, and can bring in his own witnesses later.

But in the alibi cases, ever since the existence of large-scale gangsterism and organized crime, I have been increasingly aware of abuses based on surprise. I am willing to go along in so far as insanity and alibi are concerned, but I agree with Judge Crane that we should not overload these.

Mr. Waite. I am not a proponent of any of these things, Mr. Chairman.

The Chairman. I understand.

Mr. Waite. But I want to help the Reporter determine whether as a matter of policy we want to find out to the utmost extent what the defense is going to be, just as in a civil case. For instance, we want to determine whether the defendant is going to set up notice of entrapment, which of course is set up in the Federal court cases time and time again.

Mr. Crane. There is such a difference between the defense in a criminal case and an affirmative defense in a civil case, as of course you know. In a civil case the defendant must prove it by a mere preponderance of the evidence. I suppose that is the rule throughout all the common law jurisdictions and all States. But a defendant is never bound to prove anything. The defendant is never bound to prove any affirmative defense-- we speak of it as "affirmative defense", but any

defense. If he pleads insanity or alibi or anything else you speak of here, all he has to do is to create a reasonable doubt. The people have to prove that there was no coercion and that his act was voluntary.

So it is a different situation. You cannot compare it to the civil practice.

Mr. Waite. I reiterate that. The only point is to determine whether we think it wise to determine the defense that will be made.

Mr. Crane. I agree with that, and I think a step at a time in an innovation is a wise thing. I am with you on alibi and on insanity. I do not see why it should not be, if the defendant is honest. And if he is not, he ought to go to jail anyway.

But I think it unwise to push it any farther.

Mr. Holtzoff. Did you include former jeopardy in your list?

Mr. Waite. No; I did not.

Mr. Medalie. You spoke of entrapment, but there is no question on that. You are dealing with the acts of Government agents, and you do not have to start roaming around to find someone.

The Chairman. Are you ready for the question on Mr. Waite's motion?

(The motion was rejected.)

The Chairman. Now that we have covered subsection (2) on page 4 --

Mr. Wechsler. I suggest a motion with reference to immunity and double jeopardy, where it seems to me that the case

for this sort of thing is even st_ronger than it is in cases of insanity and alibi.

Mr. Youngquist. Let me point to two others that fall into the same category, I think, with those: line 83 on page 5, justification and entrapment. I think those should come in, for the reasons that have been given with respect to the ones appearing in subdivision (4) -- that is, coercion and self-defense.

Mr. Crane. I think all those are out.

Mr. Youngquist. This is in subdivision (4).

The Chairman. Have not all the modifications been directed to subsection (2) on page 4?

Mr. Holtzoff. That is right.

The Chairman. I am trying to see if we have not disposed of subsection (2) on page 4, before we go on to subsection (c) at the bottom of the page.

Mr.Holtzoff. I think we have, Mr. Chairman.

Mr. Wechsler. Does that imply that you consider some different procedure with reference to double jeopardy and immunity, or that we have now passed the whole question of notice and affirmative defense?

Mr. Youngquist. No.

The Chairman. I thought it was also in subsection (2), the question of whether the word "affirmative" should come out.

Mr. Crane. I think you are right, Mr. Chairman. I thought our notice covered it broadly, and that we whittled it down to these two things, and that questions of fact should not be required to be tried separately from the main trial.

The Chairman. I think you are correct.

Mr. Wechsler. If that question is open I should like to express a thought about it. In the case of immunity and perhaps also in the case of double jeopardy -- although I am impressed by what Mr. Medalie said -- it seems to me there is frequently justification for separate trial of the issue. It is not unknown to Federal practice. In the Heike case, which was a famous antitrust prosecution, the issue of immunity was tried first. The record fills two volumes. As I recollect, the case went off on that ground. I do not think we should preclude that possibility.

Those two defenses, unlike the two we have dealt with, are actually confession and avoidance. If the position of the defendant is that he is willing to admit the charge in the indictment but claims he has a defense which transcends the charge, it seems to me it would be advantageous to him, particularly in view of the provision as to appeals, to provide some method to get that tried without having the Government prove its case first.

For instance, consider an antitrust case in which it would take the Government a year to prove its case, and in which the only issue is the question of immunity. The same thing may come up in a mail fraud trial, and there are many cases where the only real issue is the issue of immunity. I think we should lay a basis for that.

Mr. Holtzoff. Do you mean also former jeopardy?

Mr. Wechsler. I am not so clear about that. But in the other I see no occasion for changing that practice.

The Chairman. There is quite a variation in the various Federal districts.

Mr. Wechsler. Yes; I know that.

The Chairman. You cannot tell what is going to be done in one district because of what is done in another.

Mr. Wechsler. I understand that, of course.

Mr. Medalie. Either compel the trial on the separate issue or make the trial of the separate issue a permissible thing.

Mr. Wechsler. I suggested that it be discretionary.

Mr. Medalie. Discretionary with whom?

Mr. Wechsler. With the court.

Mr. Medalie. With the judge, or with the defendant if he chooses to try that separately?

Mr. Wechsler. No; I meant with the court.

Mr. Medalie. Of course, one of the things you want to consider, if this is to be considered, is whether the defendant shall have the choice as to a separate trial; and the other is whether the court shall compel him to have it.

Mr. Wechsler. Yes.

Mr. Medalie. It sometimes happens, where defendants do not get experienced counsel or do not pay the counsel sufficient to have them work hard on the case, that the information frequently comes to the defendant's counsel that he has a defense based on fact that the defendant never thought about. I should not like to see those poor devils deprived of it, and see it used only by defendants who can afford to employ high-priced counsel.

Mr. Wechsler. It might meet the situation to try the issues in reverse order, without making it obligatory. I recognize that possibility.

Mr. Medalie. I think it would be a practical thing, if the defendant is willing to stake his liberty on the trial of the separate issue, to let the court have discretion to do it.

Mr. Wechsler. Of course he might not have to stake his liberty on that. He might devise an issue where he could proceed to the major issue if he lost on the minor one. It is the order of trial which seems to me to have merit.

The Chairman. Will you make a motion on that, definitely?

Mr. Wechsler. I move that further consideration be given to the defenses of immunity and double jeopardy with reference to the desirability of requiring advance notice that the defense will be made, and preserving the power of the court to try those issues separately.

Mr. Holtzoff. In listing those offenses do you want to include former acquittal and former conviction?

Mr. Wechsler. Yes; I mean the classes of offenses.

The Chairman. Do you want to add the same provision as in the earlier motions: Suppression of evidence?

Mr. Wechsler. My feeling is that this is a little more complex. I deliberately put it in the form of suggesting that further study be given to this possibility, because I should not like to commit myself now to the penalty clause.

Mr. Glueck. Specifically, I suppose you mean by "further study" that the procedure in different districts ought to be determined.

Mr. Wechsler. Yes; and that the issues that are retained in any proposal of this sort be articulated and given concrete consideration later.

The Chairman. Are you ready for the motion?

Mr. Longsdorf. Mr. Chairman, I am not ready for the motion. It seems to me that a lot of these defenses fall under what I described yesterday in Blackstone's words as "special pleas in bar." Perhaps we have not disposed of those. If I am wrong I should like to be set right. But it seems to me that it is inherent in the nature of all those special pleas in bar that they raise no issue whatever as to whether the crime was committed. They concede that it was committed, but the defendant says that the time has passed or that it was barred in some way.

Mr. Holtzoff. My understanding is that it is optional with the defendant to file special pleas in bar to raise that point.

Mr. Longsdorf. Yes.

Mr. Holtzoff. He may raise them by a plea of not guilty, as well.

Mr. Longsdorf. Yes.

The Chairman. But if he does not raise it, it can be tried.

Mr. Longsdorf. If he does not raise it, he can be tried on anything that remains available to him.

Mr. Wechsler. That gives point to Mr. Medalie's suggestion of a while ago, that perhaps this ought to be optional with the defendant. That is the effect of existing practice. I meant that that should be a subject of consideration.

Mr. Seasongood. Mr. Chairman, I think it should be set up, because if you merely bring these things in under the general issue then you try the whole case, whereas if you have given

notice in advance and they are things that could be determined in advance of a long trial on the main case, the court should have the opportunity of doing that in its discretion.

Mr. Longsdorf. Yes; I agree.

Mr. Seasongood. Suppose you give notice, and at the end of the trial on the issue you make a motion to dismiss, based on the facts in the motion. It may be overruled. But the advantage is that it gives the court the opportunity of trying out these cases in advance of trying a long case.

Mr. Medalie. Do you want it compulsory?

Mr. Seasongood. I should like to have it compulsory, because then the court would have the privilege of avoiding a long trial.

Mr. Medalie. But I can show you how the defendant might not even know that he had those defenses, and yet they existed. For example, the statute of limitations.

Mr. Seasongood. Why wouldn't he know about the statute of limitations?

Mr. Crane. Sometimes it is very complicated, on a question of fact.

Mr. Seasongood. He knows enough to know whether he is going to claim it.

Mr. Medalie. Oh, no; he does not know. He may not know enough of its significance with respect to a particular act.

The Chairman. But the point is that the court can, in advance of full trial, determine whether the defendant has acted in good faith. If the court thinks so, the court then can allow this issue to be tried.

Mr. Medalie. I think that is giving the courts too much

power.

The Chairman. That is something on which you have not only the ruling of the trial court, but any abuse of discretion would be handled by the appellate court.

Mr. Medalie. I think that is all theoretical. In practice it does not work that way.

Mr. Wechsler. Does our action with reference to insanity and alibi allow sufficient leeway?

Mr. Holtzoff. Yes.

Mr. Crane. In coercion that is part of the crime itself. What you are speaking of now is distinct.

Mr. Holtzoff. Correct.

Mr. Crane. And it has nothing to do with the crime. It is a question of whether the man was in former jeopardy or immunity or whether he served a term for it and was tried and convicted.

Mr. Holtzoff. Yes.

Mr. Crane. That has nothing to do with the crime. All the things Mr. Waite was speaking of involve matters in the prosecution itself -- things for the prosecution to prove.

Mr. Glueck. The same thing applies in the others. For instance, a man says, "Yes; I killed him, but I was a warden acting under a duly executed warrant."

Mr. Crane. But he killed him.

Mr. Glueck. There is some distinction there.

Mr. Medalie. But why should you need, in a case like that, for any practical reason to give notice, when the prosecution knows exactly what happened?

Mr. Youngquist. I do not think you should.

Mr. Seasongood. Because you give the court an opportunity to determine if it should dispose of the case in that way, and thus dispose of a long trial on the merits.

Mr. Crane. I do not think you could do that on justification.

Mr. Seasongood. Perhaps not.

Mr. Crane. Those things involve something different from the crime itself, rather than those you are thinking about.

Mr. Seasongood. But you could have the point of whether this man was a warden and whether the deceased was trying to escape.

The Chairman. That is not the motion. The motion covers former acquittal, immunity, and jeopardy.

Mr. Wechsler. Yes.

Mr. Seth suggests pardon, and I think that should be amended. But I was not going to suggest the statute of limitations, for obvious reasons.

Mr. Medalie. If you are including pardon, I should like to ask this. Suppose through inadvertence, for instance, or lack of knowledge the defendant fails to give notice that he has been pardoned, or suppose through lack of information on the part of counsel or lack of appreciation of the proper procedure counsel does not give notice, and then you have a trial. According to the procedure outlined here, is that man to be convicted?

Mr. Glueck. Would that ever occur in real life?

Mr. Youngquist. Does that occur in real life -- the king's pardon given in advance of the crime?

Mr. Seasongood. It would be in the court's discretion.

Mr. Wechsler. I think in fact there may be much in making this optional with the defendant, just because you do not have a real procedure when your action would be to allow the defense in the case that Mr. Medalie puts.

But in this particular situation that we are dealing with now, even if it were optionalwith the defendant either to interpose the equivalent of a special plea or to raise it under the general issue, we would be in a better situation than if it must be raised under the general issue.

I made no concrete motion, but my thought is that that may well be the resolution.

Mr. Medalie. I would be willing to go along with the idea of making that optional with the defendant, if knowing -- or with his counsel knowing -- that he has what he considers a complete bar to the action, for instance: He ought to have an opportunity speedily to rid himself of the case.

Mr. Wechsler. Should it not be considered by the Reporter before we pass on it?

Mr. Medalie. Yes.

The Chairman. Are you ready to vote on the motion?

(The motion was agreed to.)

The Chairman. We still have outstanding one or two points under subsection (2) on page 5: Limitations, justification, and entrapment. Is there any motion as to that?

Mr. Medalie. Cannot we start with the words "affirmative defenses"?

The Chairman. I thought we eliminated that.

Mr. Holtzoff. We eliminated it by striking out the sentence in subsection (2) which uses it, but we have not eliminated

it from the heading of subsection (c) which we are dealing with now. I think we should do that.

The Chairman. The Reporter agrees that on line 71 we may strike out the word "affirmative".

Mr. Glueck. Line 73.

The Chairman. And wherever the word "affirmative" appears throughout the section.

Mr. Holtzoff. I suggest that "entrapment" and "justification" be stricken out. I do not think that should require notice.

Mr. Crane. Haven't we dealt with all of those by the motions that have already been made? And the rest are all out.

Mr. Seasongood. You must have some way of attacking the indictment.

The Chairman. That stays.

Mr. Holtzoff. With reference to lines 76 and 77 I want to make a suggestion. Misjoinder should not be a ground for dismissal. As a matter of fact, that is in line with a later rule that misjoinder shall not be ground for dismissal, but for dropping the defendant or dropping the count, whatever the case may be.

So I am willing to strike out from lines 76 and 77 the clause "because of misnamed defendant".

Mr. Robinson. I have talked to Mr. Holtzoff about that, and I think he feels that the reason for its being included here was to simplify the procedure so far as possible by including everything under a motion to dismiss. I should be very glad to have his suggestion as to how we shall have the court's attention called to misjoinder or misnaming.

Mr. Holtzoff. I would make a motion to drop the defendant

because of misjoinder or to drop a count because of misjoinder.

Mr.Robinson. In other words, you are adding to the motion?

Mr. Holtzoff. Yes.

Mr. Robinson. With this effort to simplify or perhaps by listing all motions under the general motion to dismiss -- misjoinder or whatever it may be -- you think the effort to simplify it by putting it all under the general heading is not possible to achieve?

Mr. Holtzoff. I think the words "motion to dismiss" are misleading, as used in connection with a motion to drop a defendant.

Mr.Robinson. Perhaps our previous answer has taken care of this. I think we struck out the words "to dismiss" at the beginning of rule 7.

Mr. Holtzoff. We say that the defendant shall file a motion to dismiss the indictment or information.

The Chairman. Cannot that be covered by the words "a motion addressed to the indictment or written accusation"?

Mr. Holtzoff. I think that would cover it completely.

The Chairman. Is that assented to generally: "A motion addressed to the indictment"?

Mr. Wechsler. Should not there be a specification as to what the motions are, on the part of the court, as there is with respect to the civil practice?

Mr. Youngquist. I do not see why it is not all right as it stands. If there is a misjoinder, the defendant who is misjoined makes a motion to dismiss. That would result in dismissal as to him -- or the dismissal of a single count. But that is as far as it would go. Otherwise the indictment would stand as to

other defendants and as to other counts.

Mr. Glueck. Then you would have to change the phraseology of 72, because that speaks of the entire document: "A motion addressed to the indictment or to a part thereof".

The Chairman. Then, Mr. Holtzoff, your motion as to 76 and 77 is withdrawn?

Mr. Holtzoff. Yes.

Mr. Medalie. Line 72: "dismiss the indictment or information or written accuastion if he wishes to establish affirmatively".

The Chairman. That is already out.

Mr. Medalie. Yes; "if he claims" --

Mr.Glueck. "If he contends" is better than that, I think.

Mr. Medalie. Do you prefer "contend" to "claim"?

Mr. Youngquist. Would not this do it: "file a motion under the accusation"?

The Chairman. All right; subsection (c) will be passed.

Mr. Seasongood. That is not sufficiently broad, is it? Because if you want to contend that the indictment was improperly obtained -- for instance, that the prosecutor pressed for the indictment --

Mr.Robinson. That would be a violation of statute in most States, would it not?

Mr. Holtzoff. There is no Federal statute-or if the prosecutor was present or participated in the deliberations, or any other irregularities. You must have some means of attacking that.

Mr. Holtzoff. Quite a common claim is that an unauthor-

ized person was present in the grand jury room when the grand jury was deliberating.

Mr. Youngquist. Is all of that taken care of by (1)?

Mr. Seasongood. I do not think so.

The Chairman. Your motion is "where the indictment was improperly obtained", or words to that effect?

Mr. Seasongood. Yes. And then another motion: "where the affidavit is based in positive terms". That was involved in the medical case.

Mr. Medalie. Are we dealing here with the composition of the grand jury and such proceedings before it as would render the indictment illegal?

Mr.Seasongood. Yes. In other words, in order to broaden this I made the suggestion; and the Reporter will know how to broaden it to cover all those matters.

Mr. Robinson. The words "where improperly obtained"?

Mr. Seasongood. I have no particular choice of words.

Mr. Holtzoff. Why not say "obtained in violation of law"?

Mr. Seasongood. Yes; that would be good.

Mr. Medalie. That would cover irregular proceedings and unauthorized persons and bullying by the district attorney, and all the other claims that appear on such motions.

Mr. Seasongood. At least it is intended that there should be some privilege of attacking the indictment.

Mr. Wechsler. Will there be any specification of law with reference to indictments, or will we leave that law as it is? Will there be a rule specifying what makes an indictment invalid and what does not?

Mr. Robinson. It would be a very long rule. I do not

think we should try that.

Mr. Wechsler. Is there not some rule there that needs correction?

Mr. Robinson. Probably, but I do not think it is for us to correct it.

Mr. Wechsler. Why not?

Mr. Robinson. We could put it on the basis -- I would not say it is outside the scope of the committee's work, but it would be a long catalogue, from which there would inevitably be an omission.

Mr.Wechsler. One of the major reforms in the new rules on civil procedure was to cut through some of the red tape regarding what made a pleading insufficient; and I think there may be room for similar work here. I do not assert how much of that is needed, but it seems to me it is a problem.

Mr. Youngquist. It seems to me that all those matters are covered by the decisions; and if we undertake to restate them here we will be in danger of perhaps omitting something that now is the law. In addition to that, as the reporter says, it would make an unduly long rule. I think we can safely leave it in this fashion.

The Chairman. As I understand, all that Mr. Wechsler is arguing for is an investigation of irregularities before the grand jury.

We are getting two separate motions, I believe. May we have a vote on the motion to cover by appropriate language irregularities in obtaining the indictment?

(The motion was agreed to.)

The Chairman. Now a vote onMr. Wechsler's motion that the

Reporter be asked to prepare a memorandum as to the adequacy of the present state of the law on the whole subject of irregularities in the obtaining of indictments. Was that the scope you had in mind?

Mr.Wechsler. I meant it to be a little broader than that: on the factors which now invalidate an indictment, other than its insufficiency to charge a crime.

Mr. Dession. What it comes down to is what was formerly covered by the plea in abatement, that we have already abolished.

Mr.Wechsler. That is right.

The Chairman. Is there any discussion on the motion?

(The motion was agreed to.)

Mr. Crane. I think we should leave out the indictment. I do not want to oppose anything Mr. Wechsler wants, but I think the reporter is about right. We have the form of the indictment, and this deals with the matter of prosecuting it. I think it has been covered quite fully by what Mr. Seasongood just said regarding the motions that you can think of. We could not specify the facts which might make an indictment invalid. But now we have it covered by a motion that anything at all makes it invalid or illegal. When we come to specify what an indictment shall contain and how it shall be obtained I suppose it will mean that there must be affirmative evidence of the crime submitted to a grand jury, and twelve men voting to indict. I do not know what else there is.

Mr. Medalie. We do not do that in Federal cases.

Mr. Crane. I know.

Mr. Wechsler. Suppose it was alleged that the window was open and that some one was listening through the open window?

Mr. Crane. Is not that covered by the motion which has just been made?

Mr. Wechsler. The effect of the motion just made was that we would retain the rule that the indictment would be invalid under such circumstances.

Mr. Crane. If you are going to specify the facts under which an indictment would be invalid you would have to be a prophet. You cannot see the future. There was a case in New York where a porter hid behind a curtain in the grand jury room. It is simply a factual situation. You cannot foresee events and facts. But the motion made was a very good one, and covers everything you can think of that gives the defendant a chance to object to the indictment.

But to specify the facts -- and I am perfectly in sympathy with you -- I do not think is necessary.

The Chairman. The Chairman is in doubt as to the vote on the motion. (Putting the question.)

(The motion was rejected.)

The Chairman. Have we covered --

Mr. Medalie. No; subsection (2) --

The Chairman. Have we covered subsection (1)?

Mr. Medalie. Pardon me.

The Chairman. Very well. Now subsection (2).

Mr. Medalie. I do not believe that the defendant ought to have the right to get a trial on a motion that he was entrapped. That applies to his motion that there is a bar in fact to a conviction because of impossibility -- in the case of alibi.

The Chairman. May we hold that, and dispose of (2)?

Mr. Medalie. They are really all embraced in one theory that the defendant ought not have his case tried on a motion; he should go to trial if the district attorney wants his case tried; also that he did not have the alleged criminal intent at the time he did the act, because of coercion and so forth.

Mr. Youngquist. That is all out; is it not?

Mr.Medalie. Also that any other matter constituting an avoidance or an affirmative defense shall likewise be asserted by the defendant. I think we know what those are, and we should not give him an opportunity to try his case on a motion.

The Chairman. Have not we disposed of everything definitely except statute of limitations, justification, and entrapment? And on that we disposed of those by common consent.

Mr. Medalie. It is my view that on a motion he ought to be permitted to raise the question of former jeopardy, former conviction or acquittal, immunity, or pardon, and have the issue tried.

The Chairman. That we passed on.

Mr. Medalie. And have it disposed of without any opposition --

The Chairman. We passed on that.

Mr. Medalie. I do not think he should have his defenses determined on evidence.

Mr. Seasongood. The jurisdiction of the court is permissible.

Mr. Medalie. That is under (2).

Mr.Seasongood. The rule in civil cases is that if you are pleading a case for jurisdiction you can make a motion to

dismiss, and can supply evidence to show that the court does not have jurisdiction.

Mr.Medalie. That is right.

Mr. Dession. Or in the statute of limitations, where it appears on the face of the indictment.

Mr. Medalie. Yes. I think on motion he should be able to do everything except try his case.

Mr. Dession. That is right.

The Chairman. Lack of jurisdiction, then, as I understand it, stands -- on lines 81 and 82 -- by common consent?

Mr. Medalie. Yes.

The Chairman. What is your view with respect to the statute of limitations?

Mr. Holtzoff. I think that should stand only if it appears on the face of the indictment that the prosecution is barred. I think the defendant should have the privilege of moving to dismiss under those circumstances, but not otherwise.

Mr. Dession. I so move.

The Chairman. The motion is seconded.

(The motion was agreed to.)

The Chairman. Justification.

Mr. Medalie. I think that should go out.

The Chairman. That is out, by common consent.

Entrapment is out by common consent.

That takes us through to No. 3.

Now, (3) -- where there is a bar in fact to a conviction because of impossibility. That is out by common consent, I take it.

Mr. Robinson. What is the difference between a notice

and a motion?

Mr. Dession. Mr. Waite's motion, I believe, would require that if you are going to assert that as one of your defenses you give notice of it in advance.

The Chairman. That the defendant did not have the original criminal intent, because of insanity or intoxication.

Mr. Medalie. Insanity we passed on separately.

The Chairman. How about the last sentence on the page: "Any other matter constituting an avoidance or affirmative defense shall likewise be asserted by the defendant by a motion to dismiss the written accusation."?

Mr. Robinson. That is out, in view of the discussion here.

The Chairman. "The motion to dismiss because of an affirmative defense shall state the facts and shall cite the records, if any, on which the defense is based."

Mr. Medalie. The motion to dismiss, as hereinabove provided.

The Chairman. "Such motion" takes care of all that, and strike out the "affirmative defense" -- "the motion to dismiss because of an affirmative defense" -- and just say "Such motion", striking out the last seven words in line 91.

The next sentence: "The defendant may from time to time file with the court a motion for an order requiring the Government to provide a bill of particulars stating further facts necessary to enable the defendant to prepare his motion to dismiss."

Mr. Seasongood. How about "from time to time"? Can he do it as often as his fancy suggests?

Mr. Holtzoff. I think we should strike out "from time to time".

The Chairman. Yes.

Mr. Youngquist. I have marked it in my notes to eliminate the whole thing.

Mr. Robinson. The only thing is to bear in mind that this will be examined very carefully by lawyers all over the country, and to consider whether we are seeing to it that all the proper tests are made.

Mr. Youngquist. Have not we done that in an earlier rule providing for bills of particulars, not only for the Government?

Mr.Robinson. If it is repetition it should go out.

The Chairman. I do not think it is repetition.

Mr. Medalie. I think you intended this sentence in (a) of the provisions with respect to alibi motions --

Mr. Robinson. That would be one of the instances in which it would be immaterial.

Mr. Crane. Is this the only provision with respect to bills of particulars?

The Chairman. No; but in the other instance it is directed to indictments only.

Mr. Crane. I do not think we need it.

The Chairman. Rule 8, page 2, line 26.

Mr. Youngquist. That takes care of it in both ways; does it?

Mr. Holtzoff. I think it does.

The Chairman. That is with respect to indictments.

Mr. Crane. What else is there?

Mr. Youngquist. 29 -- line 29: "A bill of particulars likewise may be supplied by the defendant voluntarily, or by order of the court if additional details are necessary to give notice to the Government."

Mr. Crane. We questioned that, and there will be a redraft of it.

Mr. Holtzoff. I move that we strike out the sentence beginning with line 93 on page 6.

Mr. Medalie. I second the motion.

Mr. Robinson. At what point are you providing for a bill of particulars for a defendant who wants the information?

Mr. Medalie. If the indictment does not tell him enough about where he is supposed to have been, and when, at the time the crime was committed, he makes a motion for a bill of particulars and states his intention to give alibi evidence.

Mr.Robinson. All right; that line will go out.

The Chairman. By common consent, the sentence beginning on line 93 is eliminated.

Mr. Dession. Might we take out the language and put it back on page 2 of Rule 8: "Defendant gives notice of his intention to move to dismiss"? Because once having gotten this elaboration of the indictment to base his motion to dismiss --

Mr. Medalie. He can make a motion for a further bill of particulars; he can always do that. That is the accepted practice if it is not adequate.

Mr. Dession. But where the bill of particulars is adequate and gives you what you want, but gives you something that you did not see in the indictment in the first place, and consequently gives you grounds for motion to dismiss. So why

could not we say, "notice of the offense alleged, or to enable the defendant to prepare his motion to dismiss"?

Mr. Longsdorf. Would you amend that to read "to prepare a notice or motion to dismiss"?

Mr. Robinson. Where is that added?

Mr. Youngquist. At the end of line 28.

The Chairman. "Or to enable him to prepare a notice or motion". (Putting the question.)

(The motion was agreed to.)

The Chairman. That brings us to (d) on page 6.

Mr. Wechsler. Mr. Chairman, going back to page 2 of Rule 8, may I ask whether there remains the point for the bill of particulars to be supplied by the defendant to give notice of the defense which he is asserting? Was not that related to the affirmative defense provision that went out; and does not the provision as to notice of insanity or alibi, and any further provisions that may go in there, meet this? I refer to lines 29 to 32, page 2, of Rule 8.

Mr. Seth. They went out.

The Chairman. I had a note here: "Judge Crane wanted his own bill of particulars on this, and the Reporter is directed to prepare it."

Mr. Crane. How far they can compel a defendant to disclose the facts.

The Chairman. That is right.

Mr. Wechsler. Of course the discussion today on notice probably has answered that question and has eliminated the need for this provision.

Mr. Holtzoff. Suppose a defense of former jeopardy is

raised by motion, and the prosecution needs some additional particulars.

Mr. Crane. Yes; if there are to be any other affirmative defenses, I see the point of that.

Mr. Holtzoff. I do not think the motion is used very frequently.

Mr. Crane. All I had in mind is that I think there is a point beyond which the Government cannot go in fishing for evidence.

Mr. Wechsler. I agree with you. My point is that the whole occasion for it may have been lost now, anyhow.

The Chairman. I suppose the Reporter will review that in checking over the record.

Now (d).

Mr.Robinson. The word "affirmative" has been stricken out-- in line 98 -- and at any other place where "affirmative" would appear, as defining or qualifying the defense.

TheChairman. Do we say "United States attorney", or do we refer to the "district attorney"?

Mr. Holtzoff. "United States attorney" is the technical name.

Mr. Youngquist. We also use the word "government" throughout the rule. Is that appropriate?

Mr. Holtzoff. I do not think so. I think it ought to be "prosecution", rather than "government". I would use "United States".

Mr. Medalie. The defendants prefer that the word "prosecution" be used, and they use it every once in a while with subtle effect. They do not like the word "government".

Mr. Holtzoff. I think the words "United States" are proper to be used.

Mr. Robinson. I should state to the committee that that question has been carefully considered. We may be wrong in our conclusions. We considered "government", "prosecution", and "United States attorney"; and one by one they were eliminated until we came down to "United States attorney". The statute seems to use "district attorney"; but I understand that the Department of Justice uses "United States attorney", and some States use "UnitedStates attorney".

So the Reporter's office is satisfied that the proper appellation for the United States attorney would be "United States attorney".

Mr. Dession. How about special assistants to the Attorney General and special attorneys?

Mr.Robinson. Would not he then act as an assistant United States attorney?

Mr. Holtzoff. No.

Mr. Youngquist. There is another item for definition, it seems to me.

Mr. Medalie. The statutes use the words "United States attorney" and "district attorney", and yet the certificate of appointment of a United States attorney is "the attorney of the United States in and for such and such a district."

Mr. Seth. Should not we use "attorney for the United States"?

Mr. Youngquist. What bothers me is the use of the word "government".

Mr. Glueck. On page 7 you have an instance of the use of

the word "government".

Mr. Robinson. Probably that would be the place to use "attorney for the United States".

The Chairman. We have two questions. One is whether we shall use the word "government" or the words "United States". It does look a little heavy to use the words "United States". Every one knows what it is.

Mr. Longsdorf. If we use the word "government", I think we should capitalize it.

Mr. Crane. When we make speeches for the Government we say "We, the people". It is the United States.

Mr. Holtzoff. I like the idea of using the words "United States".

Mr. Crane. There are so many different kinds of government, and it is used in so many connections. It does not make any difference to me, but the dignified way is "for the United States".

Mr. Robinson. I think we will get into the same trouble.

The Chairman. Can we use "United States" alone, or must we say "United States of America"?

Mr. Holtzoff. Not necessarily.

Mr. Medalie. After all, there is the U.S.S.R.

The Chairman. Every subpoena bears the words "United States of America". I do not like all these capitals.

Mr. Holtzoff. Why not say "prosecution"?

Mr. Robinson. Mr. Medalie gave the answer to that.

The Chairman. Yes; Mr. Medalie's answer is very sound. Well, gentlemen, let us discuss this at lunch.

Mr. Glueck. It is common to say, "the prosecution can

prove". It sounds almost like "the persecution".

Mr.Medalie. That is the reason.

(Thereupon, at 12.30 o'clock p.m., a recess was taken until 1.30 o'clock p.m., of the same day.)

AFTERNOON SESSION

The proceedings were resumed at 1:30 o'clock p. m., at the expiration of the recess.

The Chairman. We were up to item 18 on line 97. Is there any comment on that?

Mr. Medalie. You want the word "reply" there?

Mr. Robinson. I do not.

Mr. Holtzoff. I do not think we should have "reply". I do not think the United States Attorney ought to be required to reply to a motion; just go to the bar and argue it. I do not see any need for any document known as a reply.

Mr. Robinson. Did we not pretty well settle that by "answer and reply," two or three things?

Mr. Holtzoff. I think so. I think we did.

The Chairman. Does that strike this whole section out, Mr. Robinson?

Mr. Robinson. Let me have the page.

The Chairman. Page 6.

Mr. Robinson. That is (d)?

The Chairman. (d).

Mr. Robinson. Yes. Well, now, the way we find it working in the alibi notice cases is that frequently a case is ended by the government's conceding that the alibi is good, and therefore the defendant is discharged, the indictment dismissed. Now, I think it would be well for us to have some provision of that sort here.

Mr. Holtzoff. The government just consents to the motion being granted. You do not need that in the rule.

The Chairman. What if the government does not consent?

Mr. Holtzoff. Then you have a hearing on the motion, but you do not have to have a reply. Of course, if it is alibi it is a little different; alibi would be tried at the trial; but if you mean such motions as go to the jurisdiction, that is like former jeopardy.

Mr. Robinson. As I would see it, what is left of it, (d), we had better knock out "reply" there in 97 following "(d)," before "Motion by the Government. The United States Attorney upon investigation of the defense alleged in the defendant's motion--" Strike out "to dismiss". --"may file a reply in opposition to the defendant's motion."

Mr. Medalie. I do not think you need any of that, because it is like any other motion. If in a civil case I move for a bill of particulars or for the examination of a party or a witness, and my adversary consents to it, does not oppose, that is all there is to it.

Mr. Robinson. How about the second clause, "a reply in opposition," striking out the word "reply"?

Mr. Medalie. Well, he may always oppose the motion, and the way to oppose a motion is by answering affidavits.

Mr. Robinson. All right. What about the next sentence? Do you think there is anything necessary in it?

Mr. Dean. 101?

Mr. Robinson. Yes.

The Chairman. Yes.

Mr. Holtzoff. Should not that come out completely?

Mr. Longsdorf. "motion."

Mr. Holtzoff. Does not this duplicate a provision we have already had? Motion for bill of particulars. As far as the

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second sentence is concerned, I think that should go out, too.

The Chairman. Is it not covered by page 2 of Rule 8?

Mr. Holtzoff. That is what I think.

Mr. Robinson. That is that same, beginning with 26, 29.

Mr. Dean. In lines 29 to 32 on page 2?

Mr. Robinson. I think we could provide for it there if it is not already covered.

The Chairman. I think so.

Mr. Robinson. Yes. All right. ~~Omission~~ Permission to amend; is that covered somewhere?

Mr. Holtzoff. I think that is covered somewhere, is it not, about amendment?

Mr. Robinson. If it is not, we can cover it somewhere else.

Mr. Crane. Yes.

Mr. Robinson. All right.

Mr. Holtzoff. This is not the proper point at which to cover amendments, anyway.

The Chairman. Make a note that that will be somewhere with the accusation.

Mr. Robinson. Well, yes. All right. There is a separate civil rule along amendments.

The Chairman. It may go in that, and the same with 107.

Mr. Robinson. Yes.

Mr. Holtzoff. I think you do not need the first sentence on page 7, either.

Mr. Medalie. There is another point.

Mr. Longsdorf. I did not hear. What did you do with those

2 two words "written accusation" in line 105, page 6?

Mr. Robinson. We think we can let that go out and take care of whatever may be desirable from it at another place.

Mr. Longsdorf. The whole thing is out?

The Chairman. Out here. Bring it in somewhere under "Amendments."

Mr. Medalie. Now, the next sentence beginning with the word "If" on 109: I do not think you need that, particularly the middle portion of it.

Mr. Holtzoff. I do not think we need any of it.

Mr. Medalie. It says if the United States Attorney's written reply to the defendant's motion is considered by the court to be insufficient. Of course the defendant's own papers may be insufficient or unpersuasive.

The Chairman. Is not the whole sentence beginning on 109 unnecessary?

Mr. Dean. Right.

The Chairman. Is that not what the court must do?

Mr. Dean. Right.

Mr. Crane. Could not do anything else.

Mr. Youngquist. I think the whole sentence is unnecessary.

Mr. Robinson. So do I. I do not think there is any doubt about it.

Mr. Longsdorf. Is that out?

Mr. Robinson. Yes.

Mr. Longsdorf. And the one beginning on 107, did that go out, too?

Mr. Holtzoff. Yes.

Mr. Robinson. What about 113? According to Mr. Dean's report on the California effort to separate the issue of the

insanity defense into a separate hearing from the other, probably we should not wish to provide for it.

Mr. Holtzoff. I think--

Mr. Robinson. (Interposing) Pardon me just a minute, Mr. Holtzoff. Let me finish up. I want to get Mr. Medalie's motion then at the same time, if you will excuse me, but Mr. Medalie I understood suggested there might be some of these motions which would require a hearing. Is that right? Would you want to specify here, Mr. Medalie, what they should be?

Mr. Medalie. They would relate to what is covered by pleas in bar or pleas in abatement under the old practice. Now let us limit it, say, to double jeopardy.

Mr. Crane. Say it was specified. The others all involved something connected with the main crime.

Mr. Holtzoff. The defendant is entitled to a jury trial on the issue of double jeopardy under some Supreme Court decisions.

Mr. Crane. What is that?

Mr. Holtzoff. The defendant is entitled to a jury trial on the issue of double jeopardy ~~even if it strikes separately;~~ that is right, isn't it?

Mr. Longsdorf. Yes. There is a decision by Judge Murray in the Ninth on that, a number of years ago, but it was not necessary for him to say that. He said that it did not do any harm to have tried them together, but he felt the proper way would have been to impanel a different jury to try the special plea in bar.

Mr. Holtzoff. But this sentence beginning on line 113

has a function to perform, and it seems to me it ought to stay in, because suppose the defendant pleads double jeopardy affirmatively under the rule we adopted this morning, and he asks for a separate hearing on it. He would be entitled to a jury, and this sentence would cover that situation.

Mr. Crane. The only thing, it is probably too broad, because you are going to have notice now of the alibi and notice of the insanity. Would that also cover that?

Mr. Dean. It would also cover the question of fact raised by a plea in abatement. Where you raised the question of things that happened in the grand jury room you would have to try that out some way.

Mr. Holtzoff. You are not entitled to a jury trial as to that.

Mr. Medalie. No.

Mr. Holtzoff. But you are as to a plea in bar.

Mr. Dean. I am just talking about this sentence here. If you will read it you will see that it does cover that situation.

Mr. Holtzoff. Yes.

Mr. Crane. Too broad.

Mr. Holtzoff. Perhaps it needs rephrasing in order to provide that the defendant will have a jury trial on those issues on which he is entitled by the constitutional right to trial by jury, but not on others.

The Chairman. May we leave that to the reporter?

Mr. Glueck. Yes.

Mr. Medalie. I think so.

Mr. Robinson. I am glad to have that recommendation. You do not care to list anything, Mr. Medalie?

Mr. Medalie. Of course I assume that double jeopardy, immunity, pardon, would certainly come within the plea-in-bar categories. I do not know what else comes there.

Mr. Crane. Dealing with questions of law, I suppose.

Mr. Robinson. In line 115 Mr. Youngquist raised the question about using the term "request of the government." Was it decided that you would wish to have "the attorney for the United States," and do you wish to decide that?

Mr. Holtzoff. The chairman has something to say on that.

The Chairman. I feel that if you use "of the United States" you have no right to use it unless you use the name of the country, "United States of America," and that is a mouthful.

Mr. Crane. "The government" is all right.

Mr. Robinson. Leave "the government." Very well. Now, the next sentence.

Mr. Longdorf. Only that has a capital on it.

Mr. Holtzoff. I do not think so.

Mr. Youngquist. No.

Mr. Dean. A person.

Mr. Longsdorf. A proper name.

Mr. Youngquist. But it is not a proper name. "The United States of America" is a proper name.

Mr. Longsdorf. Yes, but "the government" to substitute for that is also a proper name in the print shop.

Mr. Holtzoff. If you spell "government" with a cap, you ought to spell "defendant" with a cap.

The Chairman. "The court."

Mr. Crane. Surely; you have to make them equal in the law.

Mr. Longsdorf. There are no signs of that rule in the

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print shop. You do not want to spell "federal" with caps. It clutters up the page with capital letters.

Mr. Holtzoff. The Government Printing Office always capitalizes "Federal."

Mr. Robinson. Do you wish to have that sentence in 115 left in?

Mr. Holtzoff. I think that is not necessary.

Mr. Robinson. You want to withdraw it, do you?

Mr. Holtzoff. All it says is that the judge must decide the motion.

The Chairman. I think it will tie that preceding sentence up when it is revised.

Mr. Robinson. All right. The next is 119:

"If the court overrules the defendant's motion, it shall also enter in its order a provision that the facts--"

Now, at this point is where we try to put the teeth in this advance-notice and other types of pleading of what we did call affirmative defenses. It has been found in the application of the alibi-notice law that some judges are quite timid in upholding the requirement that the defendant may not introduce evidence of which he has not given notice, even though he cannot make a showing of surprise or anything of that sort.

I believe from the experience of the states with the alibi-notice type of procedure that there is not much use for us to provide for alibi notice or insanity notice, any other type of advance notice of a defense, unless we do accompany that with some power in the court to uphold it, and our problem is how to provide for the power of the court.

This line 119 sentence begins, "If the court overrules the

defendant's motion, it shall also enter in its order a provision that the facts established on the hearing shall be taken as proved at any subsequent trial by the defendant's motion to dismiss."

Mr. Holtzoff. No, but we decided that alibi would not be tried in advance or insanity tried in advance. Those notices are notices as to evidence produced at the trial.

Mr. Robinson. So this will not apply.

Mr. Crane. Then, as to the others, if the defendant fails, nothing need be said, as though they never existed: double
4 jeopardy, warrant, pardon. If he fails, they never existed, so you have not got to have anything of that kind.

Mr. Dean. And if he wins, the case would never go on.

Mr. Crane. I think you would be safe in striking it out.

Mr. Youngquist. One thought occurs to me in that connection. You could, for instance, make it optional with the defendant to plead double jeopardy in advance, and that would not necessarily preclude him from interposing that defense on the trial of the general issue, would it?

Mr. Robinson. That is right.

Mr. Holtzoff. That is fair enough, is it not?

Mr. Youngquist. Yes, it is. I think it is, yes.

Mr. Longsdorf. I should like to question the phrase "or other judicial consideration." It seems to me that takes a pretty large excursion into the law of res adjudicata.

Mr. Glueck. Are you cutting that out?

Mr. Robinson. Both sentences out.

Mr. Glueck. Both sentences out?

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Mr. Longsdorf. Yes, both sentences out.

The Chairman. In line 125 that is poor style. Would it not read a little bit better if we said "not in compliance in good faith"?

Mr. Robinson. We considered that, and maybe we were wrong in putting it in this way. Some adjective.

Mr. Medalie. Why should good faith determine that? In perfect good faith the district attorney might give you a bill of particulars, but it would be inadequate; you would still be entitled to relief. Good faith should not be the sole issue.

Mr. Robinson. Could we trust the court tobe able to distinguish whether or not it should take this action? We might just say he should make such orders as are just. This is copied from the civil rule in part.

Mr. Medalie. Yes.

The Chairman. Your idea would be to eliminate the two words "good faith"?

Mr. Medalie. Yes.

Mr. Holtzoff. I think he is right about that. It is a factual question which you determine by inspection of documents, whether they comply with the court's order.

Mr. Medalie. The question is not whether the district attorney is a nice boy but whether the defendant got what he is entitled to.

Mr. Robinson. Again that is based on the experiences of our courts, and it is with the alibi defense. I think even we use that by way of analogy, experience on it here, and there has been some tendency to evade the requirements of the statute with regard to proving or with regard to filing your information.

b11

So that is the only reason for it. If that is not a sufficient reason, it should go out.

Mr. Dean. It would not be a sufficient reason, though, since in fact alibi or insanity is now simply a notice; and if any of these statute rules, it seems to me, are to apply to those situations we ought to tie them right in with alibi and insanity. This refers to pleadings or bills of particulars, neither one of which applies to insanity or alibi.

Mr. Robinson. We have not drafted our provision with regard to insanity and alibi as yet, have we? I think we are under instructions to prepare something on that by way of notice.

Mr. Dean. Notice; right.

Mr. Glueck. Notice merely.

Mr. Robinson. We have understood, too, that there will be the power in the parties, in the government or the defendant, to require additional notice to be given or additional information by the respective sides. So this is largely a matter of instructions on how we may make the alibi-notice and insanity-notice requirements effective--not at this point, understand, but where we shall deal with them.

Mr. Dean. Well, my point is: If it is designed to apply to this, too, why do you not specify thatif at any time the court considers that the notice of alibi or insanity is insufficient then it may do so and so? If, on the other hand, it is designed to apply generally to all pleadings and bills of particulars, that is something else.

Mr. Robinson. Well, that would have to be done, of course. There will have to be a distinction, in view of the vote taken

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this morning.

Mr. Holtzoff. Should not the word "pleadings" go out in line 124? I thought we were not using the word "pleadings," in the light of the decision made yesterday.

5 The Chairman. That is right.

Mr. Dession. I am wondering.

Mr. Youngquist. Motions or bills of particulars, maybe not.

Mr. Holtzoff. Yes.

Mr. Robinson. All right. Let us substitute for "notices"--

Mr. Holtzoff. (Interposing) Or bills of particulars.

Mr. Youngquist. "Motions."

Mr. Robinson. "Motions."

Mr. Holtzoff. "Motions."

Mr. Robinson. "Or bills of particulars." All right.

Mr. Dession. Mr. Reporter, do we really need this section? The power to order a bill of particulars or anything else of that nature would require the power to keep on ordering it until a sufficient compliance has been had, would it not?

Mr. Robinson. Perhaps you are right on that.

Mr. Holtzoff. I think we should have services

Mr. Robinson. The effort was made to make the procedure quite definite, at least for our consideration, and now we can cut out, rather than we could have added.

Mr. Crane. We are going to take that out, then, on 123?

Mr. Longsdorf. 123 onward goes out.

Mr. Robinson. I think so.

The Chairman. Is there not a danger of some district judge

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thinking he may not have this power?

Mr. Holtzoff. I rather doubt that. It is inherent, it seems to me, if you order a bill of particulars and the bill of particulars does not comply with your order, that you could require a further bill.

Mr. Medalie. No, it does not stop.

Mr. Holtzoff. It does not do any harm to leave it in.

Mr. Robinson. My thought was to put it in in our regular bill-of-particulars place; we are planning to have a bill-of-particulars, general provision for that.

Mr. Crane. I think it is self-evident, if a judge makes an order, that it has got to be complied with. We have not got to say that the defendant must obey the order.

Mr. Holtzoff. No.

The Chairman. All right. Let us leave it out here, then.

Mr. Robinson. Now, even though this sentence beginning on line 127 is left out here, it touches on the problem I mentioned a while ago: What shall the court do in order to make its orders effective?

Mr. Holtzoff. Should not this sentence be transferred to the rule that you are going to draw on notice of alibi and notice of insanity?

Mr. Dean. I think so.

Mr. Holtzoff. Logically.

Mr. Robinson. Where would we be left on double jeopardy then?

Mr. Holtzoff. Well, I do not see how that applies--oh, well, how would that apply, say, to double jeopardy?

Mr. Robinson. Well, we are going to have a separate hearing

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on it, with the possibility of--

Mr. Crane. (Interposing) Well, if it is found in the defendant's favor, that ends the prosecution. If it is found against him, it does not end the prosecution. The only thing is, he cannot try it over again in the main case. Do you think it necessary to have it so stated?

Mr. Youngquist. I think the only place that is going to arise is in connection with the insanity and alibi.

Mr. Holtzoff. That is why I think it ought to be transferred into that rule.

Mr. Robinson. All right. We will check it with that in mind, see if it cannot be transferred to insanity and alibi defense, or notice. 132 perhaps is unnecessary.

Mr. Holtzoff. I think you ought to add something there. This is the way it is now: "No order of the court, however, shall be deemed to interfere with the assertion at any time of the defense of lack of jurisdiction." I think that is O. K., but you also ought to add "or of failure of the accusation to set forth an offense." That should never be waived.

Mr. Medalie. But it never is waived if there is no jurisdiction.

Mr. Holtzoff. Beg pardon?

Mr. Medalie. There is no jurisdiction. You cannot confer jurisdiction by moving for an order in the case, can you?

Mr. Robinson. No.

Mr. Holtzoff. I think this sentence is intended to convey
6 the thought that nothing that may be done will waive the right to raise the defense of lack of jurisdiction.

Mr. Robinson. At any time.

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Mr. Holtzoff. At any time, but I think the same rule ought to apply to the defendant's right to raise the point that the indictment does not charge a crime.

Mr. Medalie. Well, that is still the law, is it not? At the trial you can raise that question, though you never made a motion.

Mr. Dean. That is right.

Mr. Medalie. The reason you make a motion is that you do not want to have the wait, to wait for a trial, and you do not want to have to stand the uncertainty of trial.

Mr. Holtzoff. But I think it is a good thing to provide for that, Mr. Medalie. Now, the civil rules specifically provide that failure to make such a motion before trial does not waive any point of lack of jurisdiction or sufficiency of the complaint. Now I think this is one point where there ought to be a corresponding provision in the criminal rules to safeguard the defendant's rights.

Mr. Medalie. I do not think you need it. You cannot amend answers, counterclaims, and you cannot amend indictments.

Mr. Youngquist. That is all true.

Mr. Longsdorf. You can waive any jurisdiction except the capacity of the court to entertain that kind of a civil suit. You can waive the venue.

Mr. Medalie. You can waive venue but not jurisdiction.

Mr. Longsdorf. Well, you cannot waive jurisdiction. You are correct in making the distinction, but a lot of people fail to do it.

Mr. Robinson. This sentence was put in here not with the

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idea of adding anything to the legal rights of the parties, or anything of that kind, but just to show anyone who might otherwise object that the point of jurisdiction was not overlooked.

Mr. Longsdorf. Oh, I quite understand that.

Mr. Holtzoff. I think the sentence ought to go out or be enlarged.

Mr. Robinson. I cannot agree with your enlargement, Mr. Holtzoff. I am not sure. Are you considering the possibility of defects that can be cured by verdict, and the fact that during the progress of trial certain defects in the accusation are considered to be waived if there is no motion to quash or anything like that?

Mr. Holtzoff. I am not talking about that. I am talking about failure of the indictment to state an offense. I think that is fundamental.

Mr. Longsdorf. But it does not waive jurisdiction.

Mr. Holtzoff. Suppose the indictment does not charge a crime.

Mr. Robinson. That is still my point. You are familiar with the rules, are you not, that even defects in the accusation--

The Chairman. (Interposing) Let us not argue this. We have a motion. All those in favor of the motion to strike the sentence will say aye.

(There were a number of ayes.)

The Chairman. Those opposed will say no.

(There were a number of noes.)

The Chairman. How many noes were there?

(There was a show of hands.)

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The Chairman. One, two, three, four. The ayes seem to have it. The ayes have it.

Mr. Longsdorf. I think there is a latent ambiguity in that last sentence.

Mr. Holtzoff. Well, but there, if we are silent on the point and we give the defendant the opportunity to move to dismiss, somebody may contend at some time or other that failure to take advantage of the opportunity of the rules of the court is a waiver of his right. I think it is necessary. You are probably right, but the point is that some judge might sometime hold that way, and it would be a wise safeguard.

Mr. Medalie. I think it is better to assume that the judges will--

Mr. Holtzoff. Beg pardon?

Mr. Medalie. I think it is better to assume that the judges are fairly good lawyers and will not make any great mistakes. Suppose you charged a man with mail fraud, or attempted to in an indictment, and failed to allege a scheme to defraud, or what you did allege certainly was not a scheme to defraud. Let us go to the extreme: that in that indictment you charge a scheme to defraud, that is, to pay a man less than the goods were worth, and nothing else; no false representations. Suppose a motion were not made. A man goes to trial. I think the judge would dismiss the indictment.

Mr. Holtzoff. I think he should, but it seems to me--

Mr. Medalie. (Interposing) If he does not, he is trying a case where there is no indictment, practically.

Mr. Holtzoff. The only point is this: that if you are going to safeguard the right to raise the point of lack of

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7 jurisdiction, you by your silence do not imply that he waives the insufficiency of the indictment.

Mr. Medalie. Look: you are dealing with jurisdiction. I have always understood that that cannot be waived.

Mr. Holtzoff. That is right.

Mr. Medalie. The judge has no power.

Mr. Holtzoff. That is right.

Mr. Medalie. The court has no power. The case is not there. It is no court for purposes of that case, and your silence does not give a power that it does not possess.

Mr. Holtzoff. Then, your thought is that the whole sentence ought to go out?

Mr. Medalie. I do not think we need it.

Mr. Holtzoff. I should not mind that so much. My point was that if that sentence stands you also ought to safeguard the defendant as to failure of the indictment.

Mr. Medalie. Well, I raise the question. I move that that sentence be stricken.

Mr. Holtzoff. I second the motion.

Mr. Youngquist. May I suggest that for the sake of uniformity with the civil rules it might be well to leave it in here, expanded as suggested by Mr. Holtzoff, even though it may not strictly be necessary.

Mr. Medalie. There is a reason for putting these things into the civil rules, particularly as to the sufficiency of a pleading, in view of the fact that--

The Chairman. (Interposing) That brings us to section (e).

Mr. Robinson. That ought to be harmless enough to meet

everybody's ideas. That happens to parallel the civil rules, too. You notice Rule 8, too, to the left, of the civil rules.

"Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required."

Do you want that "pleading" out there, Mr. Holtzoff, too?

Mr. Holtzoff. I suppose it should be.

Mr. Robinson. Well, now, wait a minute. Is an indictment a pleading?

Mr. Holtzoff. Yes. No. I suppose that can stay there.

Mr. Robinson. Better leave it.

Mr. Holtzoff. Yes.

Mr. Youngquist. Why not simply say "Pleadings" instead of "Each averment"?

Mr. Holtzoff. That is a good idea. This was just copied from the civil rules, I guess.

Mr. Longsdorf. Strike it out.

Mr. Youngquist. "Pleadings shall be simple, concise, and direct." Or perhaps you should say "Pleadings and motions."

Mr. Robinson. I was trying to follow your recent suggestion there, that we follow the civil rules on points of this kind. You notice the civil rules: this is just exactly the words of the civil rule.

Mr. Youngquist. Well, yes. No, I did not mean--

Mr. Robinson. Do you think there is reason for changing it here?

Mr. Youngquist. I did not mean the words. I mean the substance.

The Chairman. This is a copy of the civil rules.

b20

Mr. Holtzoff. This is a copy of the civil rules.

Mr. Longsdorf. Yes.

Mr. Glueck. I do not think it makes much harm either way.

The Chairman. All right. Now, what about section (2)?

Mr. Holtzoff. I have one suggestion about section (2). The last sentence on page 9 I have a question about. That

8 permits the court to require the government to elect as between counts of an indictment, and that would introduce a technicality that does not now exist.

Suppose a man is indicted on a large number of counts in a mail fraud case. I do not think the court should have authority to say to the district attorney, "Well, you have got to elect as between these counts."

Mr. Medalie. That deals with a very practical experience. The provisions of 8 (e) (2) are now the law of New York, and they work very, very well. Now, in practice in the jury trials before competent judges like Carl Nott, where there are many, many counts, each stating another episode on which the defendant can get another ten years, and he is going to get about 60 if he is convicted on six, and he can even get convicted on 20, it gets confusing to the jury. Now, the judges have had this practical experience. One of the greatest criminal judges is Carl Nott, just retired, General Sessions. It was a matter of practical experience for him to say to the district attorney and to the jury, "Now, look. You don't need any confusion. Let us take out three, four, five of these counts. They are all duplicates of each other, and the case will fall anyhow unless the district attorney has proved at least these, and if he establishes these he has enough. Now the jury will be able

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to follow it, and it can go to the jury on these five or six."

That is the situation that I assume brought about the writing of that particular provision in this subsection.

Mr. Holtzoff. Yes, but the way this is worded this situation may confront the United States Attorney: Suppose we have a mail fraud case, and you have, say, ten counts, one for each indictment letter, and suppose under the way this is worded the judge could say to you, "Well, now, you elect three counts out of the ten," and you elect three, and you do not prove those three. Then where are you?

Mr. Medalie. You will not elect the three that you do not prove. You elect the three that you can prove.

Mr. Holtzoff. Yes, but what is the desirability of giving that authority that does not now exist?

Mr. Medalie. Simplification. It does exist in fact, though not in law.

Mr. Holtzoff. Where it is done by mutual agreement. Practically, the United States Attorney goes ahead and does it at the suggestion of the court, but if the United States Attorney declined to do it the court could not compel him to.

Mr. Medalie. No, but the judge can do it himself by the simple expedient of submitting only a few counts to the jury.

Mr. Holtzoff. Oh, yes.

Mr. Medalie. So that they can understand the case.

Mr. Holtzoff. But do not forget that there are some judges who are not as good as some of the judges in the Southern District of New York.

Mr. Medalie. Then they will not exercise it.

Mr. Holtzoff. Yes, but we have the other type of judges who

try to exercise too much authority; there is that type of federal judge.

Mr. Medalie. Yes, that type of judge will do that, and I have seen one of them do it. They will say, "Well, I guess this is a case, but this is too trivial to be a mail fraud case. This ought not to go to the jury. This does not belong in this court." What are you going to do about it?

Mr. Dean. Does not the pruning process take place later on when you go to submit the counts to the jury?

Mr. Seth. That is right.

Mr. Medalie. Well, this is the time it is done. I assume that is intended.

Mr. Dean. I assume it is not.

Mr. Holtzoff. Not the way it is worded. I should not object to that limitation. The way this phrase is worded I thought it was at the opening of the case.

Mr. Medalie. In other words, you agree that this is practical, then, should be within the power of the judge?

Mr. Dean. Yes.

Mr. Holtzoff. Yes.

Mr. Medalie. But you do not want to exercise it until the case goes to the jury?

Mr. Holtzoff. Exactly.

Mr. Medalie. Or at the close of the government's case?

Mr. Holtzoff. Yes.

Mr. Medalie. I would go along with it.

Mr. Robinson. Let us compare that with (42). I can read that briefly:

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9 "The court in furtherance of convenience or to avoid prejudice may order a separate trial of any defendant, or of any separate issue or of any number of defendants or issues."

That would seem to take care of the case before trial.

Mr. Medalie. Yes.

Mr. Robinson. So this would be during trial.

Mr. Holtzoff. No.

Mr. Dean. No.

Mr. Medalie. At the conclusion of the government's case.

Mr. Holtzoff. At the conclusion of the government's case.

Mr. Robinson. That is right. Well, that is where an election nearly always is made.

Mr. Medalie. Yes, but I should not limit it to an election. I would give the court a reasonable amount of discretion to avoid confusion to the jury, even though election is not necessary.

Mr. Holtzoff. Suppose we leave it to the reporter to rephrase this sentence in the light of this discussion.

Mr. Robinson. Very well.

Mr. Holtzoff. Would that be satisfactory?

Mr. Robinson. If you are sure you understand what you want, Mr. Holtzoff, we can confer about that later.

Mr. Holtzoff. Well, the thought is that this authority should be limited to the close of the government's case or the close of the entire case, with the discretion in the court to make a selection himself.

The Chairman. That would be at a different place in the rules.

b2 4

Mr. Dean. That is right.

The Chairman. Rather than in the pleadings.

Mr. Holtzoff. I think so.

The Chairman. Then if there is no objection that will stand. Is there anything else?

Mr. Medalie. I think you might add the words when you do this, "in the interest of simplifying the issues."

Mr. Robinson. Yes.

Mr. Crane. Well, why put any reason in it at all?

Mr. Medalie. Well, because that is the court's guide.

Mr. Crane. Which would contribute to a fair trial.

Mr. Medalie. All right. I agree. You are right.

Mr. Crane. Surely. "Suppose the defendant and the government"--that is preaching; I do not like that.

Mr. Medalie. All right. That is unanimous.

The Chairman. I think, gentlemen, we have disposed of it.

Mr. Medalie. Oh, I want to ask one question here: Does this subdivision completely take care of the existing statutory regulations on that subject as to joinder and consolidation?

Mr. Robinson. Yes.

Mr. Holtzoff. No. You have another rule on joinder. There is another rule here on joinder.

Mr. Medalie. Well, that is joinder of defendants.

Mr. Wechsler. On parties but not as to counts.

Mr. Medalie. But I maan as to joinder of counts and consolidation.

Mr. Robinson. You are confused. Well, joinder of counts. Well, consolidation for trial is taken care of under 42(a).

h25

Mr. Medalie. Well, you have here, "The court may order written accusations to be consolidated for trial."

Mr. Robinson. That is right. This is on joinder of counts.

Mr. Medalie. Then had we not better take out the consolidation provision and leave that to the consolidation provision which comes later?

Mr. Robinson. I should like to defer that until we come to 42 and see what we get.

Mr. Longsdorf. Do you want to put the joinder of counts down into the consolidations for trial, or wait?

Mr. Robinson. I did not hear your question.

Mr. Longsdorf. Do you mean to put the joinder of counts, the making of several counts--I did not understand--down in or near to the rule on consolidations for trial? Did I understand that wrong? I did not hear distinctly.

Mr. Robinson. What we were talking about, considering it in connection with 42, Rule 42 on "Consolidation; Separate Trials," was that when we come to that we can come back and consider the two together.

10 Mr. Longsdorf. Oh, yes.

Mr. Holtzoff. Do you not have another rule on joinder of separate counts? Joinder of defendants in the same count?

Mr. Medalie. That is different.

Mr. Robinson. Yes, that is different.

Mr. Medalie. And yet all of them could be put together, and lawyers would look for them at the same place.

Mr. Holtzoff. I think so.

Mr. Robinson. There again, while I do not want you to hear me speak of the civil rules too often, at the same time I think

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we agree we ought to regard them all the way through, and I am following out the arrangement of the civil rules with respect to separating these two comparable points. So if you will check the civil rules provisions and these, you will see that lawyers who have become accustomed to questions of joinder of parties, joinder of paragraphs of their claims, and so on, in civil matters, will find that this arrangement is in criminal matters comparable to what we have been accustomed to in civil matters as far as such a parallel can be worked out, and I think it is fairly close.

Mr. Wechsler. Do I understand that the answer of the reporter to Mr. Medalie's question was that this provision is not intended to change the present law with respect to joinder of counts except charges of separate crimes made in one indictment?

Mr. Robinson. If he is referring to the federal statute of 1852 or '54, this provision is not based squarely on that statute; that is, it does not copy the words of the statute.

Mr. Wechsler. May I ask, then, if there be a consideration of the differences, if any, and the results, because I think that is a very important question.

Mr. Robinson. Yes, that has been considered quite carefully, Mr. Wechsler, and I regard this rule as a little broader than the statute.

Mr. Wechsler. In what respect, may I ask?

Mr. Robinson. If you will just take the statute and take this rule and go down through it word by word you will find it, I believe.

Mr. Dean. Is the statute set forth here, the present statute?

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Mr. Wechsler. Yes.

Mr. Robinson. Yes.

Mr. Wechsler. It is in on the left-hand side.

Mr. Longsdorf. The court has found some fault with the verbiage of that old statute?

Mr. Robinson. No, it was not based on lack of respect for that statute.

Mr. Longsdorf. No, no, but I say was not the old statute in one or more cases criticized as being a little bit difficult of understanding, incomplete?

Mr. Robinson. Well, I do not know about that.

Mr. Longsdorf. I am not sure.

Mr. Robinson. We have not run into much objection to the old statute. Here is what was done in compiling this section of this rule. California has a very good joinder statute, and one or two other states. New York's so-called Dewey joinder statute under which the Luciano conviction was made, and some other rackets were broken up there, was also considered. So the source of this rule--

Mr. Dean. (Interposing) Mr. Medalie, I can find it for you. It is opposite Rule 42.

Mr. Medalie. Oh, yes. Thanks.

Mr. Robinson. This rule is based on the present federal joinder statute, the California joinder statute, and the New York State joinder statute, and all three were considered in the drafting of the rule. I have not examined each of the other three statutes. I think you will see what the effort was designed to attain. I do not know that I can go into it word by word.

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Mr. Longsdorf. As I recall the federal statutes here, there is nothing in the federal statutes, 557, that provides for separation of trials. That was left to implication. You put it in expressly.

Mr. Holtzoff. The federal statute does not say when there may be joinder. It just says if there are several charges which may properly be joined, you may join them.

Mr. Longsdorf. Yes, but there is another statute that comes into that, another federal statute which specifies--

Mr. Robinson. (Interposing) Severances.

Mr. Longsdorf. --what may be joined in the indictment.

The Chairman. That disposes of it.

Mr. Robinson. I think so.

Mr. Wechsler. Well, it occurred to me that there is a reasonably broad ambiguity in reference to defenses of the
11 same general nature. Now, I know that that language or its equivalent is in the present federal statute. If the purpose is to carry over those interpretations substantially, I know what that means. If the purpose is to achieve some different result, while I am not unwilling to study the California and New York statutes before making up my mind, I do not see that I can make up my mind until I have engaged in that study.

Mr. Robinson. I shall be glad to discuss it with you, too.

Mr. Holtzoff. After all, our decision now is only tentative.

Mr. Seasongood. Yes. I think it is better to make a tentative decision, so the reporter will at least know in a general way what we think.

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Mr. Robinson. I think our next draft may be one that Mr. Vanderbilt has mentioned as one that we shall send out by mail. I think that in the margin it would be well to note the statutes which are either the source of the particular line or clause or other provisions. Now, I plan to do that. I think that will make it a little more convenient for members of the committee in looking up the sources of these statutes. I think with respect to Mr. Wechsler's inquiry I would agree that it is desirable to have such points made available to you as conveniently as possible.

Mr. Medalie. Is the New York statute the Dewey law?

Mr. Robinson. Yes.

Mr. Medalie. It was intended to be an adaptation of federal law and practice on the subject, and I refer to Section 279 of the Code of Criminal Procedure. It is very, very simple. I think you have simplified it further without losing anything that I can observe now.

Mr. Robinson. I have tried to do that.

Mr. Medalie. Yes. I think it is a good job. I should still like to look at it again and see if we have lost anything or added something that might be dangerous, but I doubt if that is so.

Mr. Robinson. I should appreciate it if you would write in about that. And Mr. Wechsler, too, if you will.

The Chairman. Now I think we have covered everything in Rule 8, except I think we must go back to the first page.

Mr. Seasongood. Before you do that may I just cover a small thing? On page 8 in Rule 8 (e)(1), in line 137, I think we have provided for certain notices, havewe not, and I would suggest

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you insert "No technical forms of pleading, notice,"and so forth.

Mr. Robinson. Yes. Very well. Thank you.

The Chairman. And the reading here, "notice," I suppose "motion."

Mr. Robinson. "Motion." All three.

The Chairman. All three singular.

Mr. Robinson. All three singular.

The Chairman. Coming back to the first page of Rule 8, we have left over the taking of a tentative vote as to whether or not we would follow the scheme of the rule as written or the alternative plan suggested by Judge Crane, that the paragraph be remolded to provide that the accusation should state the facts constituting the crime, and we accompany that with a note to the reporter referring in some such form as does the present paragraph to the elements that are generally necessary to constitute a sound indictment as a guide to the district attorney. Are you ready for a tentative vote on this issue?

Mr. Medalie. Before you vote, Mr. Chairman, may I read you Section 275 of the New York Code of Criminal Procedure:

> "The indictment must contain (1) a title of the action specifying the name of the court to which the indictment is presented and the names of the parties, (2) a plain and concise statement of the act constituting the crime, without unnecessary repetition."

The Chairman. Yes.

Mr. Medalie. And under that district attorneys have done everything from what Cropsey has done to prolix indictments, but the simplest form of indictment is possible under this

b31

section.

Mr. Robinson. Possibly they are afraid of it, as the section perhaps is not definite enough to guide them. Is that not possible?

Mr. Medalie. It is simply fear. They have it in their old forms lying around every district attorney's office. It is so much easier to copy the form than to revise it.

Mr. Youngquist. I have had the same fear, Mr. Medalie. Perhaps you were never assailed with it, but I know that I in drawing indictments have feared to depart from that.

Mr. Medalie. Of course. I know what you mean.

Mr. Youngquist. In the state court. That has been established by practice.

Mr. Medalie. I know. I once instructed my assistants, and did it again and again for about three months when I was United States Attorney, to leave out conspiracy counts. Well, after while they sneaked them in, afraid that they could not offer anything in evidence unless there was a conspiracy count, which of course is not the law.

Mr. Holtzoff. But of course all this fear will be probably done away with if we in an appendix of forms insert four or five forms of simple what we call short-form indictments.

Mr. Medalie. You are drawing the form on mail fraud?

Mr. Holtzoff. Yes.

Mr. Medalie. All right.

Mr. Holtzoff. That was all right.

Mr. Youngquist. Short.

Mr. Robinson. Simple.

b32

Mr. Holtzoff. Leave out all such words as "feloniously" and "thereupon, to-wit."

Mr. Robinson. You have.

Mr. Medalie. Now, when you draw your form on mail fraud please pick out a complex fraud, so as not to mislead the prosecutors.

Mr. Crane. The difficulty comes because of an antiquated fetish about a criminal indictment, all arising from a time when the courts and people were so cruel to criminals that they found every way in the world to try and beat it, and rightly so. Now we have gonebeyond that so far as the courts of this country go, except in times of, oh, some of the excitement. I do not know of any court that is not trying to be as fair to one side as to the other. I cannot imagine a judge who is not trying to do that. Now, of course that makes play for feelings here and there. That is human nature. But in the main they are wonderful. The courts are wonderful, remain all over the country, and I have known--

Mr. Medalie. (Interposing) That is Blackstonian.

Mr. Crane. Well, it is not a blackout, anyway. Now, if you think of facts constituting the crime--that is what you are bound to do--I do not see any answer to it.

Mr. Glueck. Judge, do you really want to leave out "being instigated by the devil and not having the fear of God before his eyes," and so forth?

Mr. Medalie. It has never been required. It was not even required under common-law pleading.

The Chairman. Now are you ready for the motion?

Mr. Youngquist. I do not know how to vote on it.

b33

Mr. Glueck. The alternative, the short form versus the--

The Chairman. This form presented by the reporter or the short form advocated by Judge Crane and just quoted by Mr. Medalie, to be accompanied by a note for the guidance of the district attorney, giving the substance of this rule.

Mr. Waite. The motion is to adopt a shorter statement instead of the reporter's statement?

The Chairman. Suppose we get it accurately before us. I take it as a motion made by Judge Crane, seconded by Mr. Medalie, for a short form accompanied by an explanatory note. All those in favor of the motion will say aye.

(There was a chorus of ayes.)

The Chairman. Opposed, no.

(There was no response.)

The Chairman. Carried.

Mr. Crane. That is really what you did in the American Law Institute form.

The Chairman. Well, Rule 9 isn't, so we go on to Rule 10.

Mr. Dean. May I make one suggestion there on Rule 8, if you do incorporate in the footnote these various items, that you add the regulation to the statute, following Mr. Medalie's
13 suggestion of yesterday, which I think is very important.

Mr. Holtzoff. I do not think that you ought to require reference to statutes.

Mr. Dean. Well, what are you going to do if you are prosecuting on a departmental regulation and not even the attorneys in the United States Supreme Court when they are arguing can find it?

Mr. Holtzoff. I agree with you on that.

b34

Mr. Medalie. What are we going to do about it?

Mr. Holtzoff. But I do not think we ought to require reference to statutes.

The Chairman. We are not requiring it.

Mr. Medalie. I know, but the rules, departmental or regulations--the word is not "rules." It is "regulations," is it not?

Mr. Dean. Either.

The Chairman. Either "rules" or "regulations"; they are used alternatively.

Mr. Medalie. I think anybody trying a criminal case, whether the indictment is under a rule or regulation, would like to know what the rule or regulation is.

Mr. Holtzoff. You get it by bill of particulars if the United States Attorney is disagreeable enough ~~not~~ to refuse to cite it to you when you telephone him.

Mr. Medalie. Well, that might be the answer.

Mr. Dean. What harm? What is the point?

Mr. Glueck. It is only a few words.

Mr. Holtzoff. The harm is this: that if by mistake you omit it from your indictment you might get thrown out ~~of~~ at the trial. You always have to figure on that proposition.

Mr. Glueck. Well, then you start all over again.

Mr. Holtzoff. Not if the statute of limitations has run.

Mr. Wechsler. There is another situation, too. The rule with respect to statutes is that if there is any statute of the United States that sustains the charge the indictment is valid. So that there will not be a civil rule if a violation

b35

of regulations is charged, even though there may be a mistake as to the regulation, so long as there is a proper notice to the defendant to enable him to prepare. I think there is a real issue there.

Mr. Holtzoff. And you get that information by bill of particulars.

Mr. Wechsler. Well, I am not sure that you can unless you say that it should be available. I think the information should be available, under a penalty.

Mr. Medalie. I think there is a reasonable prospect of getting it that way.

Mr. Youngquist. By bill of particulars?

Mr. Medalie. By bill of particulars.

Mr. Youngquist. I do not know.

Mr. Medalie. I should rather leave it for simplicity. The important thing is that people get that knowledge before they go to trial. There is not a lawyer living who knows these rules and regulations, either in the government service or at the bar.

Mr. Robinson. May I ask, Mr. Medalie, do you think a court would grant a bill of particulars if a lawyer would come in and say, "Under what government regulation does this indictment"--

Mr. Crane. (Interposing) Surely. Why not?

Mr. Robinson. What is that?

Mr. Crane. Surely. Why not?

Mr. Robinson. Can we assume that every federal judge would do that?

Mr. Crane. Surely.

Mr. Robinson. Can we assume every lawyer who asks that

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question might not feel that he was rather stultifying himself, at least in some cases, by asking it?

Mr. Crane. He has got to defend his client.

Mr. Robinson. Oh, yes, he has got to do that, and he is supposed to know the law, too, and the regulations.

Mr. Crane. That is a modesty in the bar that I have not run across.

Mr. Medalie. There is still the tradition around the federal courts that if you do not know what to do procedurally you ask the clerk.

Mr. Robinson. What if he does not know?

Mr. Medalie. I have been doing that for twenty-odd years. A lot of things I could not find in the books I would ask the clerk, and he would tell me. Of course I knew that the judge would ask him too, and he would get the same answer.

Mr. Robinson. I think Mr. Dean has a point there. I feel pretty strongly about this because it is very fundamental. I feel we have the responsibility of all these requests that have been coming in here about the short form of indictment. I believe about all we are doing is telling them that the indictment ought to be short, and now again we come back to the question they raised in New York in June at the meeting there: Just how short is "short"?

Mr. Crane. This has been tried out in so many places.

Mr. Robinson. And we had so much trouble in New York. Take the Bogdanoff case there.

Mr. Crane. We have not got as far as Pennsylvania and some of the other states have gone.

Mr. Robinson. I am indebted to this judge named Bogdanoff

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because you are familiar with the law of New York. I think that was one of the first tests under your short-form idea, and I believe the courts sustained it, did they not?

Mr. Crane. Oh, yes.

Mr. Robinson. And yet district attorneys have told me within the fairly recent past that they were afraid to really bring in a short-form indictment.

Mr. Crane. Now, that is where they simply charged the crime, charged John Jones with having committed a crime on the night of so and so. Now, I do not like that, and that is the thing they are criticizing. I think that was proposed first by the American Institute, or one of them, and it got too short.

Now, we have not adopted that. Now, this must state all the facts constituting the crime. I guess "the statute in such case made and provided" was the oldest phraseology. "Against the statute in such case made and provided," and even under the old indictments they never required the statutes. Never.

Mr. Robinson. Well, they did not have the statute; it was a common-law crime.

Mr. Crane. I mean even the full common-law form of indictment never required you to quote the full statute, though always it mentioned the law insuch case made and provided, the statute in such case made and provided.

Mr. Holtzoff. Never cited the statute at common law.

Mr. Crane. Never.

The Chairman. We have voted on this.

Mr. Robinson. On what?

The Chairman. All of this.

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Mr. Crane. Surely.

Mr. Medalie. Except that the question of "rule" or "regulation" came up again.

Mr. Holtzoff. That can be handled by bill of particulars.

Mr. Crane. Surely.

Mr. Medalie. If that is agreed, that is all right. I am

c15 willing to take the chance. I think you have given me the answer.

Mr. Robinson. I shall have to ask for things if I am going to be responsible for drawing any form with your help, such as Mr. Holtzoff suggests, or for delivering a rule plus a commentary, to put into it the details that will be necessary for the district, United States Attorneys, and courts, in any event, to have a little more direct line on what the judge has in mind.

Mr. Medalie. I can send you a copy of the indictment for larceny.

Mr. Robinson. I want to question you, if you will. I should appreciate it a lot if you would assist the reporter's office by giving us a specimen of an indictment which you feel does represent a short statement.

Mr. Crane. I will try to get some of those statements out.

Mr. Robinson. Either opinions or, for instance, to be more specific, take this Massachusetts form, which I regard as a pretty good short form and which this rule is based on, if you would go through it and eliminate the words in it which you think really are in excess.

Mr. Crane. You are tying yourself down--you do not mind my using the expression; there is nothing I know of in the

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Constitution that prevents a fellow from thinking for himself. You are tying yourself down always to something that has been written in the past. Now, just take this: You charge him with any crime you can think of. You just charge him that John Jones is accused of the crime of larceny in a certain degree or murder in the first degree or mail fraud, or whatever you want. Just charge him with the crime. I mean, state that it happened. You can state it in a great deal better than half the time, and I will bet on you, and there would not be a single thing left out. Not a thing. And you can make judges sit up and take notice, because you would not have a flaw in it, and you just state it in your own good, plain English. As you write these rules there is not a thing here that is not clear and understandable. There may be a disagreement as to what the result is. Another thing: If you state it in that good plain English there is not a judge on the bench, if he is awake, but who would appreciate it.

Mr. Medalie. I will send you a batch of short forms prepared by Stanley Fuld, Dewey's assistant.

Mr. Robinson. I have them.

Mr. Medalie. They are pretty good, are they not?

Mr. Robinson. That is right.

Mr. Crane. And he is a very good man, the best in New York, Fuld.

Mr. Medalie. They sent you a batch of them before they were consulted about it.

Mr. Crane. I will get you some from Kings County.

Mr. Robinson. Well, I have plenty of short forms, and I think the Massachusetts short form is the best one I have seen

b40

from any jurisdiction, and this one is based on that, just one, two, three. I do not want to take up any more time, but I just want to serve notice on Judge Crane or write him a letter.

Mr. Crane. If you are stuck just write to me, and I do not want to present as representative of a human being just a skeleton. We want to put the flesh and clothes on him.

Mr. Robinson. Well, we have got a ghost now.

The Chairman. What about Rule 10?

Mr. Longsdorf. Did you pass Rule 9?

Mr. Crane. Well, there is none there.

Mr. Seasongood. I will raise the question whether any of Rule 9 might be perhaps included: for instance, (d) and (e). As far as (d) is concerned, it seems to me that might be all right for inclusion. That is,the violation of certain regulations might be a federal crime. And then (e) involves the question whether you are going to include contempt or whether you are not. If contempt is in, certainly you can be in contempt for the noncompliance with an order of the court or a judgment of the court. I should like to have that decided, Mr. Chairman, whether we are just to have a general reservation that wherever things are appropriate to contempt, if it is decided to include
16 that, that they will be included at a later time. Perhaps that is the best way to do it.

The Chairman. All right. Mr. Seasongood moves that if we should take up contempt we include a provision or provisions comparable and similar to paragraphs (d) and (e) of Civil Rule 9 set forth on the left-hand page. That is your motion?

Mr. Seasongood. Well, I did not know but that (d) might

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be appropriate anyway.

Mr. Holtzoff. I think it is appropriate anyway, and so is (e).

Mr. Longsdorf. Including double jeopardy, for example, (e) might be used.

Mr. Seasongood. Yes, that is right.

The Chairman. That is true.

Mr. Longsdorf. I think you will find those rules in the A. L. I. code, will you not, Mr. Waite?

Mr. Waite. I am sorry. I was not listening.

Mr. Longsdorf. The preceding rule.

The Chairman. The question is about putting in the rules (d) and (e) under Civil Rule 9 on the left-hand page.

Mr. Longsdorf. Opposite Rule 9.

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Mr. Seasongood. If they can be a party to any crime or defense then it would seem to me they ought to be in.

Mr.Holtzoff. I second the motion.

The Chairman. The motion is not limited as I limited it. I will restate the motion. It is that at an appropriate place we include (d) and (e) of civil rule 9.

The motion was agreed to.

Mr. Robinson. Judge Caffee raised the question, and won his case on the ground that the State was unable to prove that a corporation had been incorporated under the law of a foreign country.

And the legislature of Alabama then passed this statute, which is still on the books there, providing that if a defendant wishes to deny the incorporation of a corporation, as alleged under an indictment, it is necessary that the defendant shall file a notice before trial that it does deny the existence of the corporation. Then on the trial if he does not file such a motion, it is taken as proof, or is established, that the corporation was incorporated as alleged.

Mr. Holtzoff. This might be useful in a Sherman law case where you might have a bunch of corporate defendants; and if you have a technical lawyer for the defense he would insist on producing certificates of incorporation fromhalf a dozen States.

Mr.Robinson. I should say that the statute does not apply to defendants, but only to corporations that may be mentioned, such as owners of property stolen, or something of that kind.

Mr. Holtzoff. I think it should cover this, too.

Mr. Robinson. That is what I should like to know.

Mr. Holtzoff. I move that the Reporter include a rule which in effect would provide that it is not necessary for the prosecution to prove the existence of a corporation, whether such corporation be a defendant or some other corporate entity necessary to be proven, unless the defendant files a special notice requiring such proof.

Mr. Medalie. Let us see. If the corporation is named as a defendant the statutes provide however the corporation shall plead. Some one comes in, in answer to a summons, and pleads the corporation guilty or not guilty. If he does that, does not he admit the corporation as a corporation?

Mr.Holtzoff. I am not sure as to that.

Mr. Youngquist. Could not there be a plea as an entity?

Mr. Medalie. It is like a defendant answering an indictment which states his name as "Joe Smith" without raising any question about it. He cannot say later, "I am not the Joe Smith" unless he pleads it before he answers the indictment.

Mr.Robinson. If you appear for a corporation and plead, you do not require proof of the incorporation?

Mr. Medalie. I am not sure.

Mr. Holtzoff. If it is a corporation that is pleaded under an indictment, and if it happens to be a joint stock association, what position is the corporation in?

Mr.Medalie. I do not know. I have never looked into it, and I cannot say.

Mr. Longsdorf. Mr. Medalie is a highly pragmatical sort of a person; but here is a situation in California which caused almost unextricable confusion, because they sued the Postal Telegraph & Cable Company of California, whereas that was not

the right one; it was the New York company. It was two or three years before they got that straightened out.

Suppose they had been indicted in that way?

Mr. Holtzoff. Then the defendant would have pleaded not guilty, on the ground that it was some other corporation.

Mr. Longsdorf. I know; but that is what you do not want to bring about.

Mr. Medalie. I would say the judgment was not enforceable.

Mr. Longsdorf. I know; but you do not want to make that mistake. What would the fine be worth?

Mr. Medalie. Nothing.

Mr. Longsdorf. Well, that was the trouble with the judgment.

Mr. Crane. There must be some way, some rule somewhere, throughout the States or districts that deal with the corporate name. I suppose you have to sue against the corporate name correctly.

I suppose it is a wise thing to do, as we do everywhere else -- just to see what has been customary. They have been prosecuted and sued, and the indictments must show how; and while we may have our own ideas about it, it is just as well to find out how it has been done. I do not know about it; but rather than guess at it, I move we find out.

The Chairman. Very well. Suppose we have a motion to that effect -- to find out what has been the practice, and to incorporate such a rule.

Mr.Crane. Yes.

Mr. Longsdorf. It seems to me that we might have a case

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similar to the Postal Telegraph case.

The Chairman. Are you ready for the question?

(The motion was agreed to.)

Mr. Wechsler. Mr. Chairman, in this connection it occurs to me that there are other particular situations comparable to that which has just been determined, as to which similar action may be necessary. In the American Law Institute model code there are some 30 sections following section 154 which are addressed to problems of this sort, where the existing law points to a special situation to be obviated by rule. Let me suggest that similar attention be given at least to the particular ones referred to, that the Law Institute thought sufficiently important to require special attention. It may not be necessary in the Federal practice to take account of some of them or, indeed, any of them, but I think it would be prudent to make sure of that, unless that has already been determined.

Mr. Robinson. Yes; we have been working on it. But our trouble is that we are limited in space. You mentioned 30 sections, did you not?

Mr. Wechsler. Yes.

Mr. Robinson. And the problem is how to contain all of those in something like Judge Crane's indictment, which would be quite brief but would be broad enough to cover the situation.

Mr. Wechsler. In the Law Institute code that situation was not deemed to be important. They have an opening generalization which sets forth the principle which Judge Crane proposed, and then some of the special difficulties are considered and resolved.

I might say that in general I am not inclined to worry

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about questions of space or arrangement. I think these are technicalities that we are supposed to resolve and if possible eliminate.

Mr. Waite. You have spoken several times of space. Are we limited to the number of sections we can have? I think we should put in everything desirable, regardless of the cost to the printer.

Mr. Robinson. Of course, the Chief Justice spoke to us about making them as brief as possible.

Mr. Dession. Should not we handle it in this way: Brevity and simplicity dealing with a particular topic are important; but do we care how many sections we have so long as we have particular sections dealing with the particular problem? It seems to me one dealing with these rules would like to have brevity and simplicity; but do we care how many we have dealing with any particular one?

Mr. Longsdorf. But if we put out a criminal code with 280 sections, someone will get up a complaint in the newspapers that the civil rules were handled in 80 sections, and that we should handle this in a comparable number.

Mr. Seasongood. Would Mr. Wechsler read enough of the ones he mentioned to show us what he is talking about?

Mr. Wechsler. I will read the captions.

Mr.Seasongood. Yes.

Mr. Wechsler. The first section is entitled "Charging the offense"; and it has the general statement of principle which Judge Crane proposed and which we have adopted.

The next deals with "Insufficiency of Indictment and Bill of Particulars". That we have covered.

The next one deals with the name of the defendant and, in particular, with the situation in which the defendant is a corporation.

The next one deals with allegations of name.

The next one deals with allegations of place.

The next one deals with allegations with reference to the means by which a crime is committed.

The next one deals with value and price.

The next one deals with ownership; the next with intent; the next with characterization of the act -- the old problem of using the qualifying words such as "unlawful", "wilfull".

The next one deals with omission of unnecessary matter.

The next one deals with allegations of places and things.

The next one deals with the name of the person other than the defendant.

The next one deals with property described as money.

The next one deals with description of written instruments.

The next one deals with description of written matter.

The next one deals with the meaning of words and phrases.

The next one deals with allegation of prior convictions.

The next one deals with private statutes, which I suppose is roughly equivalent to our regulation problem.

The next one deals with judgment; the next with exceptions -- that is to say, the negation of exceptions in a statute which constitutes a basis of the charge.

The next deals with alternative or disjunctive allegations.

The next one deals with direct allegations.

The next one deals with special problems and special crimes, such as libel, perjury, and so forth.

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The next one deals with offenses divided in degree.

Then they go into misjoindure, duplicity, uncertainty. I think that about exhausts the enumeration.

I do not for a moment say I think all of them are necessary.

Mr. Waite. Mr. Wechsler, asked me why they were put in. I think I can answer that. We all agree that section 154, as it was stated, rendered the subsequent sections quite unnecessary from a logical point of view, and we found that a provision similar to section 154 requiring simplicity had been interpreted as requiring this, that, and the other specific allegations. So we went through the pages and took all these various holdings that, despite a desideratum of simplicity, such and such a court has held such and such a thing necessary. And then we enumerate all those propositions in order to make abundantly clear what was meant by section 154.

Mr. Wechsler. Well, there are particular problems, for instance, in allegations of intent. I have drafted a number of indictments in which that was a special problem -- the principle being whether a special phase of intent was covered or whether some cover-all word was sufficient.

I think we can cover the situation by noting some of the most troublesome and recurrent of the particular issues, and meeting them. In part, indeed, I think the Reporter did that in the draft which he prepared.

Mr. Burke. You are referring now to rule 8?

Mr. Wechsler. Yes. Mr. Chairman, I am not suggesting a revival of that question, but only that this problem must have occurred to the Reporter in working that out; and I do not

think there is an inconsistency between a generalization of the ideal and specific provisions, where the problem is troublesome enough to require attention.

At any rate, my suggestion was only that these others be considered along with the particular one that was the subject of Mr. Holtzoff's motion.

Mr. Glueck. No matter how many of these specific details you put in you will still get litigation to other details within the framework of simplicity; and the question arises whether it would not be better to discuss all these details, along with appropriate citations, in the commentary, by way of warning as to pitfalls, and so forth.

At any rate, I think you are right in saying that the whole problem should be explored.

Mr. Longsdorf. Perhaps some of them should be put in, with the suggestion that they are illustrative and not exclusive, although I do not know whether that works very well.

Mr.Crane. No. The Institute gives the rule and then gives some illustration; and I see no reason why the Reporter could not somewhere state what we think it means or intends, or anything else.

Mr.Glueck. But there is the basic problem alluded to, of course; and we are just fooling ourselves --

Mr. Crane. But you are right in this, of course: That experience teaches that you cannot foresee what every judge is going to do and how wise some judges can be, whether others are not so wise.

Mr. Wechsler. Take a single example: It is often important to a prosecutor to be able to state some things hypothet-

ically and in the alternative. He is unable to state what the actual situation is that he will be able to prove, but he knows he will be able to prove one thing or another that constitutes a crime. That was deemed to be of sufficient importance to be covered in all the civil proposals written about. I do not know whether it is in the civil rules. I know that prosecutors are now uncertain in the Federal practice whether they can do that; and I am not sure whether the simple generalization of plain and concise statements answers that problem.

Mr.Crane. I do not see how, without going into detail -- which is impossible for us to do -- we can meet every situation for a court for every indictment that may be drawn, or get it so that no question ever is raised. It is impossible, anyway. You cannot frame common law pleadings that way. Questions always arise as to how to plead about a corporation or about judgment or anything else. We are not the courts to decide about these questions. We can simply state a rule of what is to be stated. If it is a committee and a corporation it can be stated as a corporation.

Mr. Waite. There is a suggestion here: The court can promulgate rules with commentaries. The legislature cannot promulgate rules with commentaries.

The Chairman. Now may we go on to Rule 10, which seems to follow rather closely the corresponding civil rule.

Mr. Medalie. How much of this do we need now?

Mr. Holtzoff. I do not know whether we need any part of it for criminal rules. I would be inclined to see it go out.

Mr. Crane. So would I.

Mr. Wechsler. Do I understand, Mr. Chairman, that my

motion was rejected?

The Chairman. I did not know you made it as a motion. I thought you wanted the Reporter to consider these items.

Mr. Wechsler. Yes.

The Chairman. Do you want to make that as a motion?

Mr. Wechsler. No; not if the conclusion is that he should consider them.

Mr. Glueck. I do not think you put it in the form of a motion. As I recall you made these suggestions.

Mr. Wechsler. I should like to know what is the judgment of the group as to whether these things should be considered.

The Chairman. Perhaps we should do it by having the motion passed upon.

Mr. Youngquist. I thought that was agreed to.

The Chairman. Suppose we have a motion and get a ruling on it.

Mr.Crane. I understood that it came up in connection with a corporation, and the Reporter was going to look up, at our suggestion, and without a motion, the forms in which indictments had been used and corporations were brought in, and how; and then we would know a little bit more about what to do about it, when we get that information. I understood we passed that by consent.

The Chairman. Yes; that was passed.

Mr. Crane. Then the question came up about what the American Law Institute had as suggestions as to what was unnecessary to be alleged; and we considered that and then stopped, I understood.

The Chairman. No; we went farther than that. The sugges-

tion was made by Mr. Wechsler that there were a very large number of contingencies that were covered by the American Law Institute Code that do not seem to be covered by our code; and at Mr. Seasongood's request he read the headings of some of them.

Mr. Crane. That was a footnote; was it not?

Mr. Wechsler. No; those are actual sections in their code.

The Chairman. And there the matter rests. Let us get some binding situation. Will you make a motion?

Mr. Wechsler. I move that the Reporter give consideration to other situations similar to that presented by the corporation problem, on which we have just acted.

The Chairman. Is there any further discussion? (Putting thequestion.)

(The motion was agreed to.)

The Chairman. Now we have Rule 10 before us.

Mr. Robinson. It has been proposed that the rule be dropped. My problem there is, again, whether if such provisions are desirable in a set of civil rules, they are or are not desirable in a set of criminal rules.

Mr. Holtzoff. There is a difference, because the only pleading you have in the criminal procedure is ~~when you indict~~ an indictment ~~or~~ or information. The only other written document we have provided for would be a motion. All the pleas of the defendant are oral. Therefore there is no particular object to be served by Rule 10.

Mr. Robinson. If that is the will of the committee, it is certainly satisfactory to me.

Mr. Youngquist. Was not the word "pleadings" used here

in Rule 10 with the idea of covering motions as well, and not only written accusations?

Mr. Holtzoff. It was my understanding that the defendant might file written pleas, and we modified the prior rule on that point.

Mr. Youngquist. We simply called them notices.

The Chairman. Notices and motions.

Mr. Holtzoff. Then we should not use the word "pleading" because the only pleading we have is the indictment on information.

Mr. Robinson. We should have "notices and motions".

Mr. Holtzoff. Then the rule should have that inserted.

Mr. Robinson. That is the thing to do, then: Line 2, "Every written pleading, notice, or motion."

The Chairman. It goes all the way through. If that is to be the action, would it not be better to ask the Reporter to modify and refer specifically to notices, motions, and so forth?

Mr. Robinson. Very well, sir.

The Chairman. If there is no objection, that will be the order on Rule 10.

Mr. Dession. What is the order?

The Chairman. That instead of using the word "pleading" we refer specifically to the indictment and information and motion.

Mr. Youngquist. I refer to Rule 7 on page 3, which bears on the suggestion I made. It reads as follows:

"The rules applicable to captions, signing, and other matters of form of pleadings apply to all motions and other papers provided for by these rules."

So we can let it stand as it is.

Mr. Holtzoff. If you let it stand as it is, is it not somewhat misleading? Because when we speak of pleadings, the impression is created that there are a series of pleadings in a criminal case, such as there are in a civil case.

Mr. Youngquist. You could use the singular, I suppose, as it is used here: "Every pleading".

Mr. Holtzoff. In one case it says "every pleading". In the next sentence it says "the written accusation". The only pleading is the written accusation. So using the two different words creates confusion, because you might think the draftsman had in mind some other pleadings besides the written accusation.

The Chairman. The Reporter suggests that this might be disposed of by referring it back to him, in view of the fact that so many more of our pleadings are written, as compared to those referred to in the first draft.

If that is satisfactory, the next is Rule 11.

Mr. Holtzoff. I think the same situation might be considered in connection with Rule 11.

Mr. Medalie. There is something there that might crop up again: "The signature of an attorney constitutes a certificate by him that he has read the pleading". That is fair enough.

"That to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay."

Mr. Holtzoff. That is not applicable to a criminal procedure.

Mr. Medalie. "If a pleading is not signed or is signed with intent to defeat the purpose of this rule, it may be

stricken as sham and false and the action may proceed as though the pleading had not been served. For a wilful violation of this rule an attorney may be subjected to appropriate disciplinary action."

Mr.Holtzoff. You cannot discipline a district attorney for filing an indictment.

The Chairman. Why not?

Mr.Holtzoff. Because the grand jury has found it.

Mr. Medalie. Yes; but he has signed it. The district attorney himself cannot refuse to sign any indictment in cases in which he is not convinced that the defendant is guilty and ought to go to jail.

Mr. Robinson. Where do you find that?

Mr. Medalie. Well, it says that he has read the pleading and that there is good ground to support it.

Mr. Robinson. He should not sign it unless he thinks there is good ground to support it; should he?

Mr.Medalie. I think the act should be a ministerial act, after the grand jury returns a true bill. The grand jury might be dumb.

Mr. Holtzoff. We had a case in the past year, in one of the midwestern districts, in which the grand jury found an indictment in a mail fraud case against the advice of the district attorney -- practically a run-away grand jury. They passed a resolution directing the United States Attorney to draft an indictment and present it to them for filing; and of course he had to endorse it "a true bill". But he did not certify it. He should not be held to the requirement --

Mr. Crane. What does this have to do with rules of

pleading, Mr. Chairman?

The Chairman. The purpose of the civil rule was to put an end to the practice in some States of counsel declining to assume responsibility for their pleadings.

Mr.Crane. I do not suppose that any lawyer in a criminal case, no matter who he is -- Mr. Bartlett, former chief justice of my court, was cited for contempt, way back in the early days, for action in a criminal case, although they thought it properly laid, and acted on their best conscience, no doubt. But the judge did not think so.

Of all places in the world you have got to have a brave and courageous bar in criminal prosecutions, on both sides, but particularly for the defense, especially if the defense is unpopular. In many cases the defense is unpopular.

There is a code of ethics thrown in here. If the code of ethics is not to be drawn up here, let the court do it; or the American Bar Association has a code of ethics which is very good indeed.

But I do not think we want to give to the lawyers here a rule of ethics, or to ask that they vouch for everything that is to be filed in the way of pleadings.

This is not stated except from experience. I know of a case in which I did not believe what was told me. I thought it was all wrong. I thought the man was just falsifying to me. And yet it turned out to be absolutely true.

Now, why is a defending lawyer put upon the stand as vouching for or believing everything that is told him? The utmost he is called upon to do is to defend his client so long as he does not intentionally deceive anyone. What his client

has told him may be true and may be false; but many times what you think is not so. You find that you are not as smart as you thought you were, and that what you think is wrong.

I do not like this preaching to the bar in these rules.

Mr. Robinson. This is the same as the civil rules, you understand.

Mr. Crane. I do not care about that.

Mr. Burke. Mr. Reporter, how can you ask a defense lawyer in a criminal case to vouch for the fact that the pleading is not interposed for purposes of delay, when in many cases he does it for delay and for his client's advantage? If a case is charged in a hostile community, you are going to delay it as long as you can.

Mr.Robinson. And the problem does not arise in a civil case?

The Chairman. You do not mean that seriously; because as a defense lawyer I am frank to say that it arises in about 50 per cent of them.

Mr. Seasongood. The rules of ethics say you may not interpose pleadings for purposes of delay.

The Chairman. I mean this. There may be cases you would like to have disposed of the day after you file your answer; but in other cases you are perfectly well satisfied if the judge has gone off the bench for the time being or if there is some reason why you do not get a particular jury in that particular term. There are thousands of reasons that come in, and every lawyer takes advantage of any of them.

Mr. Seth. Every one of them takes an oath not to interpose pleadings for purposes of delay.

The Chairman. I grant that.

Mr. Waite. This states that every pleading shall be signed. The only pleading on the part of the Government which does not need signing -- section 7 specifically provides that the information shall be signed; and this says that the only plea shall be "guilty" or "not guilty", and that may be oral.

So the second section of this, providing that he shall sign his pleading and state his address, has no meaning. I think we might properly just strike this whole section.

Mr. Robinson. Let me raise this problem, which is very acute in many State prosecutions. It may be that the Federal system escapes it. But take the case of motions for continuance, alleging the illness of a witness: In my own experience I have known of lawyers signing statements that the witness is ill, when he actually is not ill and the lawyer knows that he is not ill. In my State we have had to pass a statute to require a physician's certificate that witnesses are ill, because lawyers impose on the court by bringing in motions for continuance.

Mr. Medalie. I think it is the law in every State in the Union, so far as the courts have power over the bar, that when any lawyer brings in such motions he is subject to disciplinary action.

Mr.Robinson. I suppose that is so.

Mr. Crane. We had a prominent lawyer who asked for delay in a case because he could not go on, in the absence of a witness. The district attorney did not believe it. The court demanded that he state the name of the witness; and he did, by stating that his name was Long Green.

Mr.Robinson. The second provision is about swearing to

affidavits of prejudice; in some cases affidavits are signed stating that the judge is prejudiced.

Mr.Crane. And it is the biggest mistake that ever was, psychologically. If you want to try a case, go before the man who is terribly prejudiced against you, and never before your friend. Your friend will bend over backwards and knock the dickens out of you. If you go before your enemy, the worst enemy you have, and your client's worst enemy, and put it right up to him, he will give you a square deal.

Mr. Holtzoff. I move that we strike out section 11.

Mr. Medalie. I second the motion.

Mr. Robinson. I should like to know the ground for it, so that I will understand it from the record when I get it.

Mr. Dean. Is a substitute motion in order?

The Chairman. Yes.

Mr. Dean. I move that we strike everything from line 7 on, and request that the first 6½ lines be made to read "Motions and notice of motion" -- since we have covered information and everything else.

Mr. Holtzoff. I would accept that as a substitute for my motion.

Mr.Crane. Yes; I think that is good.

Mr. Youngquist. Motions are already included by Rule 7?

The Chairman. Yes. I am troubled by one practical consideration. Whether we do it or not, there is going to be a comparing of the two sets of rules, and it is going to be immediately asked whether we are deciding that there is a higher standard of ethical conduct in the trial of civil cases than

in the trial of criminal cases. I think we will be in an awkward position.

Mr. Holtzoff. What bothers me from the standpoint of the United States attorney is that I do not think the United States attorney by signing an indictment ought to be held to vouch for it.

The Chairman. The point I have in mind is either that we should pass the whole subject by in discreet silence or else not fall far short of the standard that has been set up for civil practice.

Mr. Crane. If you are going to represent a client in a civil case and your client owes the money and told you he owes the money, you would not come into court and represent him in an effort to deny that he owed the money, but you would tell him to pay off. You might plead mitigating circumstances, but you would not go into court and try to show that he did not owe the money.

But we know that in England when the defendant told the barrister that he was guilty in a case punishable with death, could the barrister withdraw? No; he decided he could not. He took it before the law lords, and it was discussed. They told him that he should not misrepresent, he should not desert the case, but he should see that at least the defendant is convicted according to the law, and he should stay in the case.

We have an entirely different attitude in a criminal case than we have in a civil case. The man pleaded not guilty. Should he stand by his plea? He knew he was guilty. That is the question right off. That was the trouble. He knew he was guilty, and he pleaded not guilty, to begin with.

Mr. Dession. You do not know that he is guilty just because he says he is guilty. He does not know the law. I have had a case in which a man said he was guilty of burglary, and he was not guilty of it at all.

Mr.Crane. I say there is a different attitude in a criminal case than in a civil case.

Mr. Holtzoff. I think the Chairman's objection might be met by omitting section 11 entirely.

Mr.Robinson. It would not stick out like a sore thumb, but like a thumb that has been cut off!

Mr.Holtzoff. So I withdraw my second of Mr. Dean's amendment.

Mr. Dean. I withdraw my amendment.

The Chairman. Quite frankly, in my State we have never had the slightest trouble with attorneys signing pleadings, until this rule came along; and then our chancellor conceived the idea that all attorneys must sign pleadings in person. All that is the result of civil rule No. 11. It is a lot of poppy-cock, from my personal experience in my State. I cite that to show how the civil rule is being carried over into the criminal rules in my State, and perhaps in other States.

I am impressed by the fact that we cannot hold the district attorney up for endorsing the indictment, and some of the practical difficulties that Judge Crane has pointed out with respect to the defendant's attorney.

Mr.Seth. This refers only to pleadings that the defendant's attorney signs. He does not sign the defendant's pleading of guilty or not guilty.

Mr. Medalie. Rule 11 of the rules of civil procedure

related only to pleadings; did it not?

Mr. Holtzoff. Yes. Therefore there is no necessity for applying this.

Mr. Medalie. Yes; I think so.

Mr. Dean. It points out the basic difficulties when we try to relate civil with criminal. We may have the same situation later on when some one tries to compare the civil and criminal, and actually they should not be compared.

Mr. Wechsler. I think any general student of the subject would be as surprised as I am to see the civil rules adopted as a model for the system of criminal procedure.

Mr. Dession. Yes; I think our duty is to find out what are the problems in the criminal law and to draw a code for them, and to pay no attention to what is in the civil code.

I think the civil code was well drawn in so far as its problems are concerned; and I think we should have a similar attitude.

Mr. Orfield. I used to think the criminal and civil were unlike; but from actual practice I was surprised to find how similar they are.

Mr. Holtzoff. But the attorneys in the courts say they are different.

Mr. Dession. Let me raise another question. In one of our early sections it was provided that all accusations must be signed by the United States attorney. I do not necessarily object to that. But some classes of prosecution are prepared and initiated in Washington by members of the Attorney General's staff. Do you want to require that the local United States attorneys sign those? He does it as a matter of courtesy,

usually.

Mr. Holtzoff. The signing today is no different.

Mr. Dession. Quite as a matter of courtesy.

Mr. Medalie. There is a practical reason for it, too. He is the attorney. There must be a place where you can serve process, and it must be in the district in which the case is pending, and he wants to put himself in as the attorney of record. Is not that the real reason?

Mr. Holtzoff. Yes. All papers on the part of defense counsel may be served on the United States attorney.

Mr. Medalie. And certainly you would not want to serve them on Washington.

Mr. Holtzoff. And from the department's point of view I think it would be just as well, because the department always holds the United States attorney responsible for the prosecution in his district.

Mr. Dession. I have no feeling one way or the other. I wanted to make sure that that practical problem had been taken care of.

Mr. Holtzoff. Is the motion withdrawn?

The Chairman. Do we have the substitute?

Mr. Dean. I withdraw it.

The Chairman. Then we have the original motion to strike Rule 11 as now prepared. Is there any further discussion?

Mr. Robinson. May we have a further statement of Mr. Holtzoff's reasons?

Mr. Holtzoff. Gladly. I have two reasons: First, on the part of the United States attorney, he should not be required by his signature to an indictment to be held to certify

to the statements contained in the indictment. And so far as defense counsel is concerned it seems to me that Judge Crane has so ably and well summarized the reason that I should hesitate to do so again, except simply by saying that I subscribe to everything Judge Crane has said.

Mr.Crane. Of course he does not sign any plea, as we have now defined it, anyway. And while it may apply to motions, any lawyer who signed a paper that he knew was wrong or had suspicion was wrong would be subject to discipline, anyhow.

Mr.Holtzoff. Since the only pleading is the indictment and the only written document the defendant files is a motion, this rule, which is so important in civil procedure, has no application. Those are the grounds of my motion.

The Chairman. Would it be possible as an alternative that this might be made to apply to motions and notices of motions?

Mr.Holtzoff. Then the civil rules do not hold counsel to the requirements of Rule 11 as to motions, but only hold them as to pleadings. So you would be imposing a greater burden on counsel than is imposed on the civil side of the court.

Mr. Medalie. Rule 11 of the civil rules was intended to stop fake claims and fake defenses. I think that is really the answer.

Mr. Seth. When it comes to a bill of particulars, the United States attorney should be bound when he comes to sign that. That is true.

Mr. Holtzoff. He is bound by the bill of particulars; but the question is whether he should be bound by the certificate.

Mr. Seth. I mean the certificate to it.

Mr.Dean. What is wrong with the certificate? It only says that it is to his best information and belief. He believes there is good ground for it.

Mr. Holtzoff. How about the case which sometimes occurs, in which a grand jury finds an indictment against the advice of the United States attorney?

Mr. Youngquist. That can be taken care of, as the Reporter suggested a while ago, by eliminating indictments from this section.

Mr. Holtzoff. Then all that is left is motions, and there is hardly any reason for such a rule. Rule 11 does not apply to motions in civil cases. Why should it apply to motions in criminal cases?

Mr. Youngquist. Do not motions or pleas of former jeopardy and those things we have been talking about at least fulfill the same office as pleadings in a civil case?

Mr. Holtzoff. I would refer to Judge Crane's remarks on that.

Mr. Youngquist. It is just a question whether we are going to depart wholly from the principle laid down in the rules of civil procedure. I do not see any difference whether we call them pleadings or motions. What we are calling motions are in fact pleadings -- or some of them, at least. And the whole question, it seems to me, is whether we are going to adopt the substance of the civil rule or depart from it entirely. If we are going to depart, we may as well eliminate No. 11 altogether. But if we are going to follow the precedent set by the civil rules, then I think No. 11 should remain. By Rule 7 it is already made applicable to motions and notices.

Mr.Holtzoff. Ever since yesterday morning have we not been getting away quite a bit from civil rules? Perhaps this is another place in which we ought to go away from the civil rules.

Mr.Youngquist. That is the whole question. I do not think it makes any difference whether it is motions or notices or pleadings.

Mr. Holtzoff. No.

Mr. Youngquist. It is just a flat question of whether we should adopt a different position.

Mr. Holtzoff. I think we should adopt a different position because of the different nature of civil proceedings.

Mr.Dean. There is one motion that is designed purely for delay, and that is a motion for continuance.

The Chairman. This is what I was searching for, and Mr. Tolman has been kind enough to come to my relief. The civil rules specifically apply to motions -- 7 (b) (2):

> "The rules applicable to captions, signing, and other matters of form of pleadings apply to all motions and other papers provided for by these rules."

Mr. Holtzoff. That does not apply to certificates, but only formal motions.

The Chairman. Signing them -- yes; it does.

Mr. Youngquist. What do you mean by "pleadings"?

Mr. Holtzoff. The signature of an attorney constitutes a certificate. Does that apply to motions?

The Chairman. That is what it seems to say.

Mr. Youngquist. That is 7 (b)(2)?

Mr. Holtzoff. Yes.

Mr. Youngquist. "All motions and other papers".

The Chairman. Perhaps we might take Rule 11 by confining it solely to motions and notices of motions, on the ground that indictments are out, for the reasons stated, and that the plea is oral.

Mr. Holtzoff. If it is limited to motions I have no objection.

Mr.Dean. What about motions for continuance?

Mr.Crane. It does not make any difference to me, and you can put in anything you want, and certainly I am going to follow the Chairman in so far as I can. But I do want to say -- and I am so far removed from it that there is nothing personal to me, and I have been on it for nearly half a century -- that it does seem to me that a lawyer as a representative of a client does not have to certify for his client. We have condemned a lawyer for standing before a jury and saying that he knew the man was innocent or he knew the man was guilty. The thing is that he is there to present what his client has, in the best way possible, unless he knows he is doing something deceptive or dishonest or a trick, or something of that kind. So long as he is representing what his client has got he is not called upon to certify to anything; and I think we are carrying this rule too far when we put upon a lawyer -- and I never knew it to exist -- the burden of certifying to the truth or good faith, or that he has got to say to the court, when he presents what his client has to present, that he believes it himself.

I myself feel that way about it. I think you are going a little too far. And yet if the Chairman wants it, I am going to go it.

The Chairman. No; I am debating it mentally.

Mr. Crane. Sometimes I speak forcefully, but that is just my habit. Do not make a mistake and think that that means solid conviction. I will go along with the rest of you, but I just present it for consideration. We do speak freely so that we will get it off our minds.

But I am going along with the rest; and if you are inclined to put it in, I am with you.

The Chairman. No; in the face of the realities of the district attorney's position and the defendant's counsel's position I am inclined to say let us forget it.

Mr. Waite. If at the end of the State's case the defendant's counsel wants to make a motion to dismiss for insufficiency of evidence he has got to make it in writing and sign his name to it and state in effect that it is not made for purposes of delay, and all that sort of thing. I do not believe it was intended to require that that motion be made in writing, but that is the way it reads.

The Chairman. I do not get that.

Mr. Waite. It says: "Every pleading of a defendant represented by an attorney * * * * shall be signed * * * *."

Mr. Youngquist. Where is that?

Mr. Waite. "Every motion and notice of motion of a defendant represented by an attorney and of the Government shall be signed by at least one attorney of record in his individual name, whose address shall be stated."

Mr. Holtzoff. It says "Every pleading". It does not say "Every motion".

Mr. Waite. Yes; but I protested that it did not have

any meaning, so far as "pleadings" are concerned, and the word "motion" was substituted.

Mr. Robinson. But it was made to read, "Every written motion and pleading".

Mr. Waite. Oh, all right.

The Chairman. I personally am won over to Judge Crane's view. Is there any further discussion?

Mr. Robinson. Let me ask Judge Crane one question, please. If it would be possible, would it be agreeable to have the Reporter draft this rule in such a way as to meet every objection suggested by you and Mr. Holtzoff, and then submit it to you?

Mr. Crane. Of course.

Mr. Robinson. Would that be an imposition upon you?

Mr. Crane. Of course not, not at all.

Mr. Holtzoff. Yes.

The Chairman. All right. You have heard the motion made by Mr. Holtzoff.

(The motion was unanimously agreed to.)

The Chairman. Rule 16.

Mr. Medalie. I wonder how United States attorneys feel about this.

Mr. Robinson. Mr. Medalie, to answer your question, the National Association of United States Attorneys has a committee of which the chairman is Mr. McGregor, at Houston, Texas. That committee is to report to our committee its recommendations; so we soon can find out their attitude on any question we put to them.

Mr. Holtzoff. Mr. Medalie, this pre-trial procedure has

been used in criminal cases.

Mr.Medalie. I have used it informally.

Mr. Holtzoff. Yes.

Mr. Medalie. I have sat down with a United States attorney and said,"Can we try this in six months or six weeks?"

Mr. Holtzoff. I know of one case at least where it was done by the judge.

Mr. Robinson. It is on page 3, Rule 16; the recommendations and suggestions are stated, including that of Judge Way, of Virginia. Mr. Tolman's abstract is here.

Mr. Medalie. There is nothing compulsory about this; and let us wind up with an agreement and an order made on that agreement.

Mr. Holtzoff. That is all pre-trial is.

Mr. Medalie. Not in civil cases. Of course it may be in criminal cases.

Mr.Holtzoff. But even in civil cases it is all by agreement, until trial.

The Chairman. No.

Mr. Crane. I have not found it that way.

Mr. Holtzoff. But everything that is done at pre-trial must be by agreement.

Mr. Medalie. Of course you know what happens. The judge tells one of the parties to make a motion to give him the relief he is looking for.

Mr.Robinson. I doubt if the judge would do much of that in a criminal case.

Mr. Medalie. No; they will not do it.

Mr.Crane. It worked pretty well where tried; did it not?

Mr. Robinson. Yes.

The Chairman. That is true in every State in which it has been tried; and once it is adopted the judges who opposed it are the hardest workers under it.

Mr. Medalie. Under Rule 16 there would be no amendments as to pleadings, would there?

Mr. Robinson. That might be in cases in which the alibi notice and insanity notice would be worked out together by counsel. They get their information pooled, and it would be just the place for it.

Mr. Medalie. You have the provision: "The court in its discretion may establish by rule a pre-trial calendar".

Mr. Holtzoff. He does in most districts. I was going to suggest that we might well eliminate that. I should hesitate to see the United States attorney lose control of the calendar. We had one district in which the judge regulated the calendar--with a lot of disastrous results.

Mr. Crane. I wrote you about that. I did it, too, once, when I was holding criminal courts in New York. And it was a great assistance. But of course that is local. It does not take in as wide a scope, with such tremendous cases that run so long, and those with a human element.

Mr. Seth. Is not this last sentence limited to the pre-trial calendar only?

Mr. Holtzoff. Yes.

Mr. Seth. And not the trial calendar?

Mr. Holtzoff. Yes.

The Chairman. Of course you have a provision there that the district attorney shall submit to the court a proposed

calendar for pre-trial discussions; so that you reserve the right to the district attorney to control the calendar, but you make it someone's duty to initiate these proceedings.

Mr. McDalie. I should think, too, that the defendants ought to have the right to propose preliminaries like this. Every once in a while you get a fellow who does not want to show you a paper. He has raided the office of a corporation and has taken out most of the documents under the guise of searching under a grand jury subpoena. He never has given them back, and then it is found that the district attorney has them. Although ordinarily you get what you ask for, sometimes you have a lot of resistance in the examination of documents. That does not always happen; but when it does happen the defendant ought to have an opportunity, through a procedure like this.

Mr. Youngquist. That is taken care of by Rule 34, "Discovery and Production of Documents."

Mr. Crane. Rule 34?

Mr. Youngquist. Yes.

Mr. Wechsler. It is largely that these pre-trial conferences, if they ever should be established, would assume importance on wholly non-litiguous disposition of cases -- the effectuation of a settlement, in effect, by disposing by plea. It has always seemed to me that such dispositions, which amount to most dispositions in the Federal courts, ought not be viewed with the frown with which they are sometimes viewed; and, second, that the negotiations which lead up to such dispositions might well become a more formal enterprise than ordinarily they are, and specifically that it is a good thing to bring the court into the picture, as well as the United States attorney

and the defendant's counsel.

Therefore, I am wondering, first, whether there is anything in this proposal as it now stands which means that this conference could take place only after a plea of not guilty, in which event I think it would be desirable to change that; and, second, whether it might be desirable even to point by the content of the rule to that possible utility of this pre-trial conference.

Mr. Holtzoff. I do not think this is limited to a time subsequent to a plea of guilty or not guilty. This can be taken at any time. This conference can be had at any time, under the wording of this rule.

Mr. Wechsler. In the civil situation it ordinarily happens after the pleadings have come to an end.

The Chairman. Yes.

Mr. Wechsler. And it points to a trial.

Mr. Holtzoff. I know of one district in which, under the civil rules, they hold pre-trials even before the defendant files his answer. They do that in the District of Oregon.

Mr. Youngquist. The question is whether, however, this takes care of that possibility.

Mr. Wechsler. Of course that is a catch-all. But if you want to point out this function it might be desirable to say something about it in the rule that would afford a clue as to what you have in mind.

The Chairman. Might it be better to point that out as a possibility, rather than to make it a part of the rule itself?

Mr. Wechsler. Under the idea I entertain it might be desirable to go so far as to require that there be a conference

in the presence of the judge with reference to the possibility of a disposition of that sort. Otherwise I assume that the pressure to conduct that conference in the jail or in the district attorney's office is likely to continue, and it may be that the judge will never get in at a stage at which he really could be of help.

Mr. Holtzoff. I think it would not be practicable in a country court where the judge shows up four times or six times a year. You certainly could not stop United States attorneys and defense counsel from conferring in the meantime; and if you could, it would be undesirable to do so.

Mr. Medalie. It would not be practicable in the larger districts.

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Mr. Medalie. That is especially true with a large number.

Mr. Holtzoff. I think you have got to leave the flexibility of this rule just as you would have done in the civil rules.

Mr. Wechsler. You may be right. I do not want to be too strong about this, but what happens now in a case where after all these preliminaries and you have a large number arraigned at one time and it is known that some of them will plead guilty and some of them will plead not guilty. With reference to the men pleading guilty there is always a little discussion over the point that he knows what he is doing or there may be a statement that an arraignment has been made and that the matter is understood, but will not the whole procedure be expedited in having that kind of conference take place not at the bar but in chambers? I realize that this may not fit all cases, but it would fit many cases to have the conference have the informality of the pretrial procedure.

Mr. Holtzoff. Isn't that something for the individual court? Some judges hold pretrial in open court and some in chambers. You have got to give some leeway to the individual court.

Mr. Youngquist. There is nothing to prevent the attorney from suggesting to the court that they hold the pretrial conference after the information is filed.

Mr. Glueck. Will you want the judge in all instances, or in all felony cases present where the district attorney feels a plea of guilty to a lesser offense can be taken than that which was technically permitted--would you want the judge there at that time when this is being discussed and com-

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promise is being arrived at?

Mr. Wechsler. I have seen some of the results of those compromises.

Mr. Holtzoff. I do not think you have that in federal courts because you do not have so many crimes of different degrees in federal courts.

Mr. Glueck. That is true.

Mr. Holtzoff. On the other hand in many cases negotiations take place in Washington. You cannot very well stop that.

Mr. Glueck. What about nolle pros.?

Mr. Holtzoff. Nolle pros. is an entirely different proposition. That is always the prerogative of the prosecuting attorney.

Mr. Glueck. You would not introduce any disciplining agency, any judicial agency?

Mr. Holtzoff. No, because there is no problem there actually. You do not have the same problem as in the state court because the United States attorney is a different type of official. He is not an elective official. He is under the Department of Justice rather.

Mr. Glueck. More theoretically I should say.

Mr. Holtzoff. I think it is more than theoretical. I think that some United States attorneys sometimes find the supervision a little irksome.

Mr. Youngquist. It is a very practical situation.

Mr. Wechsler. It may not be possible to achieve it in all instances, but I have no doubt particularly in those courts where probation facilities have been developed more than they have in some of the federal courts that if this kind of pro-

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cedure could be introduced at some early stage with the court operating with the assistance of the probation officer, the flexibility of negotiations and the three-party conference that you would get a lot more disposition that we would be proud of than you get under the present point of view. I pose the point only because it seems to me that where there is a chance to move along progressive lines that it should be taken.

Mr. Holtzoff. I think you are quite right but you cannot frame ~~the~~ a work to fit every court and every judge.

Mr. Dean. Maybe we can make it clear so far as the ~~crime~~ time at which the pretrial procedure is to be used for whatever purpose it is to be used by simply stating "that at any time following the filing of the written accusation the court may" and so on.

Mr. Holtzoff. I think that is a good idea.

Mr. Youngquist. Doesn't it permit that now?

Mr. Dean. I think it does, strictly speaking, but this is suggesting more of what Mr. Wechsler has in mind. That is, that there are various opinions as to where the pretrial procedure would be. It is clear that you can do it at any time after the filing of the written accusation.

The Chairman. Start with the first line and state "at any time after the filing of the written accusation, the court may"?

Mr. Dean. Yes.

The Chairman. You do not mean "in any criminal proceeding"?

Mr. Holtzoff. No.

Mr. Dean. No.

The Chairman. Is that amendment agreeable?

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Mr. Robinson. Yes.

The Chairman. There is no objection to it. It is accepted. We still have open the point Mr. Wechsler has raised which, I think, perhaps may be best pointed out in a note.

Mr. Wechsler. I think so.

The Chairman. Is that agreeable to you?

Mr. Wechsler. Yes.

The Chairman. Then in addition to that we still have the point raised as to who shall prepare this calendar and who shall bring this about, as raised by the last sentence starting with line 21.

Mr. Holtzoff. If you leave out this last sentence then you can go back to the beginning of the rule and you get the answer. Then every United States attorney or defense counsel

2 can ask for it.

Mr. Medalie. There is another reason why I do not think there should be a pretrial calendar. That is it would prevent the attorneys at an early stage before the pretrial calendar is ready in getting the kind of relief or aid they should have. Within a week or two after the plea of not guilty, the United States attorney may say that the corporation, the defendant has a lot of papers," and I do not want to waste a lot of time subpenaing those things before the grand jury." The defendant or the attorney has the papers belonging to the defendant or to the corporation, and he may say, "as early as possible we would like to get to work on it." Then if either side is not helpful to the other, a motion is made to ask the court to set a time when this can be disposed of.

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The Chairman. If we leave that last sentence out, may we insert in line 2 the words to this effect:

"The court may in its discretion or at the request of either party"?

Mr. Holtzoff. That is a good idea.

The Chairman. That would indicate that either the Government or the defendant would have the right to bring that up.

Mr. Medalie. I think you would prefer it "on its own motion or at the request of the attorney".

The Chairman. Yes, that is right. The court may on its own motion or at the request of either party.

Mr. Holtzoff. Yes.

Mr. Robinson. Leaving out "in its discretion"?

Mr. Medalie. Yes, you want the court's discretion.

Mr. Glueck. "In its discretion" would have to come after "either party".

Mr. Crane. If it is on its own motion it would have to be in its discretion.

Mr. Robinson. The "may" is permissive.

The Chairman. The "may" is permissive or "at the request of either party."

Mr. Wechsler. I should like to point out, Mr. Chairman, that as the rule is drafted it refers only to directing the attorneys for the Government and for the defendant to appear. The offenses that I have in mind frequently argue for the appearance of the defendant himself. Should that be included in the rule?

The Chairman. Would that not be reasonably implied? Very frequently lawyers at the pretrial conferences in civil suits have their clients appear also.

Mr. Youngquist. Where the defendant has no attorney, you mean, Mr. Wechsler?

Mr. Wechsler. Yes. He may have no attorney or he may have one.

Mr. Youngquist. He may or may not.

Mr. Wechsler. Yes.

Mr. Burke. I do not think it would be fair to the defendant or his attorney to be required to appear for a pretrial hearing. That raises the question that I have been considering in connection with this particular matter, the request on the part of the court to the attorney for the defendant to appear when there is a burden upon the attorney for the defendant because of failure to appear in connection with the request of the court, and presumably the rules, I suppose, in the simplified procedure at the time of the trial must be intended there to arrive at the truth with reference to some of the matters under consideration later in the trial, or presumably, as it may be expected in some way to take that advantage toward one side or the other. It seems to me that a joint request of either the defendant, in the event that he has no counsel, or by counsel for the defendant and the district attorney in this type of pretrial arraignment should be necessary.

The Chairman. Or of both?

Mr. Robinson. Or of both? Is that what you mean? Your amendment would be in line with the "direct" motion, "the court

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on its own motion or at the request of either party or both parties"?

Mr. Burke. It seems to me that if it is to be effective it should be at the request of both parties because I can conceive criminal proceeding in connection with matters before a federal court where it was a distinct advantage for the attorney for the defendant to refuse to come into that kind of

3 thing.

The Chairman. Well, he is summoned to a pretrial conference either on the court's motion or at the request of the district attorney. He certainly will not be in any more difficult situation than he is in the ordinary civil case.

Mr. Burke. Except that in some instances he may be trying to conceal something which as a matter of fairness to his client he may not desire to reveal until the appropriate place for it.

The Chairman. I think that very often in civil litigation you have to say frankly that "That is a matter we do not care to discuss at this time." That has often an effect on the other side of encouraging them to prod further by way of deposition. However, I do think that you can take that position and I think it can be done without offense to the judge or to counsel on the other side.

Mr. Burke. It just seemed to me that it would place an unfair burden or responsibility on the defendant which the law does not place upon him now.

The Chairman. On the other hand it seems to me that he has a more than compensating advantage in the right which is given to him to request the court to bring the district attorney in.

o8

I think it cuts both ways, but the knife in his hand cuts deeper.

Mr. Burke. In that situation there can be no question about it because if the defendant invoked the right to do it he cannot be heard to complain about some extralegal proceeding.

The Chairman. If it is limited to the various points which are itemized here I really do not see how it may hurt.

Mr. Burke. With respect to number 4 the court always handles that matter in any event at the time of trial.

Mr. Holtzoff. That is true but it may be useful to know in advance of the trial what is to be done.

Mr. Burke. That is purely a formal matter but the possibility of obtaining admissions of fact is something different. With documentary proof, that is one thing; but the possibility of obtaining admissions of fact seems to go to something different.

The Chairman. Well, we may get the facts of a survey so that you do not have to call the engineer or the surveyor. It may save a half hour of proof. Then you could take the testimony of a doctor by written letter.

Mr. Medalie. It would also take care of corporations.

The Chairman. To prove that they are corporations.

Mr. Medalie. Or know that you have to prove them.

The Chairman. Or know that you would be obliged to.

Mr. Youngquist. A great many formal matters can be taken care of in that way.

Mr. Medalie. My feeling about attorneys in criminal cases is that you call a man on the phone and say, "Do I have to prove so and so or do you admit it?"

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He says, "Oh, no, you do not have to prove that."

Then if there is any question about it later the court gets you together and there is very little difficulty about it. Most decent lawyers feel that way about it. I hate to try a case against a man if he feels that I am putting him to a terrible expense to establish something about which there is no dispute. I think most lawyers feel that way.

The Chairman. That is not universal.

Mr. Medalie. I think that it is not uncommon.

The Chairman. I agree with you.

Mr. Seasongood. I think the general idea, of course, of pretrial procedure is very excellent, but the matter has to be approached with some caution in criminal cases because you have several things which you do not have in civil cases. That is, you are entitled to the right of trial by jury. You are entitled to be confronted by your witnesses or your accusers. You are entitled to a public and open trial.

Now, I do not know whether you have stated this too broadly to run into the situation where somebody with a question may say that you are taking away his constitutional rights.

I think you have discussed number 2. 3 refers to admissions of fact. Sometimes you use doctors' statements without calling them in, but I doubt whether you could if the person would insist at the trial on repudiating that by the reason of being entitled to be confronted with his accuser. Then in lines 18 and 19 you are limiting the issues for trial to those not disposed of by admissions or agreements of counsel.

That brings to your consideration whether or not you have overstated the matter somewhat.

o10

Mr. Holtzoff. Not if counsel in the criminal case can stipulate it.

Mr. Medalie. It is stipulated in the trial.

Mr. Seasongood. Yes. A man pleaded guilty to an offense and then he was allowed to change his plea of guilty after he had been sentenced. So I think we have to approach this problem with a great deal of caution and overcome this weakness of this pretrial procedure. Then the judge takes the view that he would like a certain thing to be accomplished or feels it should be accomplished, and then when it is not accomplished and you come to trial he still feels that he is going to make the result coincide with what he wanted accomplished informally.

I think you should have these objections made, and I suppose the Reporter is loaded up with these objections.

The Chairman. Would it meet your objections to provide that the agreement reached at the pretrial shall be signed by both the district attorney and counsel for the defendant? It would really be a stipulation which would be in effect brought about by the intervention of the court rather than merely an order which the court would effect.

Mr. Medalie. The order would contain a recital that the attorneys "have come to an agreement to the following effect." Otherwise the order would mean nothing. Then the court's recital that the parties have agreed is equivalent to the effect that the parties have signed a stipulation.

The Chairman. Well, we are trying to meet the objections raised here.

Mr. Seasongood. I am favorable to it but I wanted to warn of the doubt that has occurred to me and which may occur to

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others when these rules are submitted in which they will differentiate between criminal and civil cases.

The Chairman. Practically doesn't that exist, the distinction between civil and criminal cases? Isn't that actually in the mind of the judge as it is in the mind of counsel?

Mr. Seasongood. No. I had a very unfortunate experience in that regard. A judge stated a certain thing was stipulated when it was not stipulated, in a case I have now pending in the Court of Appeals.

Mr. Burke. I am in accord with the procedure. I know what has been done with the congested calendars in the several courts in Detroit since they have been using it in the pretrial docket; but I do feel that if the court on its own motion or at the request of the district attorney summoned the defendant or the defendant and his counsel in, that is something a little different from "directing." If the defendant or his counsel join in that I can see no reasonable excuse for failure to join in that. Then there can be no question about overriding the rights of anyone. Secondly some defendants with financial backing may be visiting in the courtroom while you have a jury or even in the judge's chambers and you have that sort of thing with a pretrial hearing.

Mr. Glueck. Is your motion, Mr. Burke, in connection with the word "direct"?

Mr. Burke. Yes.

Mr. Glueck. Suppose we say "invite the attorneys."

Mr. Seth. Shouldn't we say the defendant's participation is purely voluntary?

Mr. Glueck. Or something of that sort.

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Mr. Seth. That he is not required to participate at all.

Mr. Medalie. The rule here implies it.

There is another situation. Now we have been talking about wholly the disadvantages to the defendant. I think Rule 16 presents very substantial advantages to the defendant in the case of physical evidence. Certainly if he needs documents and things of that sort which are in the possession of the Government he should be in a position to get them. I feel that a large profit in Rule 16 willbe to the defendant.

Mr. Youngquist. I think so, too.

Mr. Burke. But in the hands of competent counsel I cannot assume that the court would permit any disadvantage to be taken of the ignorance of the defendant, which in the hands of incompetent counsel probably would be a disadvantage. I am not familiar with all the states but I can assume that there are times when defendants may not have that type of competent counsel.

Mr. Medalie. If the case is important I think it is unlikely that he would not have one, even though he does not have an expense account. A lot of very capable men who are underpaid are doing very fine work.

Mr. Wechsler. I do not see any reason to assume that counsel for indigent defendants throughout the country will improve appreciably after these rules go into effect.

Mr. Medalie. No, but they are not likely to be assigned to cases of this sort. The indigent defendants usually are found in narcotic cases, counterfeit passing, and such things that you do not have to try on very complicated issues. It is rather rare that there is an indigent defendant in a case that

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requires serious preparation.

Mr. Wechsler. Yes, I agree, but you may have reference to offenses that I conceive this rule may not really apply to, but that may not be true in many cases.

Mr. Medalie. Do you have any statistics in mind? In talking about that last night it was stated that of 94 percent of the success that the Government has had in its criminal cases, 92 percent of it is due to pleas of guilty.

Mr. Wechsler. Yes, I had that in mind that most of these are by way of a plea of guilty, and that is likely to continue to be the case.

Mr. Medalie. And it is done without any serious effort on the part of the Government.

Mr. Wechsler. Yes, but I think that the situation presents there a different problem in the administration of criminal justice than in the litigated case with competent counsel.

Mr. Glueck. May I renew my suggestion that the term "invite" be substituted for the term "direct"?

Mr. Seasongood. I second the motion.

The Chairman. The motion is made that in line 2 where the word "direct" is that it be deleted and the word "invite" be substituted.

Does that take care of your objection?

Mr. Glueck. That presupposes acceptance of that invitation on the part of defendant's counsel before it may become a fact.

Mr. Medalie. I may call the district attorney to come in and show me his papers. He may decline.

Mr. Holtzoff. I do not think the district attorney would

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decline the invitation. The defendant's counsel may, but I do not think the district attorney would.

Mr. Medalie. Well, probably not, but I would like to make sure.

Mr. Holtzoff. He has the liberty not to.

Mr. Medalie. So has any counsel who appears regularly in court.

The Chairman. I know one district where the district attorney would not hesitate to decline the invitation.

Mr. Medalie. You know it is not easy to get the district attorney to show his papers. Judge, you remember that case. Judge Cardoza wrote an opinion on the Lemon case. Judge Cardoza wrote a very learned opinion upon the history of the district attorney in criminal cases winding up by not showing a single scrap of paper.

I think you have got to compel them to do those things.

Mr. Glueck. I have in mind the possibility that once you establish this procedure that the parties may find it so beneficial that it may become customary. If you use the expression "direct" then you run into all those problems which have been raised.

The Chairman. Gentlemen, you have the two horns of the dilemma. You have got to grab one or the other.

Mr. Crane. Why not make it "request"?

Mr. Burke. It seems to me that anything other than the suggestion made by you would result in compulsion. If it is an invitation that is fine. There is no question about the equity and justice of that; but if the court requests the district attorney or on his own initiative requests the

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defendant and his counsel to appear, then there is no question of his voluntary wish in the matter.

The Chairman. Is there any further discussion?

(There was no response.)

The Chairman. Those in favor of the motion say aye.

Mr. Medalie. What is the motion?

The Chairman. The motion is to delete the term "direct" and substitute the term "invite".

Mr. Medalie. All right.

The Chairman. Those in favor of the motion say aye.

(There was a chorus of ayes.)

The Chairman. And those opposed.

(There was a chorus of noes.)

The Chairman. The noes will have a showing of hands.

(There was a show of hands.)

The Chairman. I will count them. There are five.

We will have a show of hands by the ayes.

(There was a show of hands.)

The motion is carried. It is five to seven.

Taking the last sentence with line 21, that is deleted.

Now we have rule 20.

RULE 20

The Chairman. Any remarks, Mr. Robinson?

Mr. Robinson. Rule 20 deals with permissive joinder of defendants. The first sentence deals with the situation such as you have noticed in the rule 8, page 25, to the left, such as the Sacco-Vanzetti case where you have A and B charged with killing C. That is a case of jointly and mutually committing

the killing, the two acting to kill the deceased. In the second sentence it states:

> "Two or more defendants may be accused separately--"

or they may be accused jointly. Two or more defendants may be accused jointly in one count of an indictment or other written accusation if they are alleged to have participated mutually and jointly in the offense.

I will stop on that. As you see, there you have a case of A and B or more parties jointly involved in a given criminal case.

Beginning with line 5, the second sentence:

> "Two or more defendants may be accused separately, each in a separate count of the same written accusation, of an offense which has been committed by one or both of them without mutual participation."

An illustration of that is a case which I think is typical, therefore, may be used, and that is the case of State v. Blakeley, 70 P. 2nd, 799, decided in 1937.

That was a case where two defendants were joined in the same count. A was driving an automobile stage along a Pacific highway and B came along behind him. B was driving while intoxicated. A stopped his stage but did not get off the highway, thereby violating that law there. B came from the rear and drove his truck and struck the stage, and his car was thrown over into the far lane of the highway, causing a collision with the car of C which was coming from the opposite direction.

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As the result of the collision C was killed.

A and B were not acquainted with each other. There was no connection between them but by their separate violations of the criminal statutes they caused the death of C.

Now, the draftsman in the indictment for involuntary manslaughter joined A and B in the same count of the indictment. That would be an example of two or more defendants committing an offense which is an example of an offense committed by one or both without mutual participation. It is drawn in this way because sometimes it may not be clear before the trial whether or not the two defendants were actually united in their participation or not. So this would permit that type of situation to be taken care of as it may arise.

Mr. Holtzoff. I am wondering whether this does not produce a technicality in our criminal procedure which does not now exist there: the distinction between mutually and joint on the one hand and joint on the other and it may give rise to a lot of laborious running around.

Mr. Crane. I was just thinking that we do not want to plan for the very exceptional cases, do we? I was going to say that I doubt whether we should try to cover the very exceptional cases. The only thing we can do here is to state the general rules.

It is my impression that if we are going to draw these rules to cover these exceptional cases we may introduce more confusion than you have.

Mr. Robinson. There are only two possible cases. That is either A and B acted together jointly or they did not.

If they acted jointly together there is no question but

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that they would be joined in the same count. The facts would be substantially the same.

Mr. Medalie. We are going very far in our criminal code. Why not put them all in?

Mr. Holtzoff. What difference does it make whether they are in the same count or in two different counts? What difference does it make?

Mr. Robinson. You know a misjoinder.

Mr. Holtzoff. It is a technicality.

Mr. Robinson. No, that is not a technicality.

Mr. Crane. You put them all in one indictment.

Mr. Wechsler. Isn't this broader than that because you have the impression in this sentence, as it is drafted, that they may be accused separately, each in a separate count in the same written accusation of an offense which has been committed by one or both of them without mutual participation.

That means that if I am accused of robbery and you are accused of transporting other stolen goods entirely, I can be charged with another section.

Mr. Dean. The difficulty grows out of the offense instead of the acts.

Mr. Robinson. Are you sure about that? I don't think so.

Mr. Dean. Join the offense of robbery or murder? That is much broader than the illustration you give.

Mr. Robinson. Of two of more defendants?

In answer to that, he is talking about murder. I am talking about one offense, the offense of manslaughter. A man was killed by the unlawful act of others; therefore you have the death of C. That crime was committed either by A or B, the

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driver who left the stage on the highway or the truck driver who came from behind while intoxicated.

Mr. Dean. To drop the distinction between offense and acts on the part of both parties, it may or may not be in the same transaction, but isn't your situation so unusual that you do not need this because you could give them in two indictments and the court will consolidate them for trial?

So, if it is designed to cover a very unusual situation, I submit that it is unusual.

Mr. Wechsler. I see the point of your draft but if you have a clause where charges against two or more persons arise out of some act or related acts or events, the charges may be joined in separate counts of the same indictment, or if in separate indictments they may be consolidated for trial.

Mr. Robinson. You are talking about joinder of offenses; I am talking about joinder of defendants.

Mr. Wechsler. No. I am thinking about joinder of defendants, the principle of unity which you have to have in the same indictment where each defendant's act or acts is related to those of the other. That seems to be the principle of the unity of the case.

There is one automobile accident. I think the defendants' joinder should be allowed, but I do not think it should be allowed unless there is that unity in the cases which will point to the unity of action if proved at the trial.

Mr. Robinson. If there is unity of intent.

Mr. Wechsler. I am not thinking about that.

Mr. Robinson. We are clear about this?

Mr. Wechsler. Yes.

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Mr. Robinson. I think it is a well stated term saying that there was mutual acting in the offense. That is taken from this Washington case by Chief Justice Steiner.

Mr. Wechsler. That rule makes either responsible as an accomplice of the other.

Mr. Robinson. No.

Mr. Wechsler. In the first sentence.

The Chairman. Would you read the first sentence, Mr. Robinson?

Mr. Robinson. (Reading)

> "Two or more defendants may be accused jointly in one count of an indictment or other written accusation if they are alleged to have participated mutually and jointly in the offense."

Mr. Crane. Why put "mutually" in there? They participated jointly in the same offense.

Mr. Robinson. In the second sentence it is "without mutual participation."

Mr. Crane. Why do you have it?

Mr. Robinson. Each of them was concerned in the case but they did not participate mutually.

Mr. Crane. What law requires "mutually"? It is simply a question that they joined in the same act.

Mr. Robinson. I do not think so. I am trying to express the unity of intent.

Mr. Crane. Suppose one man breaks in a house with the intent to kill. The other man is there at the same time with the intent to commit assault. They are both guilty of

o21

burglary and they are acting jointly; but the intent would not make both guilty of manslaughter or both guilty of assault.

Mr. Robinson. No.

Mr. Crane. They are separate crimes. The intent was not sufficient, but you would indict them both for burglary at the same time.

Mr. Youngquist. It seems to me that this is rather rare.

Mr. Crane. That is the point.

Mr. Youngquist. It is not likely to arise. I am afraid that if we try to cover everything, particularly rare cases, we are likely to get into complicated situations.

Mr. Holtzoff. It seems to me that we should leave out the second sentence.

In the first sentence take out the words "mutually and" and permit the joinder of persons who have jointly participated in the offense.

In the Washington case, which you have referred to, there was no joint participation any more than there was mutual participation. That is such a rare case.

Mr. Youngquist. I think the decision of the Washington court was wrong.

Mr. Robinson. There was mutuality in the collision.

Mr. Holtzoff. I move that we strike out the words "mutually and" in the first sentence, and strike out the whole second sentence.

Mr. Youngquist. I second the motion.

Mr. Wechsler. If I may repeat, I think the confusion is in the drafting rather than in the principle. I think it is possible to achieve the result that the Reporter wants without

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the confusion that now is expressed with respect to this language.

Mr. Crane. I think we know what "joint" is.

Mr. Wechsler. I think that it should be possible to achieve that without confusion and to reach a formula to join the counts where the same act or transaction or a series of events is involved.

Mr. Crane. Suppose in an exceptional case they are joined and the court says that they are improperly joined? What is so serious about that? They just separate them. You cannot imagine anyone dismissing that.

Mr. Robinson. You have a rule for that.

Mr. Crane. They just separate them. They move for separation under the rule. What difference does it make?

Mr. Wechsler. The difference is that it is desired to have them tried together and to have a single case of proof and a single disposition of the controversy.

Mr. Crane. It is so exceptional that I think you are going to get more confusion.

Mr. Robinson. There may be some cases where they do not know. There may be a case where either A or B committed a crime and they are jointly responsible.

Mr. Holtzoff. The United States attorney would not indict two people because he did not know which one of the two committed the crime.

Mr. Medalie. It should be possible to sustain the charge on proper proof even though he has got to prove they acted jointly if he is able to know that each of them contributed toward the crime.

023

Mr. Holtzoff. Is this a common situation?

Mr. Robinson. It is common enough to be taken care of.

Mr. Youngquist. Wouldn't it be enough if you leave in the third sentence and say that if there are separate written accusations the two may be consolidated for trial? Then we will avoid the difficulty.

Mr. Wechsler. There you have to define some formula to justify consolidation.

Mr. Holtzoff. Isn't that in the discretion of the court?

Mr. Youngquist. You have the same language in the preceding sentence.

Mr. Robinson. What would you suggest?

Mr. Youngquist. Where they are accused of an offense which has been committed by one or both without mutual participation in one count or other written accusation."

Mr. Robinson. That is pretty nearly incorporating that sentence into the third.

Mr. Youngquist. No, there are separate accusations but in the discretion of the court they may be consolidated at the trial.

Mr. Robinson. Well, I understand the situation. I will drop the matter. I wanted my point to be clear. That may be the situation when the evidence is practically the same. The only question is whether they can be joined in separate counts of the same indictment rather than require them to be accused separately in different indictments. That is all to the second sentence.

Mr. Wechsler. If this were held for redrafting it may be possible to meet Mr. Youngquist's objections and the other

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objections and still make the point that you have in mind.

May I advance a substitute motion that the section be passed for the present, pending reconsideration by the Reporter, rather than let the principle be rejected now?

Mr. Holtzoff. We will accept that substitute.

Mr. Dean. I second the motion.

The Chairman. Those in favor of the motion say aye.

(There was a chorus of ayes.)

The Chairman. No.

(There was no response.)

The Chairman. It is carried.

I take it that the troublesome sentence is the second.

Mr. Robinson. Yes.

The Chairman. "Mutually" seems to be out.

Mr. Robinson. It was just used in the one court and that was in a dissenting opinion.

The Chairman. Now as to the second part of Rule 20.

Mr. Robinson. (Reading)

> "The court may order such separation of joint defendants or such groupings of joint defendants in separate trials as shall be conducive to a fair trial for each defendant and for the Government."

The Chairman. We are agreed on the first part, A, except as to the second sentence.

Mr. Wechsler. May I ask a question about B?

The Chairman. Yes.

Mr. Wechsler. Does the form of B indicate the Reporter's judgment of the complex problems of parties particularly in

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large scale transactions like conspiracy and other joint crimes that it does not yield to any rule that may improve the law as it now stands?

Mr. Robinson. The rule could hardly affect substantive law.

Mr. Wechsler. No. I am merely speaking about the joinder of all the parties. It is a standard agreement in many jurisdictions that particularly in conspiracy cases joinder is excessively large and burdensome. I have seen no solution to it.

I wonder if it is your judgment that there is no solution to it by rule other than the retention of the present system which permits the joinder because they are joint offenses vested in the discretion of the court.

Mr. Crane. You cannot make any rule for that because you have those motions enumerated under our statute. You bring up a defendant and then if he wants to make a motion for separate trial he can do so. They come up mostly in murder cases but they have all been denied. There is never any serious problem there.

I do not think that you could formulate any rule whereby the judge could separate, because it all depends upon the facts and circumstances.

There are many of them in which a man makes a motion that he should not be joined with the other defendant, but the majority of them are denied. They depend upon the facts and circumstances. You cannot do more than trust to the good judgment of the judge. After all, you have to leave something to the experience and the judgment of the court.

o26

Mr. Youngquist. The only other alternative would be to grant separate trials as of right as we had in Minnesota by statute.

Mr. Crane. We had that but you cannot do it. It does not work.

We had separate trials where they brought some witnesses in and proved a man innocent. Then they tried the other party and he got the People's witnesses and proved that he was innocent and both of the guilty men got out.

Mr. Youngquist. I think it is wrong in Minnesota, but that is the only alternative to what is proposed here.

The Chairman. Rule 21.

RULE 21.

Mr. Robinson. Misjoinder and nonjoinder of defendants. (Reading)

> "Misjoinder of defendants is not ground for dismissal of a criminal proceeding. Defendants may be dropped, or in proceedings by information"--

Strike out "or by complaint" because you have struck that out in line 4.

(Reading)

> "Defendants may be added, by order of the court on motion of any defendant."

"Or the United States Attorney" should be added. Then "by motion of any defendant."

The Chairman. Why not say "motion of either party"?

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Mr. Robinson. We have tried to avoid calling the Government a party, as much as possible.

(Reading)

"Any defendant or the United States attorney or of its own initiative, at any stage of the proceeding and on such terms as are just. Any proceeding against a defendant may be severed at any time and proceeded with separately."

The Chairman. Why put in "at any time"?

Mr. Robinson. That is because of the Strewl case in which Judge Learned Hand wrote the opinion. In that case they accused three defendants of conspiracy and then later before the case came to trial they discovered the names of three more defendants. They tried to dismiss as to the first indictment and then bring in a new indictment which would include the defendants first named and then these new defendants.

Mr. Holtzoff. You cannot do that after the trial.

Mr. Robinson. At any time prior to the trial.

Mr. Youngquist. Why not just strike out "at any time"?

Mr. Robinson. Very well.

Mr. Medalie. Yes.

Mr. Seasongood. You want to call them United States attorneys? Is that what you call them? Have we decided on that? Isn't there a special assistant to the Attorney General?

Mr. Youngquist. Why not say "attorney for the Government"? You have an attorney for the defendant.

Mr. Seasongood. Somebody said "attorney for the United States".

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Mr. Holtzoff. The department says "United States Attorney" and the United States attorney is an attorney of record.

Mr. Dession. You have a lot of cases in which the United States attorney does not participate.

Mr. Youngquist. Why not say "attorney for the Government"?

Mr. Seasongood. Let us come to an agreement on it.

Mr. Medalie. Let us dispose of this section first and then we can come to that.

I want to find out why you have this provision only in cases where the prosecution is by information.

Mr. Robinson. You know you cannot amend an indictment.

Mr. Medalie. No. How do you do it when there is an information? Do you have persons who are not at that time under indictment prosecuted by information?

Mr. Robinson. Yes, I think it is possible to bring in new defendants.

Mr. Medalie. Who does it?

Mr. Robinson. The United States attorney.

Mr. Medalie. He really files the new information?

Mr. Robinson. Yes.

Mr. Medalie. He could do that without this.

Mr. Holtzoff. Except for the statute of limitations.

Mr. Medalie. Then you cannot bring in new ones.

Mr. Longsdorf. Do you have to have a formula for new ones?

Mr. Medalie. If you wanted to bring in new ones you file specific information. It is a new information against all of the persons.

Mr. Dean. Was that statement as against the persons in the first information?

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Mr. Medalie. The attorney has filed a new information for the new people and then consolidated the two. I think that is the indicated procedure.

Mr. Dession. Say you do not have enough new defendants to discuss to make up the new indictment.

Mr. Dean. Just name one defendant as the defendant in the second information and invoke the others as in conspiracy.

Mr. Dession. All conspiracies do not have defendants.

Mr. Medalie. I do not think this works.

The Chairman. If it does not work, it is safer to leave it out.

Mr. Medalie. Just file a second information and then consolidate it.

Mr. Robinson. I can get that Strewl case and bring it to your attention.

The Chairman. Suppose we hold that off then.

Mr. Holtzoff. The first sentence should stand.

The Chairman. Yes.

Mr. Medalie. In the last sentence in Rule 21 it states:

> "Any proceeding against a defendant may be severed and proceeded with separately."

Who does the severing?

Mr. Youngquist. The court.

Mr. Medalie. That is one thing which I think should be done now. I do not want to have any doubt about it. I think we should insert "the power of the court."

Mr. Robinson. After the word "severed" insert "by the court"?

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Mr. Medalie. Yes.

Mr. Youngquist. Isn't that too broad "that any procedure may be severed"?

Mr. Crane. Pardon me. I want to get this amendment straight.

The Chairman. "Any proceeding against a defendant may be severed."

Strike out the words "at any time" and substitute "by the court."

Mr. Youngquist. Isn't that too broad? Aren't there some joint offenses which should not be severed?

Mr. Robinson. I do not think so.

Mr. Holtzoff. It is in the discretion of the court to grant a separate trial.

Mr. Dean. In line 5 cannot we scratch out all the words except the first two?

Mr. Holtzoff. Yes.

Mr. Medalie. Yes.

Mr. Robinson. Just leave in the first two words.

The Chairman. "By order of the court" and strike out the rest.

Mr. Medalie. Wait a minute. If you do that after the jury has been impaneled and the witness has testified, then there is jeopardy and the defendant is safe.

The court is supposed to have some sense as to the significance of his acts. The judge knows that once a witness has been sworn and has begun to testify that there is jeopardy under existing decisions.

The Chairman. That leaves open the question of adding

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defendants, and we will go into this case you mentioned.

Mr. Robinson. Yes.

The Chairman. All right. We will resume at eight o'clock this evening.

(Whereupon, at 4:35 p.m., the committee adjourned until this evening at 8 p.m.)

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Pendell
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9-9-41

NIGHT SESSION

The recess having expired, the Advisory Committee reconvened at 8 p.m., and proceeded further, as follows:

The Chairman. All right, gentlemen.

Rule 26, dealing with depositions and discovery.

Mr. Robinson. Mr. Chairman, I have here with me Mr. Fred S. Strine, who has also helped in the Reporter's office on this subject of depositions. I thought it might be desirable relief for you certainly if not for me if I just had Mr. Strine work initially on your questions this evening in regard to depositions; so we are starting on Rule 26, and any questions you have are in order.

The Chairman. All right, gentlemen, are there any questions on (a)?

Mr. Waite. May I ask the reporter if section 26 anywhere gives to the Government the right to take depositions of witnesses?

Mr. Robinson. I will pass that to Mr. Strine.

Mr. Holtzoff. Line 7.

Mr. Strine. Line 7.

Mr. Waite. I do not know quite what it means, but it says it may take a deposition only when the defendant has taken a deposition.

Mr. Strine. The way the rule is drawn at present it does not give the Government an unlimited right to take depositions. It only gives it a limited right in this particular situation when the defendant has taken depositions.

Mr. Waite. Yes.

Mr. Medalie. That is within the Constitution as we

understand at this moment.

Mr. Crane. That is, the Constitution says the defendant has to be confronted with the witnesses.

The Chairman. I do not think Mr. Strine got Mr. Waite's question at all, so will you give it to him?

Mr. Waite. I know of course that the Constitution requires confrontation. My own opinion has always been that he does not have to be confronted in court by the witness, it is enough if he is given opportunity to cross-examine, and all that sort of thing. Therefore I had hoped that we would take that forward step and give the Government the right to take depositions, assuming that it took the defendant along and gave him the opportunity to confront the witness--to take depositions, under those circumstances, where conditions made it necessary and proper.

Now, I understand from your answer that Rule 26 does not give any such privilege as that.

Mr. Strine. No, it does not.

Mr. Holtzoff. I would like to ask this: How would you meet the confrontation rule if the defendant is in jail? Confrontation is not satisfied with confrontation by defense counsel. There must be confrontation of the defendant in person. Or suppose the defendant is out on bail, who is to bear the travel expense to the place where the deposition is to be taken?

Mr. Waite. I said it might be necessary for the Government, at government expense, to take the defendant to the place where the deposition is to be taken,and confront him with the witness there, but there are times when that would be a practicality

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and I think a very desirable thing at times when you cannot get the witnesses to the court.

Mr. Holtzoff. Of course ordinarily since a subpoena in a criminal case runs throughout the country the Government can bring any witness at all to the place of trial if that witness is in the United States, unless of course he is too sick to travel.

Mr. Crane. Mr. Waite, may I ask you this? You said you hoped we would take a forward step, but does confrontation mean that you simply confront the defendant anywhere? I supposed it was to confront him before the triers of the fact, who are the jury, who pass upon the credibility of the witnesses.

Now, I suppose he can waive that, and I suppose that is what you mean when you say "if he applies for deposition," Mr. Strine; then of course he waives it.

Mr. Waite. No, I would not even require him to waive it. "Confrontation" obviously has no absolute meaning. I think we are agreed on that, are we not? For illustration, I do not think we could say here it meant absolutely one thing or another. There is a question of interpretation, and if the courts should say that confrontation meant confrontation before the jury that would block any possibility of depositions; on the other hand it would be perfectly possible and logical and rational in every way for the court to say confrontation does require confrontation in a particular place, but requires just what it says--confrontation--and I would like myself to see us take the step of giving the Government that opportunity and letting the court if he wants to take the onus of putting that restrictive interpretation upon the Constitutional provision.

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Mr. Medalie. I think that is wonderful. Look- you do not need juries. A defendant has been arraigned before a magistrate, and before the magistrate the complainant and the other witnesses testify and the defendant has the opportunity to cross-examine. I am giving a New York law, Judge. The defendant waives examination. Now, you know it is the New York law which is darned conservative, and that says that the deposition of the complainant is admissible in evidence against the defendant; he had the opportunity to require him to be examined, he was there, he could have cross-examined him; he waived.

In a criminal trial if the complainant dies the deposition of the complainant in writing taken before the magistrate is admissible in the jury trial passing on the defendant's guilt. Now then, "confrontation" simply means that the defendant should have the opportunity to do certain things with respect to the witnesses against him who are offered against him at the trial before the jury.

A witness is to be examined. As you, Mr. Waite, suggest, the Government is willing to pay the defendant's expenses to go to St. John, New Brunswick, or Capetown, Africa, or Shanghai, China, and says, "Here is your money; we will pay your transportation and the transportation of your counsel; you can come out there to cross-examine." In other words, everything involved in the reason of the rule has been met by Mr. Waite's suggestion.

That is a reasonable risk, there is no constitutional difficulty involved, and you get rid of a ~~foetus~~ fetish in the criminal law, do you not?

Mr. Crane. Well, except that the spirit of it is this--

that there is not a step in the felony charge--not a step--that can be taken in the absence of the defendant. He has got to be present at every step. He has got to be there. They cannot do a thing. They cannot hear him before the magistrate.

Mr. Medalie. No, wait a minute, I will give you some decisions. They are purely district court and maybe circuit court decisions. A trial is on before a jury, it has been running for about four weeks; one day the defendant does not show up. Says that tough friend of yours, Senior District Judge Campbell of the Eastern District of New York, "Well, we wanted him here, but he did not show up. Let the trial go on." And the Circuit Court of Appeals of the Second Circuit said he was right.

Mr. Crane. What did the United States Supreme Court say?

Mr. Seasongood. We cannot hear you gentlemen when you talk to each other, over on this side.

Mr. Medalie. You know that decision?

Mr. Holtzoff. Yes.

Mr. Medalie. The attorneys walked out at the trial. It does not stop the trial, according to Judge Campbell's decision, sustained by the C.C.A., Second Circuit.

Mr. Youngquist. Was not that on the theory he had waived his right to be present? I know we have decisions right in Minnesota where the same requirement of the presence of the defendant throughout the trial or proceedings exists, but the court has held that under certain circumstances when the defendant should have been there and could have been there but of his own volition failed to appear, he waived the right of being present; but that is a quite different thing from taking

it away from him.

Mr. Medalie. Well, they do not take it away from him. I do not think waiver is anything more than a rationalization of the whole thing. He has a fair opportunity, which puts no restrictions.

Mr. Robinson. "Privilege."

Mr. Medalie. "Privilege" would be better. -- No he has a right.

Mr. Robinson. It is a privilege too, is it not?

Mr. Medalie. It is both a right and a privilege. No, I think it is a right. I do not want to get into Hovage's categories. You men all know them better than I do. It goes back to 1914. That is a long time.

Mr. Holtzoff. What did he do with the case?

Mr. Medalie. In any event, no man gets rights by flaunting a court.

Mr. Robinson. That is right, he shouldn't.

Mr. Medalie. Now, when the Government is willing to pay his expenses to go to Capetown or Shanghai and puts up the money so he can go, there has been a judicial determination that that is fair. Now, he can go to that trial; the distance he can go, let's see, from Hudson, N.Y., to Manhattan--it also costs him money and expense to get there. Well, let's say that he lives in San Francisco, has been indicted, and is to be tried in New York, that he goes there; but the Government pays his expense. There is a compulsion, but there is no burden. The compulsion is to attend the hearings, that is all.

Mr. Crane. Well, I think your logic probably is good, but what are you going to do with the people of this country that

have been brought up on the idea that a man goes into a trial on a felony and has to be confronted with the different witnesses? And now we are going to ask them to approve our rule which says that he can be tried on paper depositions taken in some foreign part, with the Government saying that he can go there and listen and conduct the examination if he wants to.

I think you would not get the people of the country, Pennsylvania especially, to follow that.

Mr. Medalie. Judge, you said the people of this country have been brought up on that idea. Well, the people of this country are told about something that happened to be legalistic notions supposedly dating from 1776. They never heard of them.

Mr. Crane. I know.

Mr. Medalie. They think we are crazy, they write editorials in the evening papers telling us so.

Mr. Crane. But that doesn't happen to any of the men around here? You do not mean to include us?

Mr. Medalie. This is a cross-section of the United States and its racial and other groups. They were brought up in school where they were taught these things, too. If they had not gone to those schools and colleges and high schools they never would have been notified.

Mr. Waite. Have you noticed the backwoods of New Jersey and Colorado both approved the idea? You wondered what the people of this country think.

Mr. Crane. Well, that may be, but as I said before, I can see this because here the defendant desired to take a deposition. I suppose that is not one of the certain provisions he cannot waive in the Constitution. We know that.

There are certain things he cannot waive. He could not waive perhaps a partial judge, but there are other things he can waive, and I suppose here if he has to take a deposition of course they could examine him, cross-examine him, and so forth, and then perhaps at the same time and place take other depositions. That would constitute a waiver. But if you go, and have such opposition, in which you are going to pay the expenses of a defendant to go all over the country, I would go a little slow. I would see how it worked out with the criticism on this part of it, and I should think that perhaps would--

Mr. Wechsler. Do I understand this would be limited to cases of necessity? since otherwise if you are going to pay the expenses of the Government to go to where the witness is it would be just as well to pay a witness's expenses to go to where a defendant is.

Mr. Medalie. Well, you cannot make a witness go anywhere. If a witness lives in the Urals or in South Africa or in Asia you cannot make him go.

Mr. Holtzoff. But if he sent the defendant over there, how can he bring him back?

Mr. Wechsler. Induce him to go!

Mr. Medalie. You pay his expense and everything to go to China; suppose the defendant doesn't come back? You have to extradite him.

Mr. Longsdorf. You can do that.

Mr. Crane. They would be taking depositions in the summertime.

Mr. Medalie. And practically it means this--no defendant is going out to cross-examine someone at Shanghai. He is

sending his lawyer.

Mr. Crane. I should think he would be delighted to go, as he gets out of jail and has a joy-ride and takes his lawyer along at the expense of his Government.

Mr. Dession. Mr. Chairman, what I want to suggest is this: The idea that a defendant is entitled to confront every witness against him, some 200 years ago, was settled the other way. Every hearsay exception which is available in the law of evidence in civil trials is available in criminal trials, now, when hearsay evidence is introduced--a dying declaration, official records, regular entries made in the course of business, and all the rest of the hearsay evidence comes in. That has been settled for 200 years.

There used to be fights about this in the name of confrontation in the early cases in the United States. That is all settled. All right--he is not entitled to be confronted there. Now, in these cases the defendant waives nothing. That evidence is coming in because it has been decided by courts over and over again that there are sufficient reasons in terms of the reasonable possibilities of proof and terms of whatever you like, that that kind of evidence should come in. Now, if we have got to have a waiver from the defendant in a particular case, how do you account for the fact that all of this evidence under existing hearsay exceptions is coming in? It comes in; you all know that.

Now, if that is the case, the only question here is whether the usual conditions of a hearsay exception are being met. In other words, is there a reasonable necessity? Is the opportunity of cross-examination being afforded in so far as

is reasonably possible under the circumstances with this kind of evidence?

That is my position on that.

Mr. Holtzoff. In support of the constitutional point, you are allowed to introduce evidence given at a prior trial of the same case if the witness has died in the meantime. Now that is not considered a violation of the confrontation rule, so I would draw the inference from that that confrontation does not mean confrontation at the trial.

Mr. Medalie. Well, I would like to go along with you on it, but the confrontation requirements are there. In the example I gave Judge Crane, of the magistrates, a complaint is filed--nothing more than an affidavit--called a complaint or an information, sworn to; the defendant waives examination; the complainant dies. That deposition, complaint, affidavit, whatever you call it, is admissible in evidence against the defendant when he goes to trial before a jury.

There is no magic about cross-examination. You had your chance and you were there to take advantage of the chance. Now, the only thing in Mr. Waite's suggestion is that you give him the chance. Let me put it this way: Even in our district, the Southern District of New York, where we have only one place where the court ordinarily sits, it sometimes happens the court sits in Poughkeepsie, and ~~Alcocks~~ Cox, wanting to establish a tradition, went up to Poughkeepsie, walked into the city hall or courthouse there, wherever it was, and held a federal court.

Now, some people from Manhattan and the Bronx went up. Most people did not. There was the court. The defendants could have come there or they could not.

Instead of that let us take a bigger area. Let us take any one of the districts--I do not know which is the largest federal district in the United States territorially--the Eastern District of Texas?

Mr. Holtzoff. The Western District of Texas.

Mr. Medalie. The Western District of Texas? Suppose a hearing is arranged there. We know as a matter of fact that most defendants would not attend if a deposition were taken. The lawyer would go. The opportunity is there to go, particularly where the defendant initiates them. Presence is not important.

What really counts is the opportunity to be present, and when the Government under judicial supervision and direction provides the expense to go and come, every possible requirement has been met, has it not?

Mr. Crane. You can see at once that that is not correct, otherwise the Government would try cases of the defendants who ran away, and yet they always insist upon picking them up somehow and waiting until they can get them and bring them in, and yet he gets away and he has had opportunity to be present, but the case does not go on, and I never heard of a defendant being tried for a felony in his absence although he had opportunity to be present.

Mr. Medalie. He has. A defendant may be tried for a felong in his absence at least so far as the law goes now, if he attended the beginning of the trial and if when he sees the case is going against him he walks out and doesn't show up, as in Judge Campbell's decision, affirmed by the C.C.A.--I do not know the name of the case. He walks out and the trial goes on

and goes to a conviction, and it is sustained, not by the Supreme Court, but at least by the C.C.A., Second Circuit.

The Chairman. Mr. Waite, do you make a motion?

Mr. Waite. Yes, but I would like if I may to explain a little further. I do not know that I made one point clear. I think it would be very a desirable position, as I hope some of the rest of you gentlemen know. It may or may not be constitutional. I think it is constitutional myself, and the discussion here indicates that there is no absolute, and I think it would be a mistake if we tried to decide here whether it was or was not constitutional.

It would be a better thing to do, if you agree with me that it is a desirable thing, provided it is constitutional, to put it in and throw upon the court the onus of holding that it is not constitutional. I am particularly interested in this because as someone said a while ago this set of rules is going to be a standard for the States.

Now, it may be that we do not need that power of depositions particularly where process runs throughout this whole country, but that is not true in the state courts, and I should very much like to see this set up as an example and a standard for the States to follow; and so I move that the Reporter be directed to put into Rule 26--I do not know the phrase tonight--to put into Rule 26 for our consideration next time an appropriate provision giving the Government power to take depositions in case of necessity under conditions where the defendant is given an opportunity to confront the person from whom the deposition is taken.

Mr. Medalie. And the Government's paying the expenses?

Mr. Waite. Yes.

Mr. Medalie. To come and go, for himself and counsel, and necessary clerical expense?

Mr. Waite. Yes.

Mr. Medalie. Let us make it as broad as possible, to put this over.

Mr. Crane. Of course you would also have to define "necessity" would you not?

Mr. Seasongood. Mr. Chairman, I would like leave to speak to the motion if it has been seconded.

The Chairman. Is the motion seconded?

Mr. Crane. I second it.

The Chairman. Proceed.

Mr. Seasongood. I am under the impression we have a special constitutional provision in Ohio which permits this very thing. I am sorry I have not looked it up, but I am almost certain there is such a provision in the amendments to the Ohio Constitution,made in 1912.

There are these differences. I understand we have been told a subpoena on behalf of the United States runs anywhere in the United States, so there is very little necessity for the United States to take depositions, because they can subpoena the witness and bring him to the trial.

The Chairman. Except in the event of sickness?

Mr. Seasongood. Well, that may be. Yes, they cannot if he is sick, but in general they can bring the witness, or if he is sick they should ask for a postponement of the case because a material witness could not be produced.

Of course it is possible that the witness might live in

some country other than the United States, and then in that case you would have a difficulty, but that is rare.

On behalf of the defendant, if you did this you would certainly have to provide the expense for the defendant, his counsel, and you would have to send along some bailiff or court person or whatever you would call him to keep the defendant from staying in the agreeable surroundings in which he finds himself when he once got out, if you have him and his lawyer.

If he did not go, it does seem to me, with deference to the gentlemen who have spoken, that he would not be confronted in a public trial with the witnesses. He would not have to do that. A defendant might say, "A man could testify against me in a deposition off in Kamchatka or somewhere else with a great deal more freedom from restraint or pressure than he would in a federal court with the judge sitting there in his majesty and 12 jurors looking at him to see whether he tells the truth."

Mr. Glueck. Exactly; that is the point.

Mr. Seasongood. I think it would be, with deference to the gentlemen, plainly unconstitutional to provide that.

Now as to the hearsay rule being an exception, the Constitution is to be interpreted in accordance with well recognized rules of law, of which this is one, and at least he is confronted with the person who gives the hearsay testimony; so he is confronted to that extent.

I think you inject a very serious question which is to my mind almost certainly unconstitutional, and that is fortified by the fact that the Ohio Constitution was especially

amended to take care of this thing, where they do take the defendant along. He hasn't any say in the matter. If the State wants to take depositions they take him out of jail and take his lawyer along at their expense and take somebody to keep him so that he will return to his ordinary surroundings; and I do not feel that it is something we ought to stick in.

Mr. Crane. May I ask a question? Where does the money come from? You have to have appropriations, do you not?

Mr. Seasongood. May I mention this also: Won't there be difficulty if he is confined in a penitentiary? Whoever has charge of the penitentiary will say "I am not going to give this man up and run the risk of his not coming back and my being held personally liable for letting him escape."

Mr. Crane. Are the appropriations limited?

Mr. Holtzoff. Of course we have limited appropriations, but if this procedure were established by rule we would get an appropriation in order to meet this contingency.

Mr. Medalie. You could not do it unless you had the money.

Mr. Holtzoff. That is right.

Mr. Medalie. So the question of the money is purely academic, isn't it?

Mr. Crane. Not nowadays!

Mr. Seasongood. They have more money than they ever had.

Mr. Holtzoff. The warden is an officer of the Department of Justice, and the Department would just order the warden to surrender the prisoner for that purpose.

Mr. Crane. Suppose there was not an appropriation and you never have the money, would it be unconstitutional then?

Mr. Medalie. They could not carry it out and meet the

requirements. Now, look, Alex--if your man were in jail, obviously he could not go to Shanghai.

Mr. Holtzoff. No.

Mr. Medalie. Because the minute he stepped out of the 3-mile limit he would tell you and the whole Department to go plumb to hades.

Mr. Holtzoff. That is right.

Mr. Medalie. So you would not do it, if that is the case.

Mr. Holtzoff. No.

Mr. Dession. May I suggest another thing along the same line? No lawyer with any sense would use a deposition if it were feasible to use the witness, because you know perfectly well that there is a preference for witnesses. You can see why.

But I want to separate two issues here; one is the policy issue; the other is the constitutional issue. Now, your constitutional issue I think is a ghost. Now, in the first place, there has never been a statute so far as I know which has purported to authorize the use of depositions by the prosecution in criminal cases; therefore there has never been a judicial test of whether that could be done or not. That question has never been decided to my knowledge.

Now what would be the reason for having such a statute? Well, the reason would be that there are situations where it would be desirable, and I do not have in mind at all a situation where the prosecution could feasibly call a witness.

Mr. Crane. "Could not feasibly call a witness"?

The Chairman. Where he could feasibly call a witness.

Mr. Dession. Yes. Now, as a matter of fact, in the State of New York right now--as I recall the case it is People against Reeves--one may use the certified report of a state analyst as to fingerprints, or a chemist, I forget which, in any case, without producing the witness. The witness is alive, he is within not too many miles of New York City, but nevertheless it is accepted practice under the decisions in that State to introduce his certified report.

The defendant might justifiably say, "Well, why don't you bring this man here? Why don't you bring this man here so we can cross-examine him?" But the State does not have to, and there is no violation of confrontation; which incidentally is a requirement in the State of New York. So that is why I say the constitutional issue I think is a ghost, or, if I go as far as I can go, at least undecided; so I think we ought to talk about policy.

The Chairman. Are you ready for the question?

Mr. Dean. What is the necessity for it? Let us put it that way. What situations arise that make it necessary?

Mr. Dession. That is what I think we should talk about.

Mr. Dean. You have got the case of sickness, the man may be ill. He may be flat on his back for two or three years--an essential witness. I can see that. And what else do you have?

Mr. Medalie. Well, let us take the ~~Dogherty~~ Barnes case. The Government broke their necks to bring this fellow ~~Mertens~~ Bard in from Switzerland to the United States. It cost the Government an awful lot of money to get him in here. I do not know how the Government bribed him to get him in here to testify. ~~Mertens~~ Bard

was an important witness in a very important case. There would have been a miscarriage of justice if that man had not testified.

Now, the cases are few and far between, but there are a handful of cases of tremendous public importance that require that we go all over the world to get the witnesses.

The Chairman. I suppose, some of the oil men who were in Paris for years.

Mr. Medalie. Yes. Just think of this fellow Blackmer. He stayed in Paris and practically became an expatriate. He should have been examined. It was an affront to the public sense of justice that that could not be done.

Mr. Seasongood. May I suggest another thing? Excuse me for talking again, I forgot to mention it before. You are going to inject a great deal of delay in the trial of cases if you do this. A defendant could very easily say "I have got to have a witness's testimony at a remote point, and I want to go there," and you will have a long delay before that witness's testimony is obtained.

Mr. Medalie. Yes, sir. He gets it today. Many of you will remember in our bootleg cases of 1931-32 when we grabbed Voltz and wanted to prove he was connected with the ship that brought in the liquor. These defendants would hold up other trials while they made motions to take depositions in Nova Scotia, Newfoundland, and other places of that sort, and we just had to wait. The defendants can hold it up.

Now, when you get to an important case, not a case relating to seizure of a ship or its contents, bootleg contents, but a case involving a prominent public official or a great corporation or a member of the Cabinet, the public sense of

justice requires that we get all that proof, and the public feels frustrated in the sense of confidence in the administration of justice. Justice is defeated. We must do everything we can to uphold public confidence in the successful administration of criminal justice against powerful people; and in that handful of cases, only a handful, we must make this big effort.

Mr. Holtzoff. There is another case, Mr. Dean--in fact, in the case that you refer to, suppose a witness is aged or infirm and there is danger he might pass on before trial, it is useful to be able to take his deposition.

Mr. Dean. I remember one two or three years ago when I was trying a case in the United States Court for Shanghai. The process does not run out of that court to the continent here, and I had to get the fellow over there, and the only way I could do it was to bribe him to take the boat, and he said, "Well, I won't go unless you take my wife and two children with me at Government expense." We finally had to do it. It was the only way we could get him there.

Mr. Medalie. I really believe, if the case arises only once in three or four years, it is important.

Mr. Dean. That is the only one I am acquainted with.

Mr. Medalie. We must restore confidence of the public in the administration of justice. That Blackmer thing was a terrible indictment of the futility of public justice. The rich were protected.

Mr. Crane. Why do you say "restored"? What has happened to it?

Mr. Medalie. Every once in a while a situation like the

Blackmer case arises, and the public is not concerned with what we as lawyers know about constitutional limitations. They are just sore that there should be any impediment in what they regard as sensible methods for the administration of public justice.

Mr. Crane. I do not mean by personal knowledge, now, of course; you know that; but the appeal to the public. I have not heard the public finding any fault particularly with our courts.

Mr. Medalie. Of course they have.

Mr. Seasongood. We get 92 percent convictions in the federal courts.

Mr. Medalie. Not convictions--pleas of guilty. It is the occasional case that brings about an undermining of the public confidence in our processes. Now, that does not obtain in Great Britain. It happens here. It does not happen in continental countries because they have all these devices, and they are not impeded.

Mr. Crane. They do not wait for the witness in continental countries.

Mr. Medalie. But they do justice, they do not do injustice, unless there is a political reason.

Mr. Youngquist. George, the Blackmer case was somewhat different, though. He was indicted and the United States tried to extradite him, and the French Government refused to honor the extradition. That is where the real trouble lay there.

Mr. Medalie. I grant that, and I may have overstated the other situation. The fact remains, Blackmer might have found

a way out had he been examined, if the opportunity was given to the Government to examine him.

Now, you know there are many things about our constitutional provisions that we as lawyers talk about as involving some inherent notion of the American people, but what I notice is the American people think we are crazy when we talk about the Constitution. That is not what we are talking about. We are talking about things that frustrate justice.

We fall back on the Constitution, and the people of this country think the Constitution is just a means by which justice can be frustrated by the rich and the powerful.

Mr. Crane. Well, let's abolish it!

Mr. Medalie. We won't abolish it, but wherever possible we can conform this Constitution as it has been conformed over one hundred odd years to changing needs wherever possible, to bring about the one thing the constitution needs--public support.

Mr. Crane. I saw by the paper tonight that Willkie down here was charged with making a political speech before a committee.

Mr. Medalie. You did not read the paper. He had a right to make his speech. I knew what he was going to say before he said it, and it was probably very sound.

Mr. Crane. Well, all I can say is this: I will go along--I am speaking personally--with Mr. Waite, on anything he wants, but I do say this on the matter of policy: if you are going to have the government taking depositions, it is a change, isn't it?

Mr. Dean. Terrific.

Mr. Crane. Are you not going step by step to try it out, if you adopt what is suggested here by the Reporter, that you are taking it up to Congress, the Government is taking depositions when the defendant wants to take a deposition?

Mr. Youngquist. This present motion goes further than that.

Mr. Crane. I know it does. I am speaking to that first, the matter of policy in adopting it; yet I do not want to stand in the way of anything they want. I will go along.

The Chairman. I think we ought to have a vote.

Mr. Medalie. Judge, you know you have written some of the most ridiculous things that "went along."

Mr. Crane. Well, that is true. It is pretty hard.

Mr. Glueck. There, he was acting as a judge.

Mr. Crane. It is pretty hard to know just how far to go always. You do not want to hold back. I think that is true, and that is the reason I do not want to say anything that will block anything that may be useful and constitutional. We can try it out.

Mr. Medalie. Well, let us try it.

Mr. Crane. But it is awfully hard to try to keep within reasonable bounds and not simply discard everything. We have got a few safeguards left.

Mr. Medalie. Judge, as long as this Government is willing to spend the money to transport a defendant and his counsel--

Mr. Crane (interposing). How do you know they are?

Mr. Medalie. Then they can't get the deposition.

Mr. Crane. Well.

The Chairman. Gentlemen, are you ready for the motion?

Mr. Seasongood. I just want to interject one more thing. When you talk about this constitutional provision, you have in mind, gentlemen, you have a Supreme Court that is solicitous--I won't say too solicitous, whatever my opinion may be--for personal rights and civil liberties, and you are not going to get to first base in my opinion with the United States Supreme Court.

Mr. Crane. No--nor with Congress, either.

Mr. Seasongood. Sir?

Mr. Crane. I do not think you would, with Congress, either.

Mr. Seasongood. Well, the Court has to approve these rules.

The Chairman. Yes--then the Congress, next.

Mr. Dession. Before we vote I think it might be helpful if the Reporter explain to us the provisions of section (d) in this rule, which I think might take care of many of the objections.

Mr. Strine. This section (d) is very much the same as the corresponding Civil Rule. By rule 27, following this, we provide the procedure by which a party may obtain leave to take a deposition. This (d) provides that even if the depositions are taken on an order of the court, before they may be admitted he still must meet these requirements.

Mr. Dession. That is what I mean. You cannot use them just because you take them.

Mr. Strine. That is right.

Mr. Dession. I think the limitations you use should be in mind in voting on this.

Mr. Seasongood. We are not discussing verbiage or

phraseology.

Mr. Dession. Oh, no--the mere substance. When would you be able to use these things? because the discussion should not proceed on the assumption you could always use a deposition just because you had taken it.

The Chairman. The question now is on Mr. Waite's motion.

(The question being put, the Chair is in doubt.)

Mr. Crane. We were discussing this between ourselves.

The Chairman. I think you both missed the vote. You are not voting, Mr. Robinson?

Mr. Robinson. I began voting earlier in our sessions, and I decided I had better be used only in the case of a tie vote.

The Chairman. I have been doing that, but it counts too many of us out.

Mr. Crane. May we not do this: This is new, and it makes you a little thoughtful, and it is not a thing you can just vote and cast off. Can't we just have something drafted to consider it and vote on it later?

Mr. Youngquist. That is the motion.

The Chairman. That is the motion. I was going to suggest that this be drafted first and substituted, but I would like to make this suggestion, that when we get something that really seems to have a command of attention as this does, and where we haven't any direct authority to guide us one way or another in a decision, that we might well consider submitting an optional provision to the Court. We do not want to do it too many times, but I think it would be helpful to let the Court know that we were not just going down a road in the rut but that

we would consider these things when they came up.

I think this really is the first one--perhaps one other--that we have passed upon, of this type, where we might submit optional provisions to the Court for consideration.

Mr. Medalie. Mr. Chairman, I always felt whenever the vote was reasonably close that there was no substantial agreement, that the vote was divided 7 to 4 or 6 to 3 or something of that sort, we were not foreclosed but could take it up again.

The Chairman. That is right. Well, that is true, no matter what the vote is.

Mr. Medalie. I think I have indicated that in matters in which I was with the prevailing group, yet I thought the vote was close, I wanted to think about it again.

The Chairman. Mr. Waite, are you willing? I will declare the motion carried, but are you willing to come forward with another motion to submit optional provisions to the Court?

Mr. Waite. I think that is a very good idea.

The Chairman. Is that seconded?

Mr. Crane. I second it.

Mr. Longsdorf. I second it.

The Chairman. All in favor of the motion--

Mr. Seasongood (interposing) How do you get it optional?

The Chairman. Submit to the Court two alternative plans, one following substantially this, here, and the other, that embodied in Mr. Waite's suggestion. You will get the benefit in that way if the Court approves it going out in the optional form of the widespread discussion of bench and bar, and we will have a volume of opinion that may be worth something to the

Court when we give them the rules, to decide which of the two they will take.

Mr. Wechsler. Does this suggestion, Mr. Chairman, carry with it the thought that when we ultimately submit to the Court, we will submit it in that form, or that in the stage of distribution for criticism we will distribute them in that form?

The Chairman. No, I mean we are only involving ourselves now up to the point of the submission of our draft to the Court, for the purposes of obtaining permission of the Court to distribute it to the bench and bar for criticism.

Mr. Wechsler. Not for purposes of adoption?

The Chairman. That is a method pursued as I recall by the Committee on Civil Rules. Mr. Tolman can confirm that.

Mr. Longsdorf. Now, Mr. Chairman, may I ask a question for information? What is the meaning of the phrase occurring in line 3 of this rule 26, following the words "over any defendant or over property which is involved in the proceeding"?

The Chairman. An action in rem.

Mr. Youngquist. Forfeiture.

Mr. Dean. Which ones would be criminal?

Mr. Medalie. Sometimes property is one of the things involved in a case.

Mr. Longsdorf. A suppression of evidence?

Mr. Medalie. I should say seizure of liquor.

Mr. Longsdorf. Yes.

Mr. Medalie. Or of narcotics.

Mr. Robinson. Slot machines.

Mr. Medalie. Or a case of compulsion, and slot machines--things of that kind, where there is a proceeding with respect

to search and seizure, and controlled by agents at the time of the arrest or before.

Mr. Longsdorf. Or an offence against the customs revenue.

Mr. Youngquist. I am wondering whether that comes within the scope of criminal proceedings. It is merely for the forfeiture of the property. No penalty is imposed upon anyone.

Mr. Medalie. It is a dealing with evidence too.

Mr. Youngquist. That may be, but have you a criminal proceeding?

Mr. Medalie. Sooner or later it gets to be a criminal proceeding.

Mr. Youngquist. Well, not that proceeding.

Mr. Medalie. It may not, unless you have a criminal case.

Mr. Youngquist. Well, is a forfeiture for violation of the internal revenue law let us say a criminal proceeding?

Mr. Holtzoff. No.

Mr. Medalie. It can be, or may not be.

Mr. Holtzoff. It is a libel proceeding. That is civil.

Mr. Youngquist. Not the internal revenue laws. That is not a libel, is it?

Mr. Medalie. These libels arise in a number of ways. One is under the customs law. The other is under your liquor law, the other, under your Food and Drugs act. I do not know how many more. Those are three I think of readily.

Now, they ultimately wind up in criminal cases sometimes, probably very often; the identity of the person connected with the property is established. Then you get questions of search and seizure, which relate to the use of that property, the circumstances attending the seizure as evidence in the criminal

case. To that extent I think it is a part of our business.

Mr. Youngquist. I should doubt it. The act relates to proceedings prior to and including verdict or finding of guilty or not guilty by a court or jury, has been waived, or a plea of guilty in criminal cases in the district courts.

Mr. Medalie. Does it relate to evidence under that, with reference to us? Necessarily it includes us.

Mr. Youngquist. "Rules of Pleading, Practice, and Procedure. With respect to any and all proceedings prior to and including"--

Mr. Medalie. Would not that include evidence and the suppression of evidence?

Mr. Youngquist. Oh, it would include evidence, yes, but is a forfeiture or a libel proceeding a criminal proceeding? It may have a bearing upon a criminal proceeding, but I think it is not itself one.

Mr. Medalie. No, if it is only a libel I am quite sure it does not concern us.

Mr. Robinson. This language, Mr. Youngquist, is probably just involved in a proceeding. It is not necessary the property is involved.

Mr. Youngquist. It must be involved in the criminal proceeding, but how can property be involved in a criminal proceeding?

Mr. Longsdorf. Before you get jurisdiction over the person, what proceeding is there?

Mr. Youngquist. I do not see any.

Mr. Medalie. You are probably right that at that point there isn't any jurisdiction, but once an indictment or

information is filed, then very speedily proceedings start with respect to that property.

Mr. Longsdorf. Then I would strike out the words "over any defendant."

Mr. Wechsler. There has got to be a defendant in order for the other provisions of the deposition procedure to be met. If there is not a defendant there isn't anybody to send traveling around to confront.

Mr. Crane. Except the lawyer.

Mr. Orfield. Isn't this language taken from the Civil Rules?

Mr. Youngquist. Yes, it is.

Mr. Seasongood. Let the reporter make a study of it.

Mr. Medalie. Can we add the words, "or where the criminal proceeding is involved over property that is involved in the proceeding, or where a criminal proceeding is concerned," or whatever the word is that you want to use?

Mr. Youngquist. I should think the reference to property ought to be eliminated entirely.

Mr. Medalie. You mean, still have the same rights?

Mr. Youngquist. On the trial.

Mr. Medalie. And on either side? After indictment, information, or criminal proceeding has been started?

Mr. Youngquist. What do you mean by "the same rights," George?

Mr. Medalie. Well, once a man is arrested or proceeded against--is arrested, arraigned before a commissioner, complaint filed before him, or indictment or information filed, then normally his attorney will make motions with respect to

suppression of evidence, concerning the property involved in the case, if there is property involved in the case. Now, he would have that right even if we didn't have that language.

Mr. Seasongood. Cannot the Reporter make a study? The point has been suggested, whether that is to stay in or not.

Mr. Robinson. There has been some doubt about that from the beginning.

Mr. Longsdorf. Does he not submit himself to the jurisdiction by moving the suppression of evidence?

Mr. Medalie. He is a defendant, otherwise he cannot make a motion, otherwise he has no status.

Mr. Longsdorf. But when he moves, there is jurisdiction of his person?

Mr. Medalie. Of his person?

Mr. Longsdorf. Yes.

Mr. Medalie. He cannot move until he is a defendant. He has no status.

Mr. Longsdorf. He may not be arrested yet.

Mr. Medalie. He cannot make a motion if he is not arrested.

Mr. Wechsler. Is it your point that you want to see this procedure available for motions in the criminal case which relate to property, as for example a motion to recover property which has been unlawfully seized from the defendant, and not only relate to the proceedings on the substantive question of guilt or innocence?

Mr. Medalie. Yes; for example, an automobile is seized going somewhere across Texas, and which has either narcotics coming from Mexico or liquor.

Mr. Longsdorf. Or was stolen in New Mexico.

Mr. Medalie. All right. A criminal case is started, but the seizure has had some relation to the commission of an offence or the attempt to use that property, the automobile or its contents, in connection with a case against him. All he is concerned with is that that property shall not be used as evidence against him if there has been an unlawful search or seizure.

Once he becomes a defendant he can make motions with respect to that property.

Mr. Youngquist. And under this section 26, I suppose he would be permitted to take depositions in support of any proceeding connected with the indictment?

Mr. Medalie. Yes, sir.

Mr. Youngquist. Such for instance as the motion to dismiss on the ground of former jeopardy. And could he not then take a deposition to secure evidence to aid him in suppressing evidence against him?

Mr. Medalie. You have stated it very well.

Mr. Youngquist. So it is covered without any reference to property, I think.

Mr. Crane. Would it do any harm to put it in there, though?

Mr. Youngquist. I think it is quite out of place.

The Chairman. Do you move to strike it out?

Mr. Youngquist. I move that the language "or over property which is involved in a proceeding" be stricken out.

Mr. Dean. Second.

Mr. Holtzoff. That is taken from the Civil Rules, and is

intended to cover the situation in the Civil Rules where you start your action by attachment, by levy. Therefore, it seems to me it is not necessary here.

Mr. Medalie. I think Mr. Youngquist's point is quite right, we do not need it, because so long as property is not involved in the criminal proceeding depositions may be taken not only for using same at the trial but for any other purpose in connection with any other proceeding connected with the criminal case.

The Chairman. The phrase goes out by consent.

Anything else on section (a)?

Mr. Seasongood. Well, if you are going to leave it all as it is in lines 5 and 6, isn't that very indefinite? And what does it mean, "subject to any privilege or right secured to the defendant by the Constitution and laws of the United States"? Why is that necessary, or what does it mean?

Mr. Robinson. It certainly would cut off any deposition to be taken by the defendant, himself, it would seem. That would be one clear thing.

Mr. Wechsler. I do not think it ought to be possible to take the deposition of a defendant.

Mr. Robinson. Certainly not.

Mr. Wechsler. I think we ought to leave out the defendant.

Mr. Dean. Right.

Mr. Robinson. Did you understand me to say we do permit the taking of the defendant's deposition?

Mr. Crane. I thought so.

Mr. Dean. Why is it in?

Mr. Youngquist. You first put it in, then you take it

out. You say, "whether a party or not," then you say, "subject to constitutional rights."

Mr. Robinson. It could only be by consent, of course, of the defendant. So he could assert his privilege against self-incrimination. He would not have to submit. It leaves it voluntary with him, that is all.

Mr. Crane. May I ask where you get that? That puzzled me, too. On page 3, at the bottom, you say this:

> "If a defendant waiving his privilege has given a deposition, the deposition shall not be admitted in evidence or otherwise used at the trial unless the defendant testifies at the trial."

Does not that refer to his deposition?

Mr. Robinson. Oh, yes. Oh, yes, if he consents; but the question you see we started off with was, Mr. Seasongood asked, "subject to any privilege or rights secured to the defendant by the constitution or laws of the United States."

Of course under the Constitution he would have the privilege against self-incrimination. He would not have to submit to deposition.

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Mr. Wechsler. What purpose could be served by providing for deposition of the defendant to be taken?

Mr. Holtzoff. Could not a defendant take a deposition of a co-defendant? Suppose a co-defendant was a very old person and there was a doubt as to whether he would live until the trial.

Mr. Wechsler. We are not talking about a defendant taking a deposition of a co-defendant. We are talking about the Government taking the deposition, aren't we?

Mr. Robinson. It does not make any difference. It does not say that.

Mr. Wechsler. Then Mr. Holtzoff has a point. I could not see any reason why the Government should want to take the deposition of the defendant unless the defendant consented.

Mr. Robinson. He might wish to have a self-serving deposition. It might be a fine way to have a defendant pack the record by taking a deposition and then refusing to take the stand.

Mr. Crane. If a defendant, no matter how voluntarily, has given a deposition, why, it is an admission in court or out of court or anywhere. It is like a letter he has written. Why shouldn't it be taken in evidence?

Mr. Robinson. It could be used as an admission if the Government wanted to introduce it.

Mr. Crane. I will speak of it at the time when you reach it.

Mr. Robinson. Well, we have some changes to suggest in lines 52 and 53.

Mr. Youngquist. With that explanation, this language in

5 and 6 looks all right to me.

Mr. Seasongood. Why not use something more definite than that, because it may be susceptible of a reading that the Government might take the deposition, but he could raise the constitutional point that it could not be used against him at the trial.

Mr. Youngquist. In line 7, that deposition may be taken only at the instance of the defendant.

Mr. Seasongood. Or at the instance of the Government.

Mr. Youngquist. If the defendant has taken the deposition of the witness.

Mr. Seasongood. That is very indefinite, too. It is consistent with an interpretation that if the defendant takes any deposition the Government has a right to take depositions.

Mr. Robinson. His or anybody's.

Mr. Seasongood. Anybody's.

Mr. Robinson. That is a statute I happen to be familiar with. I have taken depositions under it and have had them taken against me, so to speak, where the defendant has requested that the deposition be taken of a state witness. The statute provides in some States that the prosecution may take depositions of the defendant's witnesses.

Mr. Seasongood. That won't do unless the defendant is there. The defendant may take a deposition and send his lawyer to take the deposition. According to this, the Government could then take testimony of witnesses without the defendant being present.

Mr. Robinson. Oh, no. He would have to be present. That would be his privilege and right under the Constitution.

Mr. Youngquist. I do not exactly understand the phrase in line 9, "as a prospective witness for the Government."

Does that mean that if a defendant wants to take a deposition of A and A is a prospective witness for the Government, the Government may also take the deposition of A?

Mr. Dean. Does it mean that same witness, in other words?

Mr. Robinson. It does not mean the same witness. It is not intended to mean that, of course. You cannot have the same person be a witness for the defendant and for the Government.

Mr. Youngquist. You could.

Mr. Robinson. Oh, it is possible.

Mr. Waite. What does that mean? Why would the defendant ever take the deposition of a witness for the Government?

Mr. Robinson. Well, in a case that I happened to be prosecutor in, a statutory rape case, the defendant had the deposition of the girl in the case taken.

Mr. Waite. But did he take the deposition of a witness who was a prospective witness for the Government?

2 Mr. Robinson. That is the way the statute reads. You will find that in the Indiana statute.

Mr. Waite. It does not make sense, even if it is an Indiana statute.

Mr. Medalie. You are falling for an old fallacy as to the proprietorship of a witness. The Government does not own a witness. Anyone may examine the witness. It may be through the Government's interest to examine the witness.

Mr. Dean. How about the prospective witness?

Mr. Medalie. My guess is that the young lady in this particular case would have been a witness for the Government

unless she was a witness for the defendant.

Mr. Youngquist. I should like to ask a question of the reporter. Is it intended by this language that if the defendant takes a deposition of anyone as a witness, the Government is then free to take the deposition of whatever other witnesses it chooses?

Mr. Robinson. That is the statute, yes, on which this is based.

The Chairman. This does not say so.

Mr. Robinson. Beginning at line 7, "or at the instance of the Government, deposition may be taken if the defendant shall take the deposition of a witness who is likely to become a witness for the Government."

Mr. Holtzoff. Why should the defendant take the deposition of a witness who is likely to be a witness for the Government? The defendant would take the deposition of a witness who is likely to be a witness for himself.

Mr. Robinson. It is much along the line of discovery. He wants to know what he is going to have to meet in court.

Mr. Crane. You have not the witness described. If he wants to take the deposition, he can take it and state the reason why. Why should he guess at it and complicate it by saying that he may be a witness for the Government or that they may call him.

Mr. Youngquist. All the United States Attorney would have to do would be this: After the defendant asks to take the deposition of anybody, all he would have to say is that it is a prospective witness for the Government and open the door for the Government to take all the depositions that they like.

The Chairman. I do not see that that phrase creates anything but trouble.

Mr. Crane. This question about depositions ought to be very plain.

Mr. Wechsler. I would like to know what the answer was to Mr. Youngquist's question of a moment ago. Is it the intention to open the door so that the Government may take the deposition of that witness or any witness?

Mr. Crane. The answer was any witness.

Mr. Seasongood. That is what I objected to.

Mr. Dean. Take a case where you have a defendant in the case where you have other defendants, and this man eventually is going to turn government witness, or he is going to plead guilty or do something. In other words, he ~~is~~ sold out. He is not interested in the case any more, such as Fox in the Davis case. Now, in that situation that man can make the application, really at the instance of the Government, take the deposition, and then the whole full force of the prosecution is turned loose to take the deposition of anyone.

Why should there be a reciprocity in here, "If you dare use this deposition once, then the Government will come down on you"? That is the way I read it. What is the point in that?

Mr. Medalie. Following out what you say, in a mail fraud case the Government uses people who are friendly to the defendant, and when the defendant uses them who owns the witness? There is no such thing as owning a witness or being friendly to either side. The law cannot recognize that. The assumption of the law is that every witness, unless he commits perjury, is going to tell the truth.

Mr. Robinson. Just a minute, now. Why not stick to the case I gave you a minute ago, where the Government's case is going to depend on only one witness?

Mr. Medalie. The Government tells the court she was raped, and she tells the court she was not.

Mr. Robinson. Of course,that is not the situation.

Mr. Medalie. Oh, that has happened. She may have a breach of promise case back of it. The girl wants to have the fellow marry her, and she is willing to testify to certain things under the White Slave Act or otherwise to bring it about.

Mr. Robinson. Isn't the point this: that there are cases that cannot be made except by a certain witness?

Mr. Medalie. Yes.

Mr. Robinson. That is, the prosecution is dependent on the testimony of one witness. That is very commonly true.

There is no need of our imagining the impossible thing when we have our own actual experience at the bar and elsewhere. We have had those cases.

Now, the defendant can, under this statute, which is in effect in one or more States, take the deposition of the witness who is going to be the one witness for the Government or the principal witness for the Government, one who will testify to an essential detail that probably cannot be gotten from any other witness.

Now, the statute simply provides reciprocity there by saying that if the defendant does take a deposition from the witness who is to be the Government's chief witness -- that is not proprietorship but a matter of evidence or proof in a criminal case -- then, as a matter of reciprocity, the Government in

turn may take the deposition of a witness or witnesses who may necessarily be required as a part of the defendant's defense.

Mr. Crane. On what basis can the defendant take the deposition of such a witness?

Mr. Robinson. The statute allows it.

Mr. Crane. What statute? We have not any such statute. Is that an act of Congress?

Mr. Robinson. This is a state statute.

Mr. Medalie. You mean this is a deposition to be taken regardless of whether the person is out of the reach of the subpoena? Is that what you have in mind?

Mr. Robinson. I do not see why that should be necessary.

Mr. Medalie. I do not think a deposition should be taken of a witness who can be reached by subpoena --

Mr. Holtzoff. I think this provides for de bene esse depositions.

Mr. Medalie. It does not say so. If it is de bene esse

3 or a person not subject to subpoena, then you have a different situation altogether, and it does not depend on who is going to qualify a witness.

What we want to provide for is this: that persons who are not within the reach of subpoena or persons who might die or leave the jurisdiction shall, if possible, unless there is a constitutional inhibition, have their depositions taken.

Now, if we keep that in mind we can do justice, unless the Constitution stops us.

If the complainant or the supposed complainant or the injured person in a criminal case is within the jurisdiction, subject to the reach of process, and is not likely to die or

leave the jurisdiction, there is no case made, under any principle of justice, for the taking of the deposition in advance of the trial, unless you want to try the whole case by deposition.

The whole theory of trials is that you shall not take depositions unless the person is without the jurisdiction or about to die or likely to leave the jurisdiction. Now you are putting in something new in the jurisprudence which I do not think you should put in.

Mr. Robinson. May I read the statute now so we will know specifically what we are talking about? It is Section 91, 610, Burns' Indiana Statutes, 1933:

> "Depositions. A defendant, by leave of the court or by written notice to the prosecuting attorney, may take the depositions of witnesses residing within or without the State to be read on the trial, and the request of the defendant for such leave of the court or the giving by him of such notice to the prosecuting attorney shall be deemed a waiver of his constitutional right to object to the taking of depositions of witnesses by the State relative to the same matter to be read on the trial; provided, that leave to take such depositions be given the State or notice of the taking of such depositions be given to the defendant by the prosecuting attorney."

Mr. Medalie. As I understand that, if the defendant chooses to apply for the taking of depositions of persons who may be reached by subpoena, are not likely to die, are not likely to leave the jurisdiction, then the prosecution gets the same right.

Mr. Robinson. That is right. It is a conditional examination.

Mr. Glueck. It is a very difficult situation altogether, because the aim of the whole show is to use this device when you cannot use the regular device of bringing the defendant into court.

Mr. Robinson. That is not the aim. You are familiar with the taking of conditional examinations in civil cases. You want to find out what the other side is going to do on the trial.

Mr. Crane. I think that is the trouble. I think you have the idea of civil practice injected into the criminal procedure.

Mr. Robinson. This is criminal practice.

Mr. Crane. I know, but it brings up the subject we have been discussing here, as to how far the Government can take depositions. It throws the door wide open, because the defendant has waived any objection to taking any deposition.

Mr. Robinson. It has worked for over forty years.

Mr. Medalie. Do we want the Government to take depositions of persons who are available?

Mr. Robinson. It is put up for your consideration.

Mr. Longsdorf. In civil procedure it is for discovery.

Mr. Dession. At the present time if you had a grand jury sitting you could call prospective defendants. They have not been indicted yet, so you can examine them.

Mr. Medalie. Practically, you know, the Government can examine anybody it wants to after indictment and before trial on whatever pretext it has. Subpoenaing people before a grand jury does not cover that pretext, but they cannot use that testimony before a jury.

Mr. Dession. That is right, so the only new feature here is that the thing that results is a deposition instead of grand jury minutes.

For what purposes may these be used as depositions? That is not in Section (a). It is in Section (d).

Mr. Crane. I think it ought to be put up to us in good, clean fashion, and take depositions in the instances where it would be necessary, and let it go at that. I do not see how the defendant can take depositions unless they become necessary within the same rule.- the witness is sick or absent or cannot be obtained at the trial. To go beyond that is getting into the civil end of it, where you simply go into the other side's case to examine anybody, in our State, before trial, but that is a thing you would never think of in a criminal case.

Mr. Seasongood. I think the reporter has stated the matter more broadly than the Indiana statute to which he referred. That Indiana statute says that if the defendant takes a deposition the State may take a deposition on the same matter; but the way the reporter has stated it, if the defendant takes any deposition the Government can take a deposition of any one person or anybody else.

Mr. Robinson. I suppose there should be a few words set in there, a limitation.

4 Mr. Seasongood. The mere fact that he takes a deposition does not open the world to the prosecution.

The Chairman. Gentlemen, I thought I had understood this when I had read it first. I wonder if we would not save a lot of time if we asked Mr. Robinson to outline what they mean in this Chapter 5, so we can get the scheme of things. I see now

how dumb I was in reading it. I thought this applied to sick witnesses, witnesses who might die before the trial, or very important fellows like Mr. Black~~burn~~mar who was hiding over in Paris. I see that does not apply to that.

Mr. Robinson. I beg your pardon. It does.

The Chairman. What I thought it applied to is so inconspicuous that it is lost in the shuffle. These rules run to 33.

Mr. Strine. I think it might safe time to refer to Rule 27 first. Rule 27 provides the conditions under which a deposition may be taken.

Up until the present time the only way depositions have been taken in criminal cases has been under the statute, which is Section 624, Title 28, of the Code; and depositions under that section may be taken in cases where the court finds that it is necessary in order to prevent a failure or delay of justice, and in those cases, after so finding, the court may issue an order to take the deposition of a particular witness before a commissioner. Thereafter the deposition may be used in evidence at the criminal case.

Mr. Youngquist. Taken in behalf of the defendant only?

Mr. Strine. Yes.

The Chairman. Mr. Strine, I notice Rule 27 is entitled, "Depositions Before Trial or Pending Appeal," and Rule 26 is entitled, "Depositions Pending Criminal Proceeding."

What is the difference between those two?

Mr. Strine. I think, as a matter of fact, 26 and 27 may very well be in one rule.

Mr. Robinson. We can consolidate them.

The Chairman. Those two headings seem to me to be the same.

Mr. Holtzoff. They are taken from the civil rules, are they not?

Mr. Strine. Yes.

Mr. Holtzoff. Rule 28 in the civil rules pertains to depositions before the action is ~~taken~~ commenced, and Rule 26 relates to depositions after the commencement of the action, and it may perhaps be we do not need Rule 27 here at all.

Mr. Strine. I think either one of the two would be enough.

Mr. Robinson. It is more or less a matter of choice.

Mr. Seasongood. In 27 you have depositions pending appeal.

Mr. Robinson. I would suggest that you direct the reporters to consolidate 26 and 27 in line with the discussions we have had here. I think that will take care of it, unless there is further discussion.

The Chairman. If there is no objection, I think it might be very desirable that we do that.

Will you continue, Mr. Strine?

Mr. Strine. Well, very briefly, Rule 27 adopts what has been the practice in the Federal courts when dedimus potestatum is granted. We provide here that the person desiring to take the deposition first file the request, supported by affidavit, in the district court, showing the reasons why it is necessary to take these depositions. On page 8 these various things are listed.

Mr. Crane. Page 8 of what?

Mr. Strine. It is the first page of Rule 27. It starts in line 7.

After filing that notice and serving a copy on the other side, the other side may oppose it or they may ask for a hearing

before the court, and, if necessary, the court may hold a hearing.

Mr. Glueck. Pardon me just a minute. Apropos of what we were saying before, you notice in line 14 it says, "The reasons for the defendant's inability to produce such persons," and that is narrower, therefore, than 26, which has these two types of depositions, with the additional one also referred to in 14, and this special situation.

Mr. Wechsler. Does not Rule 27 qualify Rule 26, since 27 sets forth what you must show in order to avail yourself of the right which is established in 26? Isn't that correct?

Mr. Strine. That is correct.

5 Mr. Dean. I do not think it is, because Section (d) of 26 relates to the uses of depositions. There is no such qualification as appears in the affidavit in Rule 27.

Mr. Wechsler. Well, of course, it would not be necessary to be in the provision that determines the use of the deposition, if it was --

Mr. Glueck. The showing you must make.

Mr. Wechsler. Yes, you have got to make the showing to get the deposition, and presumably that exists with reference to all cases in which a deposition has been obtained.

If it is true that Rule 27 is intended to qualify Rule 26, then I think it is unfortunate that the drafting should be in this form.

What we ought to begin with is a statement of the conditions under which depositions should be permitted to be taken. We are just getting to that now.

Second, there ought to be a description of the use to

which depositions could be put, assuming that they had been properly taken. Then I think we would at least know where we stand.

The Chairman. Gentlemen, I have just been discussing with the reporter here both 26 and 27. It is his feeling that we would save a lot of time if we pass both of them by until they have had a chance to reword them and consolidate them. We can not go into matters of phraseology here.

If it is agreeable, we will pass on to Rule 28.

Mr. Seasongood. Before we come to that, may I ask why were 22 to 26 left out? What were those?

Mr. Robinson. Some of them were not applicable at all.

Mr. Seasongood. I assumed not, but what were they?

Mr. Robinson. Interpleader, and so forth.

Mr. Seasongood. I see.

Mr. Strine. Rule 28 merely names the person before whom the deposition may be taken: Subdivision (a), persons within the United States; subdivision (b), persons in foreign countries who may be designated by the court to take depositions; and (c) provides that:

> "No deposition shall be taken before a person who is a relative or employee or attorney or counsel of any of the parties, or who is a relative or employee of such an attorney or counsel, or who is otherwise interested in the proceeding."

The Chairman: That follows word for word, practically, the civil rule.

Mr. Strine. Yes.

The Chairman . 29.

Mr. Strine. Rule 29 would apply to the case where both parties would agree on the necessity of taking the deposition and were willing to stipulate. In such cases, upon application to the court, it is unnecessary --

The Chairman. That likewise follows the civil rule.

Rule 30.

Mr. Strine. Rule 30 provides for the taking of depositions orally and provides that the court may issue various orders to protect the parties.

The Chairman. How does this type of deposition differ from 26 and 27?

Mr. Strine. This is a deposition taken under 26 and 27. This rule covers depositions under that rule. Rule 31 covers interrogatories.

Mr. Glueck. I am just wondering, Mr. Chairman, whether in the process of reworking this topic much of this could not be consolidated as well as simplified in accordance with your general suggestion throughout that you are in favor of brevity. It does seem to me this whole field occupies an altogether disproportionate amount of your draft.

Mr. Robinson. It has the same number of rules as in the civil rules, and we tried to carry the analogy along between the two, criminal and civil.

Mr. Glueck. In civil practice depositions are used much more frequently.

Mr. Robinson. Well, that is true.

The Chairman. As a matter of fact, the amount of space given to the civil rules is much less than you will find in

statutes dealing with the same subject.

Mr. Medalie. In New York we have a handful of civil act provisions, and you know the general rules of practice that relate to that subject. In other words, you can find really the procedure prescribed without going into an awful lot of detail. I would rather, if we could, make reference to the civil practice, whatever it may be, general rules of civil procedure, statutes, or anything else.

All we ought to do here is prescribe the right to take the deposition, and then the taking of depositions and formal matters relating to it ought to be subject to the rules applicable to the taking of depositions, oral or interrogatories, in civil cases.

Mr. Robinson. We made the motion yesterday that we should not refer to civil rules in our rules.

Mr. Medalie. We made the motion yesterday not to prepare our rules in line conformative to the pattern of the civil rules.

Mr. Robinson. Further than that, we agreed not to cite them.

The Chairman. Not to incorporate by reference.

Mr. Medalie. We need not incorporate the rules. All we need to say is, whatever the practice is in connection with civil cases as distinguished from criminal cases shall refer to the practice in criminal cases -- in other words, as to matters of procedure, routine, taking of depositions, the commissioners, the oaths --

Mr. Robinson. You may incorporate by reference.

Mr. Medalie. Without saying "civil rules." Just say, whatever rules are applicable to the taking of the depositions in civil cases, once we allow them to be taken, shall apply in

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criminal cases. I do not think we need to do more than that. Otherwise you have two sets of procedure, word for word.

The right to take them is all we are concerned with. We will adopt the procedure in civil cases, whatever that may be, whether

6 it be by statute, whether it be by rule, or whether it be by common law.

Mr. Youngquist. I am all for that. I suggested that, but you, among others, turned it down.

Mr. Medalie. I will withdraw it.

Mr. Robinson. The motion was not to cite civil rules.

Mr. Glueck. I think what Mr. Medalie means is that where the practice already exists, whether it is in these rules or elsewhere, where it is an accepted practice, all we need to say is --

Mr. Medalie. All we need do here is authorize or not authorize the taking of depositions. The procedure to be followed is the civil procedure.

Mr. Robinson. Let me suggest two facts that have been brought before the committee, one in the Southern District of New York. In one case one of the defendants requested a deposition in Timbuktu and one in Africa, or wherever it might be. It is causing difficulty. It would be open to abuse. That is all the more necessity --

Mr. Medalie. That is only the right to take the deposition. How it shall be taken is determined by the civil rules. If a judge is fool enough to say that an application is made in good faith to take a deposition in Timbuktu, when he knows perfectly well it does not need to be --

Mr. Robinson. We do not seem to be able to dispose of it

that simply.

Mr. Medalie. That is only the right to take the deposition.

Mr. Robinson. You are now talking about the method.

Mr. Medalie. It should be the civil rule method, whatever method that would be.

The Chairman. I object to it on this ground. If you say whatever the civil rule method may be, some of the districts have worked out ancillary rules of their own, and then we begin to form local rules, and that I think gets them into trouble.

It seems to me we were directed to prepare rules of criminal procedure, and the object, among other things, was to have the rules in one compact pamphlet; and even if it takes two or three pages of print, I think it is --

Mr. Medalie. Ten or twelve.

The Chairman. All right, ten or twelve. Here is a whole book of all the criminal rules, in big print, so that I can read them without my glasses. Suppose it takes three or four pages. It is better to have it here.

Mr. Medalie. You said that some districts have ancillary rules. If they can have them under the existing rules of civil procedure, they certainly can have them under the rules of criminal procedure. I do not think there is any trouble involved there. You cannot prohibit those things.

If they are not inconsistent with the rules of civil procedure, they won't be inconsistent with the rules of criminal procedure, particularly if they are written under the same pattern.

Mr. Robinson. Some of the districts are following the same practice.

Mr. Youngquist. I suggest that you set it out, and then if the court would prefer to have it by reference, let the court so indicate. In any case, we have literally fulfilled our duty.

Mr. Medalie. I feel as proud of this as the court does, and I have given more time to it than the court has. I have broken many engagements to do this work, and so has everybody else. I would like this to be a workmanlike job and complete, if it can be done, and I think it can be done.

You talk very earnestly about having lawyers who do civil work do work in criminal cases. I think that is a futile hope of yours, because of the mystery connected with criminal cases. Still, I think it is a mighty good thing to have procedure the same in both branches of trial and litigated practice wherever possible; and here for the first time we have a definite opportunity to make the things about the same.

To do it by a mere repetition of words is wholly unnecessary.

Mr. Crane. It is very easy to do what Mr. Medalie has said, because it saves us the trouble of writing something we seem to have difficulty in writing. If it is so simple, why not have the reporter put it down, and then if it is the same as it is in the civil rules, we can leave it to the Supreme Court either to adopt what we suggest or shorten it by saying, "Refer to the civil rules."

We have wasted two hours in trying to formulate this. If we come around and make it the same as the civil rules, then it will be time enough to say whether we shall adopt them. Let the reporter try his hand at it.

Mr. Youngquist. I so move.

The Chairman. All those in favor of that motion, say "Aye."

(There was a chorus of ayes.)

The Chairman. All those opposed, "No." (Silence.)

It is carried.

Mr. Seasongood. May I ask a question about Rule 29? It reads:

"If the defendant and the attorney for the Government so stipulate in writing, depositions may be taken before any person, at any time or place, upon any notice, and in any manner,and when so taken may be used like other depositions."

Mr. Robinson. It is a civil rule.

Mr. Seasongood. I know it is a civil rule, but here it is to be by order of the court. The court has to grant the leave and everything else.

Mr. Robinson. That is an alternative method of taking depositions.

Mr. Seasongood. It does not seem to me that it ought to lie with them. The court should have some say about whether a deposition should be taken.

Mr. Medalie. Suppose I were district attorney and you were defendant's counsel. You and I sit down and stipulate a fact and we put it in writing and each of us signs his name to it, and that stipulation is offered in evidence. We agree to certain facts.

Instead of that you and I agree that we will appear before Jim Roberts to take a deposition, and that deposition shall be used by either party in whole or in part. You can be a notary public or a mere outsider, having no official designation. We

7 can do that in any case.

Mr. Seasongood. It seems to me the court should have some say as to that. Here you provide very scrupulously that the court shall order the taking of depositions. Then in another provision you provide that if they agree they shall take the deposition.

Mr. Medalie. Suppose both sides agree to putting an affidavit in evidence and they sign a stipulation to that effect. The court can take it.

Mr. Crane. I have refused to accept a stipulation in the form of an affidavit agreed to by the district attorney and the defendant's counsel. I put it under the glass of water on my desk and told them I would not receive it. I need not go into the reasons now, but it was a very wise decision.

Mr. Seasongood. I do not want a protracted discussion, but here you have provided with the utmost elaborateness that it should be by the order of the court, and then you say the court has nothing to say about it.

The Chairman. Isn't that the customary procedure in all state practice? They give you a formal way in which you can proceed, but they also say that by stipulation you can take it before anybody, at any time, and on any notice.

Mr. Medalie. I have tried criminal cases where the district attorney and I stipulated facts. Of course, the court could have rejected that stipulation.

Mr. Crane. This will come up in connection with what they are going to write. It can be taken up then, I presume.

Mr. Medalie. In the course of a trial of a case, civil or criminal, one or the other of counsel will rise and will say,

"It is agreed that if John Jones were called he would testify as follows." If material, the court takes it. Now, it is the same thing.

Mr. Seasongood. Well, not exactly, because, as I say, it lies with the prosecution and the defendant's counsel to take depositions at any time, which might be at a remote place, and the court might not like it at all.

Mr. Medalie. It does not affect the rights of either party, and that is what we are primarily concerned with.

Mr. Seasongood. Well, I do not want to argue with you too much.

The Chairman. Now, the suggestion is made by Judge Crane, I think acquiesced in, that the subject of depositions be referred to the reporter, and that will bring us on to the subject of discovery, Rule 34.

Mr. Robinson. Here again you see an effort has been made to present to you a rule which would be adapted to criminal cases so far as possible in a comparative way with the civil rule 34 applying to civil cases.

Whether or not that is possible or practicable is for your consideration. If you feel that discovery cannot be used in criminal cases, you may indicate that.

Mr. Holtzoff. Am I right that this could operate only in favor of the defendant as against the Government and never in favor of the Government as against the defendant, because the defendant could always plead the privilege against self-incrimination?

Mr. Medalie. I do not think so, if you put this modification in: "Order any party or person to permit entry upon

designated land or other property."

Mr. Holtzoff. I have in mind the first part of the rule relating to production of documents. That would operate in favor of the defendant against the Government and not in favor of the Government against the defendant. It is a one-sided proposition.

Mr. Medalie. You do not want the Government to lose any advantages. If the Government has anything in its possession which will aid the defendant, it ought to be produced, if it is true.

Mr. Holtzoff. I agree with that, but should not we condition that on a waiver by the defendant?

Mr. Medalie. No. The production of the truth ought to have no favorites.

The Chairman. Yes, but it should be bilateral.

Mr. Youngquist. If you disclose your evidence to the defendant, it gives him, if he be that kind of person, an opportunity to frame up a defense to meet it.

Mr. Holtzoff. This is not only a question of producing the truth at the trial. This is a way of getting a discovery before the trial and preparing evidence to meet it with, which means that unscrupulous defendants may fabricate evidence with which to meet the evidence that the Government is going to introduce at the trial.

Mr. Medalie. It is like the old terror, like the terror that if you do certain things they will foment litigation and produce frivolous claims and foment perjury. I do not think we ought to have that terror of the truth.

Mr. Holtzoff. This ought to be bilateral.

Mr. Medalie. There is a constitutional restriction against its being bilateral, and you are practicing law now in criminal cases with that handicap for the Government. Nevertheless, to the extent that the truth is available to both sides, without constitutional restriction, it ought to be available.

Mr. Holtzoff. This is not a question of concealing the truth. This is a question as to whether or not the evidence should be revealed -- that is, the prosecution's evidence -- before trial.

I agree with you that a prosecutor should not hold back any evidence that will help a defendant, but this is not limited to that. This rule would permit the defendant to examine into the documents that the prosecution is going to use in support of its case in order to prepare a defense.

Mr. Medalie. He is going to use it, isn't he?

Mr. Holtzoff. I think it might be very legitimate, but it seems to me that ought to be coupled with the waiver against the right of self-incrimination, so that what is sauce for the goose is sauce for the gander. That frequently leads to miscarriage of justice and the concealment of truth.

Mr. Medalie. In other words, the defendant does not produce what he knows; the prosecution produces what it does know. What harm is there in knowing what the prosecutor knows? It is the truth.

Mr. Dean. You know that the prosecution has to put it on at the trial. The defendant does not have to. In view of that burden, why should not the Government give you an opportunity to examine the revolver, for example, which was at the scene of the crime, number so-and-so, so that you have advance notice and

can prove you never heard of it. If it is sprung at you at the trial, you can never make any defense to it.

Mr. Holtzoff. Why should not the defendant, by the same token, allow the prosecutor the opportunity of inspecting some object which the defendant is going to use?

Mr. Dean. But the defendant may never take the stand. He does not have to say anything or reveal anything.

Mr. Medalie. There is another answer to that, and a very

8 practicable one. In the last fifteen years there has developed a procedure which is utterly illegal but is going on day by day in every district in the United States where the United States Attorney is half awake. After he has procured an indictment and before trial he has a grand jury before whom he subpoenas anybody and everything, and he has ample opportunity to do it, so practically you know perfectly well that the United States Attorney is precluded from nothing that he wants to do in the way of finding out any evidence within the territorial limits of the United States, whether it be a person or an object.

Mr. Holtzoff. That is not done in many districts, because in many districts grand juries convene only at intervals.

Mr. Medalie. But where you have real, active criminal litigation going on, this kind of thing becomes important. Grand juries are available, and they do it.

The Chairman. We would not dare put this particular rule forward --

Mr. Medalie. I would dare to do it. I think we might as well be realistic about it. The district attorney always has an adequate excuse for doing it. He is considering whether or not to file a superseding indictment and he is also considering

whether or not to indict somebody for perjury or for obstruction of justice in connection with the pending case, and that is always the reason that they advance when a defendant comes in, or someone connected with him, and asks to be relieved of a subpoena. They assert it and reassert it.

Let us deal with this realistically and not by blueprint, by which we ignore things that are actually going on.

The Government has no handicap whatever in the preparation of a case, because of its power actually exercised of using grand jury process for the examination of everybody, including every one of the defendant's witnesses.

Mr. Holtzoff. But I have in mind the defendant's own papers. If he stands on his right not to produce them, he should not be given the right to examine the Government's papers.

Mr. Medalie. You would not give him a bill of particulars unless he waives the right of self-incrimination.

Mr. Holtzoff. Oh, no. I would give him a bill of particulars, but I would not let him find out what the Government has unless he discloses what he has.

Mr. Medalie. The only thing that is kept from the Government is the defendant's articles. The defendant does not have most of the things that he is going to use at the trial. They belong to other people. There is very little that he has.

Mr. Holtzoff. Take a concealment of assets in bankruptcy cases. The defendant may have books of account. He has a right to refuse to produce them at the trial or before the trial.

On the other hand, suppose the prosecutor was able to obtain some other parts of the records. Why should he be permitted to obtain discovery before the trial of those documents

which the prosecution has unless he is also willing to disclose to the prosecution the documents that he has?

Mr. Medalie. You are simply raising something that is inherent in our whole system, and that is the privilege against self-incrimination.

Mr. Holtzoff. Yes, but this is a new rule. This is not inherent. Should we make this new departure knowing that we have the --

Mr. Medalie. You take the ordinary mail fraud case. You take the ordinary case in which people are indicted in connection with some business transaction which gets into the Federal courts, including anti-trust cases, and you know the defendant has next to nothing in his possession compared with what the Government is able to get hold of against him.

Realistically, the Government has all of the cards and the defendant has next to nothing. What he has in his personal possession is negligible.

If the defendant is a corporation or if he is an officer of the corporation and was indicted in connection with the acts of that corporation, you know perfectly well that that corporation's records are subject to process.

Leaving out the rare case where an individual defendant is indicted in connection with the concealment of assets, as a bankrupt not connected with a corporation, generally speaking the Government gets everything that can possibly be gotten and far more than the defendant could get.

I do not think the rules should be based on the remote prospect of the defendant's having any advantage, because he usually does not have it.

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Mr. Holtzoff. How are you going to protect the Government against a fabrication of testimony to meet documents ~~he~~ it has in ~~his~~ its possession?

Mr. Medalie. If the Government has a document in its possession, there can be no fabrication in respect to that document. If the defendant or his counsel are foolish enough to fabricate evidence about a document, it will insure the defendant's conviction.

Mr. Dean. It seems to me that would refer to another type of rule, which would provide that if the Government is going to put on the case, the defendant should have a right to look at the documents in its possession. After the Government's case is in, if the defendant is going to take the stand and put on his case, then he shall give to the Government at that point such evidence as he relies upon. But to require, in advance of the entire trial, the defendant, who may never take the stand and never put on the defense and is under no obligation to, to give up his case in advance so that it will help the Government to win its case in chief seems to me to be hardly even reciprocal.

9 Mr. Youngquist. That is not proposed by this rule, because the defendant has his constitutional privileges. He is not required to give up everything.

Mr. Robinson. Lines 4 and 5 say that it is subject to the Constitution.

The Chairman. Mr. Holtzoff is arguing for making it bilateral by providing that if the defendant asks for this that would give the other party, namely the Government, the same privileges of discovery.

To bring it to a head, do you make a motion to that effect?

Mr. Holtzoff. I do.

The Chairman. Is there a second?

Mr. Robinson. I will second it.

The Chairman. Is there any further discussion?

All those in favor of Mr. Holtzoff's motion, by appropriate language, to make this section bilateral, respond by saying "Aye."

(There was a chorus of ayes.)

The Chairman. Those opposed, "No."

(There was a chorus of noes.)

The Chairman. The motion is lost.

Mr. Youngquist. I vote "no" because I think we should not have 34 at all.

Mr. Holtzoff. I am willing to go along with that.

Then, I move that we strike out Rule 34.

Mr. Youngquist. I second that motion.

Mr. Medalie. Well, now, in arguing against that motion, when the Government seizes a defendant's papers -- he is in the business and he has not seen most of the papers and there are many, many file cases of his own papers -- if he cannot see them, that is an outrage. When they see the papers of his corporation and he cannot see them, that outrages every sense of justice.

If you strike out Rule 34 you defeat something that satisfies the sense of justice.

Mr. Youngquist. Does not the defendant have a right to examine his own papers?

Mr. Medalie. He has not any right in the world if the court does not give it to him.

Mr. Youngquist. Would not the court give it to him?

Mr. Medalie. No.

Mr. Dean. No. I can testify to that.

Mr. Medalie. And when it does give it to him, it gives it to him under conditions that make it practically impossible to make a thorough study.

The Chairman. Is there any further discussion on the motion to strike the rule?

All those in favor of the motion say "Aye."

(There was a chorus of ayes.)

The Chairman. Opposed, "No."

(There was a chorus of noes.)

The Chairman. The motion is lost.

Mr. Wechsler. May I ask if there is to be a provision on the special case of investigating grand jury minutes?

Mr. Robinson. I wonder if Mr. Medalie thinks that, beginning at line 6, that would permit them to examine that. They are papers in the possession of the Government.

Mr. Medalie. I am perfectly willing that you include a protective proviso so that the defendant does not examine grand jury minutes.

Mr. Youngquist. That is not covered, because the last clause is "and which are in his possession, custody, or control."

Mr. Medalie. I am also willing that the defendant does not take the statements of witnesses that the district attorney has in his own possession.

Mr. Crane. Those are not papers, either.

Mr. Wechsler. There is a division of authority in the districts that might be resolved by these rules. Without

addressing myself as to how it should be resolved, I know it has caused trouble.

Mr. Medalie. I understand that the only way in which today you can inspect the grand jury minutes in the Federal court is in a motion to show irregularity before a grand jury.

Mr. Wechsler. I think there is some broader authority than that in favor of the inspection.

Mr. Medalie. You can examine them for the purpose of determining whether or not the grand jury had enough evidence for probable cause for indicting the defendant.

Mr. Wechsler. Yes.

Mr. Medalie. Well, that is so limited.

Mr. Holtzoff. In many districts they do not have grand jury minutes. They do not take grand jury minutes in a great many districts.

Mr. Medalie. The ordinary devices for establishing irregularity of procedure before a grand jury -- such as bullying by the district attorney; for instance, the conduct of a person in the Eastern District of New York, who was mentioned in another case in the Supreme Court. I won't mention his name. He was a capable lawyer, very zealous in that particular case-- is by establishing that conduct by affidavits of grand jurors. You have a right to get affidavits of grand jurors once the defendants are apprehended, there being no more purpose in secrecy when everybody is apprehended.

Outside of that I do not know of any respectable authority that permits the obtaining of grand jury minutes or records for the purpose of establishing that the grand jury did not have adequate evidence on which to indict a defendant.

Now, in New York you have got a peculiar situation. The Code of Criminal Procedure in New York expressly forbids the giving of that kind of information, but the Court of Appeals said that the defendant has a constitutional right to be indicted only on evidence establishing that he has been guilty of a crime.

Therefore, they said, the only way you can find out whether or not that was done is by an inspection of the grand jury minutes, but you cannot have it unless you first show that in all probability he was indicted on a lack of prima facie evidence. Then, in aid of that motion, they gave you access to inspection of the grand jury minutes, and then you could make a motion to dismiss, provided the grand jury minutes established your point.

That was one of the far-fetched things that was established in New York before Judge Crane became an appellate judge.

Mr. Crane. In other words, it is generally denied now.

Mr. Medalie. The judges say the evidence does not establish it.

Mr. Robinson. Is there any statute now?

Mr. Crane. No. It is generally denied. It was granted in Buffalo once, but in New York they generally deny it.

Mr. Dean. Your problem is further complicated by the fact that in some districts the court attempts to impose an oath of secrecy which extends beyond the point at which they are arrested and even beyond the sitting of the court term. There is some practice that it is a secret forever.

10 Mr. Medalie. I understand there was a case in one of the western circuits which dealt with an oath administered to

witnesses to the effect that they would not disclose what they had testified to.

Mr. Youngquist. That is the practice in California.

Mr. Medalie. That might be by statute.

Mr. Youngquist. No. This is a Federal district court.

Mr. Medalie. Then that went to the Circuit Court of Appeals, which sustained a commitment for contempt for a person who refused to take that oath. Certiorari was denied by the Supreme Court. But when the district attorney or assistant district attorney brought a witness before John Knox, I understand that he laughed it off and refused to punish the witness for contempt. So it exists as a terror today, but it is questionable law whether such an oath can be administered to a witness.

Mr. Crane. An indictment in New York must contain the names of all the witnesses on the back of it.

Mr. Medalie. I think that has been ~~established~~ abolished by statute. I was on a committee of the Bar Association which brought about that abolition. They do not have that any more.

Mr. Dean. I think there are serious difficulties in permitting anyone to see the grand jury minutes, because it would be abused. On the other hand, if there are, in fact, irregularities, you have virtually no remedy, particularly if this oath of secrecy applies beyond the court term. That is our problem.

Mr. Medalie. I think we had better not tinker with it. I think we ought to let it alone. If the judges decide that that oath has no validity and that a person is not guilty of contempt for refusing to take the oath, we would have no difficulty about it.

RULE 35

The Chairman. May we proceed to rule 35, which follows substantially, I think, the civil rule.

Mr. Robinson. That is right. The same question is involved here as before, whether or not we should have a rule to correspond with the civil rule.

Mr. Seasongood. I do not say I am a great constitutional lawyer, but I believe that provision would not be upheld.

The case to which I refer is Sibbeth against Wilson & Company, which will be recorded officialy in 312 Supreme Court, involved the rule in the civil procedure of requiring compulsory examination. Four justices dissented, so that I think that that is a change.

Mr. Medalie. Could you tell us what theMassachusetts situation is on that with respect to the examination of defendants concerning their psychiatric condition?

Mr. Glueck. I referred Mr. Robinson to the so-called Briggs law in Massachusetts, which provides for the examination, as a matter of course and as a matter of routine, of persons accused of felonies and of certain other defendants by psychiatrists on the staff of the State Department of Mental Diseases, a neutral agency, and the filing of a report by these psychiatrists,that the report be available to all parties concerned, including the judge, but not admissible in evidence.

Now, in practice the way it has worked out is that that report has been used a great deal by prosecutors in borderline cases of mental disorder, in which the accused was not able to meet the requirement of due responsibility because of insanity, because he did not know right from wrong, but in which, never-

theless, there was something wrong with him.

The prosecutor had something concrete and reliable on which to exercise his discretion in accepting a plea of guilty to manslaughter, with the understanding that no sooner was the man sent to the prison than he was transferred to a mental hospital.

I suggest that you consider that statute.

Mr. Robinson. We have been thinking, of course, that you were going to work especially on judgments and applications of mental examinations in that connection. Is that mental examination compulsory?

Mr. Glueck. Yes.

Mr. Crane. I suppose there is no objection to the court's ordering an examination of the defendant to find out whether he is sane enough and mentally capable of going on with his trial.

Mr. Seasongood. I should think so.

Mr. Crane. This would be broad enoughto cover that, and I suppose there would be no objection to that, because that is being done right along and that is for his protection more than anything else.

Mr. Seasongood. In line 3 it says mental or physical condition. It also says: "of a party."

Well, I suppose you do not examine the United States. It means just a defendant.

Then you have: "Subject to the rights and privileges secured to the party by the Constitution or laws of the United States."

If I am correct, it means that you may not do it.

Mr. Medalie. You mean that if he says no you cannot do it?

Mr. Seasongood. That is, if the assumption is correct. I think it is, as four of the justices as previously constituted said it is an infraction of the right of privacy of a person, to which I myself do not agree, but there it is. They are certainly going to say it is a right of requirement to give evidence against himself.

Mr. Youngquist. Is this intended to apply only to the cases where the question is whether the defendant can be tried, whether his present mental condition is such that he can be tried, or his present physical condition?

Mr. Medalie. He claimed he was physically incapable of doing the act with which he is charged, or being mentally incapable of intending the result of his action. Mental examination means asking questions. Physical examination means looking at him.

11 Mr. Glueck. Well, it may, but it is not thorough. Your psychological examination may entail asking him questions.

Mr. Medalie. There is no examination of his mental health without talking to him. When you talk to him you are compelling him to testify.

If you look at him or take his fingerprints or take his height and weight, that is different; or if you compel him, as in a recent case in New York, to take a shave. That happened in a murder case. The defendant in one of these Murder, Inc. cases grew whiskers so that witnesses could not identify him. The court ordered him shaved. He was shaved.

The Chairman. Gentlemen, are there any motions addressed to this rule?

Mr. Medalie. It is too heavy for us to make up our minds

as to whether we are imposing something futile on the courts or whether we are doing something that is workable. Isn't that the way you feel about that?

Mr. Seasongood. Yes.

Mr. Robinson. Here are two questions I would like to ask. One is in regard to mental examinations in insanity cases where the defendant pleads insanity. Many States have statutes providing that the court may appoint expert witnesses to examine the defendant, and since he has pleaded insanity --

Mr. Glueck. He cannot object.

Mr. Robinson. He does not object. He wants to show how crazy he is, sometimes. At least, he wants to show how much he is entitled to have that plea sustained, and so he welcomes the doctors, and they may testify as the court's own experts.

Now, should something of that kind be in the rules? That is the first question.

The second is in connection with judgments. The whole problem of the Briggs law is with reference to that type of examination prior to trial and prior to sentence. The question has come up at two or three different times, and I am wondering whether in our rules we should try to consolidate the question all in one rule, or whether we had better sift it into two or three places in the proceedings as I have indicated, where it might be material -- one at the trial, one at the time of the arrest, one preceding judgment.

What do you think about that?

The Chairman. You mean three separate provisions for an examination?

Mr. Robinson. This is preferable to that, is it not, to

have it all arranged in one separate rule -- a provision for mental examination -- and in that rule specify the places --

Mr. Glueck. The stages in the procedure.

Mr. Robinson. Yes, at which such an examination would be required.

Mr. Crane. Where he pleads insanity he is going to plead insanity at the time of the act, of course. They may appoint doctors to examine him. Whether that applies to the time of the trial or to the time of the offense, I am not quite sure, because I know there has been quite a bit of heavy scandal over the appointment of doctors in cases where it was hardly necessary for the fee they have obtained. It has caused a comment in the papers about it, because instead of putting one on it they put two or three.

Of course, that has nothing to do with the merits of the measure. I think, if it can be done, people ought to be allowed to examine the defendant where he is making a plea of insanity, and he is given experts, and they are going to testify to his mental condition, so that the present time is indicative of what his mental condition was at the time of the offense. It would narrow any objection there might be of a general examination.

Mr. Robinson. If you permit courts to call experts on the insanity issue, should you permit the courts to call experts on any other issues?

Mr. Crane. I do not know of any case except in cases of insanity where it has been admitted.

Mr. Holtzoff. Why not do it on ballistics questions?

Mr. Crane. They get experts for such ridiculous things. A man was shot in the heart from a shotgun held about 10 feet

from him, and they brought experts and brought his clothes in to show that he had been wounded by a shotgun by reason of what the clothes showed.

Mr. Seasongood. If you are going to consider this rule further, as of course you are, I do not think it is sufficiently guarded in any event. You should have a provision that if he is examined he is entitled to have his own physician present at the examination. It says "any party."

The Chairman. Must it not be changed throughout to "the defendant"?

Mr. Seasongood. I think so, because you are only talking about the defendant.

Then you have a provision in here that he has to turn over any reports that the doctors have made to the prosecution, and if he does not do so you can exclude the testimony. Well, I do not think you can prevent the defendant from defending by requiring him to turn over his evidence to the prosecution, and if not to exclude the evidence.

Mr. Holtzoff. That is a civil rule.

Mr. Seasongood. I know it is a civil rule.

The Chairman. Gentlemen, we have passed our stipulated hour, and we will adjourn now until 10 o'clock tomorrow morning.

(Whereupon, at 10:20 o'clock p.m., an adjournment was taken until tomorrow, Wednesday, September 10, 1941, at 10 o'clock a.m.)

RETURN TO FILES

CRIMINAL RULES COMMITTEE
207 United States Supreme Court

Copy for Mr. Alexander Holtzoff, Secretary.

Wednesday, September 10, 1941.

Hearing Before the

ADVISORY COMMITTEE ON RULES OF CRIMINAL PROCEDURE

UNITED STATES SUPREME COURT

WASHINGTON, D. C.

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C O N T E N T S .

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ADVISORY COMMITTEE ON RULES OF CRIMINAL PROCEDURE

UNITED STATES SUPREME COURT

WASHINGTON, D. C.

Wednesday, September 10, 1941.

The Advisory Committee met at 10:30 o'clock a. m., in room 147-B, Supreme Court Building, Washington, D. C., Arthur T. Vanderbilt presiding.

Present: Arthur T. Vanderbilt, Chairman; James J. Robinson, Reporter; Alexander Holtzoff, Secretary; George James Burke, Federick E. Crane, Gordon Dean, George H. Dession, Sheldon Glueck, George Z. Medalie, Lester B. Orfield, Murray Seasongood, J. O. Seth, Herbert Wechsler, G. Aaron Youngquist, George F. Longsdorf.

The Chairman. Rule 36.

RULE 36

The Chairman. That parallels Rule 36 of the Civil Rules.

Mr. Robinson. Yes. It has to do with admission of facts and genuineness of documents. The present federal law has no provision on this subject.

The idea of the rule, so far as criminal cases are concerned, is the idea of allowing parties to request admissions of facts and genuineness of documents. The idea is that if it can be worked into the criminal procedure it would tend to simplify that procedure. The proposed rule protects the party toward whom the request is directed where that matter is privileged against disclosure. For instance, in lines 11, 12,

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and 13 the effort was made to obtain that protection.

Beginning at line 9:

"Each of the matters of which an admission is requested, except matters which are privileged against disclosure by the Constitution or laws of the United States, shall be deemed admitted unless"--

And then we go on to a clause which I am sure is subject to question as to what shall be done if the parties refuse the admission.

Beginning with line 12:

"--shall be deemed admitted unless, within a period designated in the request, not less than ten days after service thereof or within such further time as the court may allow on motion and notice, the party to whom the request is directed serves upon the party requesting the admission a sworn statement either denying specifically the matters of which an admission is requested or setting forth in detail the reasons why he cannot truthfully or should not as a matter of privilege or of legal right either admit or deny those matters."

Then the last clause (b) provides that this admission shall have effect only for the purpose of the pending action and cannot be used as an admission for any other purpose or for any other proceeding.

The main difference from the civil rules is in lines 17, 18, and 19, which I have just read, providing that the party may refuse such an admission on the ground that he should not as a matter of privilege or of legal right make any such admission.

b3

Mr. Holtzoff. I should like to ask this question first: Is it proper in criminal cases to ask the defendant to make an admission? Isn't that very fact a denial of his privilege against self incrimination? In other words, should ~~not~~ the exception be only as to privileged matters? Should not a defendant be entirely excepted from this rule? Should not it be limited only to requests on the part of counsel for the defense against the government?

Mr. Crane. If there is a refusal to make an admission, you could not exclude his testifying.

Mr. Holtzoff. Well, he pleads not guilty. He denies everything. This puts all the burden on him to file a sworn denial.

Mr. Crane. Yes, it does.

Mr. Holtzoff. I am wondering whether you can do that with a defendant in a criminal case. I think it is an excellent rule in the Civil Rules, but I am puzzled about its possible applicability to criminal procedure.

Mr. Robinson. As we talked yesterday about admission of due incorporation in a last-minute indictment. This goes back to the discussion we had before. That proposition was discussed on alibi notice and plea of double jeopardy.

The Chairman. I am wondering whether the adequate use of pretrial practice would not obviate the necessity for this.

Mr. Medalie. We argued that under that section yesterday.

Mr. Holtzoff. I would like to see this rule go out.

Mr. Glueck. So should I. Mr. Medalie mentioned yesterday that in the give and take of practice that counsel are sometimes perfectly willing to make admissions.

b4

Mr. Medalie. Yes.

The Chairman. That is often fostered by pretrial practices.

Mr. Holtzoff. There is another fear I have which is, you might say, psychological. When this is finished some courts and the Congress and others may say, "You are requiring the defendant to file formal denials or admit facts." They may feel that that in itself is an infringement upon the liberties of the defendant.

Mr. Medalie. When they read this it may affect the entire thing. I think there would be a basis for it.

Mr. Robinson. You think we should leave this out?

Mr. Medalie. I think we would be safe in leaving this out.

Mr. Youngquist. Rule 16, paragraph (3), dealing with pretrial procedure, considers the possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof. That may be adequate as it is. If it is not, it may be perhaps that we could extend it slightly.

The Chairman. Isn't that sufficient? Isn't this point from Rule 16 sufficient just as it is?

Mr. Youngquist. I think that for all practical purposes it is.

Mr. Glueck. Certainly nothing will come of it unless they agree.

The Chairman. By common consent, Rule 36 will be eliminated.

Mr. Seasongood. The only point is that the court may invite attorneys, but they do not have to come.

The Chairman. It is like an invitation to dinner from the

b5

President.

Mr. Youngquist. I do not like the word "invite."

Mr. Holtzoff. I do not myself.

Mr. Dean. I did not understand that we adopted it.

Mr. Youngquist. Yes, by vote.

Mr. Medalie. And a close vote at that.

The Chairman. I like the word "invite" because it does not carry the connotation referred to.

Next we have Rule 37.

RULE 37

Mr. Robinson. Rule 37 refers to refusal to make discovery and consequences.

My suggestion would be that that may well be considered also with the subject of depositions which you referred back to the reporter yesterday.

The Chairman. Very well. Rule 38.

RULE 38

Mr. Robinson. This refers to jury trials. I take it that there is no objection to Rule 38 (a), is there?

The Chairman. Do we need it?

Mr. Holtzoff. It is in the Civil Rules.

Mr. Robinson. It is exactly the same provision.

Mr. Holtzoff. I think we should retain that, as long as they thought enough about it to put it in the Civil Rules.

The Chairman. All right.

Mr. Holtzoff. I am wondering whether we should say in line 4 "to the defendant and to the government"? Why not say "shall be preserved inviolate"?

b6

Mr. Robinson. The Civil Rules say "shall be preserved to the parties inviolate."

Mr. Holtzoff. Then why not say "to the parties inviolate"?

Mr. Robinson. My only answer to your question is I would say that these rules are drawn so as to balance the matter of procedure as between the defendant and the government. Very often an impartial tribunal, whether a jury or judge, is considered to mean impartial only as to the defendant. It seems to me that it is wise to consider the fact that impartiality should extend to both sides in criminal cases as well as in civil.

Mr. Holtzoff. Why not say "to the parties"?

Mr. Robinson. "Parties" has more of a civil suit connotation to me.

Mr. Youngquist. I have always used "parties".

The Chairman. I feel that way, too. We changed it several times before.

Is there any technical objection to referring to the United States Government and to the defendant as "parties"?

Mr. Holtzoff. Oh, no.

Mr. Waite. I think we are making a mistake all the way through here in our subservience to the civil rules. We try to make the languageof the civil rules fit the criminal rules, but it just does not fit.

We speak of "parties." Really there are only the prosecution and one or more defendants. In this one in line 10 we have adhered to the civil rules phrase "after the service of the last pleading directed to such issue." It seems to me that we depart from the basic proposition of the law. In Rule 7

b7

we have the word "plea".

Mr. Robinson. Didn't we understand that where "plea" occurs that it is to be supplemented by "notice" or "motion"?

Mr. Waite. I did not understand that.

Mr. Robinson. Yes.

Mr. Waite. Where we find "plea" here we change it to "motion" or something of that sort?

Mr. Robinson. Yes, by adding to it the other types of papers which have been agreed upon as appropriate.

Mr. Youngquist. You undertake to cover by notice, motion, accusation, and so forth, all those by the one word "pleading"?

The Chairman. The rules as originally drafted contemplated the system of written pleadings, but we have departed from that considerably here.

3 Mr. Crane. Are we down to (b)?

Mr. Holtzoff. We are still on (a).

Mr. Crane. I would like to ask why they should not make an indictment.

The Chairman. They always make a ringing declaration before they take something from the other fellow.

Mr. Medalie. Well, you donot preserve his rights inviolate at all here.

The Chairman. I think that there may be some objection on that.

Mr. Youngquist. Is the phrase "to the defendant and to the government" out?

Mr. Holtzoff. I think it should go out and just say "shall be preserved inviolate".

Mr. Medalie. What is the good of adopting that when

b8

everything depends on whether this stays in at all? I think we are just wasting time by discussing this by separate sections.

The purpose of this rule is to dispense with jury trials unless either the government or the defendant demands it, which means to dispense with jury trials unless the defendant demands a jury trial. It is perfectly all right for defendants to waive jury trials.

Mr. Robinson. That is (b)?

Mr. Medalie. Yes. Let him waive it if he wishes, but in default of demanding it he waives it. Now, that is not what you want; that is not what the American people want, and the bar will never stand for it.

The Chairman. I think that having attended some of the hearings before the congressional committees on the civil rules that there is no doubt about what their attitude would be with respect to (b).

Mr. Holtzoff. Yes. I may say that we had quite a problem over the civil rules with congressional committees with respect to the proposition that the party must affirmatively demand a jury trial or on failure to do so he waives it. We had trouble enough on that with the civil rules, although I believe in that proposition in the civil rules, but when it comes to criminal rules you will never get these rules past Congress if you put the burden of demanding a jury trial on the defendant.

The Chairman. And when the civil rules were up it was this section (b) that caused more hubbub before the congressional committee than all the other sections put together.

Mr. Youngquist. I think a jury trial comes as a matter of

b9

course in criminal proceedings.

Mr. Holtzoff. Yes, I think so.

Mr. Dean. May I suggest that we strike out (a), (b), and (c) of this, and redraft a rule based on the Patton case. That was a case in which, during the course of trial, the defendant agreed to go ahead with 11 jurors. From the opinion as I read it, it seems that a man could waive completely a jury trial either prior to the trial or during the course of the trial.

Mr. Holtzoff. Oh, yes. Jury trials are often waived in criminal cases.

Mr. Dean. I think that we should take full advantage of that language in the Patton case.

The Chairman. The motion is to strike out (a), (b), and (c), and substitute a new section (b).

Mr. Dean. Dealing generally with waiver by the defendant of a jury trial before or during the trial.

Mr. Crane. Of course, we keep the constitution.

Mr. Holtzoff. I think we should amend Rule 39 as well, because Rule 39 is largely dependent upon the demand for a jury trial.

The Chairman. If there is no objection, all those in favor of the motion say aye.

(There was a chorus ofayes.)

The Chairman. Those opposed.

(There was no response.)

The Chairman. It is carried.

Mr. Waite. I would like to suggest to the reporter when he redrafts it that he put in a provision as to the tribunal

b10

by whom the trial shall be held if the jury trial is waived. You know that in some states it provides specifically that trial shall be by the judge. In others it is that the trial shall be by a judge except in certain cases, and in those shall be three judges.

I am not insisting on this or moving it, but I am suggesting that the reporter could put in a specific provision of one sort or another to that effect.

There is a Pennsylvania case which held that although, as far as the situation was concerned, the jury might be waived, there was no statutory provision for the trial by any tribunal without a jury. Therefore the waiver was effective, but no tribunal was provided to try the case. We may as well take care of a situation of that sort by mentioning the tribunal.

The Chairman. Aren't there some decisions in the civil cases which hold that a waiver of a jury trial thereby constitutes the judge as referee?

Mr. Holtzoff. That is in civil cases.

The Chairman. Of course, that does not apply here.

Mr. Holtzoff. No. It does not now apply in civil cases.

Mr. Seasongood. Is it permissible to discuss (a)?

The Chairman. Under Rule 39?

Mr. Seasongood. Yes.

The Chairman. Certainly.

3 Mr. Seasongood. I want to call attention towards recognizing the statutes of the United States. There is the question of the comment on the failure of the accused to testify.

There is a statute of the United States which specifically says that in a trial by indictment, information or complaint

that during the proceeding against the person, the person shall at his own request, but not otherwise, be a witness.

In Bruno against United States, 308 U. S. 287, it was held that the effect of the Constitution on the statutes is that the judge must affirmatively charge that the failureof the accused to testify is not to be held against him.

I just wanted to call attention to the fact that if in this you give the right to jury as recognized by statutes of the United States and that you should later favor comment on the failure to testify that you should get a contradiction with those two.

Mr. Holtzoff. I do not see that.

Mr. Youngquist. I think thatthe same thing may be true with respect to some of the rules that we have already passed. We speak of the Constitution or the laws of the United States. Those statutory laws and the judicial law as well will be superseded to the extent that they are inconsistent with these rules. Therefore, I would suggest that these provisions be examined with the suggestion of Mr. Seasongood in mind.

Mr. Wechsler, Does not this mean, Mr. Youngquist, that in cases where the right to a trial by jury originally existed it shall continue to exist rather than the insistence on the trial by jury as they always have been shall continue hereafter? I think that if you stated it that way it would obviate the problem which Mr. Seasongood raises.

Mr. Holtzoff. I think your understanding is correct. The civil rules have been so construed, and the language is the same asin the civil rules.

b12

Mr. Wechsler. It may be easy to meet the point by changing the language slightly.

The Chairman. Why do we need the words here "as given or recognized by statute of the United States"?

Mr. Holtzoff. I do not think we need them in the criminal rules. They were needed in the civil rules because there may be cases where in the civil rules the constitutional right of trial by jury is recognized by statute, but that situation does not arise in the criminal cases.

Mr. Youngquist. There is always the constitutional right of trial in civil cases.

Mr. Holtzoff. Only under the common law cases, and there may be statutory provisions wherethe jury trial is provided for.

Mr. Robinson. Isn't that the same question of the right to trial by jury in cases of misdemeanors? Certain statutes may give it although the Constitution does not?

If we provide later for proceedings before United States Commissioners I think we must cover that.

Mr. Holtzoff. The statute does not give the right.

Mr. Robinson. It may.

Mr. Wechsler. The Constitution says: "In all criminal proceedings." It does not say "prosecutions for felonies."

Mr. Robinson. We are supplementing it.

Mr. Longsdorf. I do not think that the problem the reporter had in mind covers it. Article III, Section 2 of the Constitution says that trial shall be by jury.

The Chairman. Your motion is to strike this out?

Mr. Seasongood. I am not sure. Somebody seemed to say

b13

that there may be statutes where you get the trial by jury where you would not have it under the Constitution.

Mr. Holtzoff. I cannot conceive of any such case.

Mr. Wechsler. There are none.

Mr. Crane. Well, suppose there is no statute. What is the harm of having it in because you would not make any rule that would supersede an Act of Congress.

Mr. Robinson. Yes, we can.

Mr. Crane. Yes, after they pass these.

Mr. Longsdorf. There is another aspect that I have in mind. I may be a bit technical about it, but it seems to me that when the law of Congress provides that a trial shall be before a jury it to some extent refers to the Constitution of the tribunal, not merely to the procedure before that tribunal.

5 Now, can we go beyond the procedure to the extent of taking in the constitution of the tribunal before whom the procedure is had? If that is too technical, just let it pass, but I wanted to raise the question. Maybe that is the reason why this language is incorporated.

Mr. Youngquist. I suppose we could do that, because after all that is a part of our practice, isn't it? The procedure is the practice. The constitution of the tribunal may have to be a part of the practice.

Mr. Longsdorf. But as I said, it may be considered very technical.

Mr. Seasongood. Perhaps it is enough to callthis to the attention of the reporter, but it seems to me to present a very serious problem.

b14

Mr. Wechsler. I think there is some cause for eliminating (a). In the civil rules there was a special problem of law and equity with this complexity in the case of a jury trial, and in view of what was done later on the law and equity situation, it was important to indicate that there was no intention to affect the substantive right of trial by jury. However, that problem does not arise in criminal cases. There is a right to trial by jury in all criminal proceedings.

Can we say under (a) that in all criminal proceedings the accused shall be entitled to the right of trial by jury? To state that we preserve that right by rule, when it is in the Constitution, seems to me to be presumptuous. I am not opposed to the incorporation of fundamental things in the rules, but it is not something that we have any power to change, and there is no need to declare it. Therefore I think that it should go out.

Mr. Holtzoff. I think the paragraph should stay in for its moral effect, because when you come before Congress one of the things they will say is, "You have not done anything which will infringe upon the defendant's right of trial by jury, have you?"

Mr. Wechsler. I think it is better to say that you have not done anything with it.

Mr. Holtzoff. My observation has been, from my participation in the civil rules, that that would be a great help and would have some moral effect.

Mr. Wechsler. That is because people were worried about the combination of law and equity which might let jury trials slip out the window.

b15

Mr. Youngquist. Maybe it may help if in the construing of these rules the courts are admonished by the Supreme Court not to have any intention of going beyond what probably they might.

Mr. Holtzoff. I think the words "recognized by a statute" should go out.

Mr. Crane. I think the word "preserved" should go out.

Mr. Glueck. It says "shall be preserved" as though we were legislating on the Constitution.

Mr. Wechsler. People may say that "It was fine what you did about preserving the Constitution."

Mr. Holtzoff. I think it has a good moral effect.

Mr. Crane. Then why not put in the constitutional language if you are going to do that?

Mr. Medalie. I do not think we should patronize the Constitution.

Mr. Dean. Another possibility is to put in another rule and call it "Trial by Jury." After the first clause where the right of trial by jury is declared and "that the Constitution shall be preserved inviolate and that the defendant may prior to or during the course of the trial waive a jury trial," with a specific clause.

The Chairman. I think the reporter has the point of view of the committee.

Mr. Medalie. I cannot get quite reconciled to the idea of voicing our approval of the Constitution. I do not think it requires our approval, and I think we are presumptuous in saying it.

The Chairman. I would agree with you if I had not

b16

listened to the debate on this particular thing in the House Judiciary Committee. You should bear in mind that the members of that committee are men who largely were formerly state prosecutors and district attorneys.

Mr. Holtzoff. And defense counsel.

The Chairman. And also that a good many defense counsel are members of the House of Representatives.

These things are very much in their minds, and they will be reassured by hearing that the Constitution has not been whittled away.

Mr. Longsdorf. Doesn't it just boil down to a rule of construction which we impose in these rules? That is what it means.

The Chairman. Yes, but I like Mr. Dean's suggestion. We can weave them all in one section.

The Chairman. If there is no objection, we will go on to Rule 39.

RULE 39

Mr. Robinson. This refers to trial by jury or by the court. As was discussed on the previous rule, "When trial
6 by jury has been demanded," that goes out. I do not think there is much left under (a). I take it the district court with this sort of rule would go ahead and take care of its docket and take care of requests for jury trials.

Mr. Crane. Are you going to rewrite Rule 38? Won't this require some modification?

The Chairman. Yes.

Mr. Robinson. Under (b). With regard to trial by the

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court, lines 12 and 13 probably should be placed somewhere.

The Chairman. Well, isn't that rule out because it relates exclusively to the equity process?

Mr. Robinson. Yes.

The Chairman. Then by consent the parts of Rule 39 that remain will be incorporated in Rule 38.

Mr. Seasongood. This says that you may waive a jury trial by oral stipulation made in open court. The rule in civil cases used to be when the rules were established that the waiver had to be in writing. I think we should have the same in order to waive the right of trial by jury. I had an instance just recently wherein the court said that there was a stipulation and there was no stipulation at all. If you are going to waive an important constitutional right it should be a matter of writing.

Mr. Robinson. Well, the same as in Rule 38?

Mr. Seasongood. I am just advancing a suggestion.

The Chairman. That is in our state practice.

Mr. Medalie. In New Jersey you waive juries, but only in writing?

The Chairman. Yes.

Mr. Medalie. With regard to what Mr. Seasongood said, the court can tell the clerk that there has been a waiver when there was not. The clerk may be out of hearing or out of the courtroom or out to lunch and the judge tells him to make a note that there has been a waiver, and the clerk puts it down.

Mr. Robinson. Clerks are not infallible, either.

Mr. Seasongood. And it should be signed by the defendant himself.

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Mr. Medalie. It will not happen very often that jury trials are waived.

The Chairman. Rule 40.

RULE 40

Mr. Robinson. Assignment of cases for trial. This is a matter of advising the district court with regard to trial calendars. It is perhaps unnecessary. It is the same as the civil rule, but perhaps we can get along without it.

Mr. Holtzoff. I do not think you need this.

Mr. Medalie. You will have one calendar of criminal cases. Once in a while there may be a waiver, but very few.

Mr. Holtzoff. In some districts there are quite a number of waivers.

Mr. Medalie. That is, for example, where colored defendants would rather have the judge than the jury, isn't it?

Mr. Holtzoff. Well, in migratory bird cases and the less serious cases.

Mr. Medalie. If I ever get caught in a migratory bird case I will demand a jury trial as a matter of right.

The Chairman. I wonder if we need this rule at all in view of the fact that the district attorneys control the calendar.

Mr. Crane. Do they make up the calendar? Generally the courts have different procedures with regard to it. They have different methods of calendar work. Some of them have the calendars published.

Mr. Medalie. The district attorney makes up the calendar.

Mr. Crane. I always thought that it was a bad practice.

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Mr. Medalie. It is almost universal.

Mr. Crane. That is the reason why it is bad.

Mr. Medalie. The defendant may move that the indictment be dismissed; otherwise in a month it goes on for trial.

Mr. Crane. The reason why I say this is that there are many delays and I never could see why the court should not control its criminal calendar the same as it does with its civil calendar. It does control the civil calendar and gets the attorneys to trial and often they are more important than many criminal cases which are to be tried and involve huge sums of money. We have the civil calendar controlled by the court because we are accustomed to it. Sometimes the courts are quite arbitrary in exercising their power over that calendar. They make the attorney general and the corporation counsels in our great cities with millions of dollars at stake get there and try their cases or show a cause as to why they are not ready for trial.

When you come to criminal cases a defendant has nothing to say about it except to come in and move to dismiss, but it is a healthy thing in my opinion in criminal cases to have the court control the calendar and find out why a case is not tried by the prosecutor, or find out whether the delay is caused by the defendant.

Why shouldn't it be done? Of course, I am not saying this about federal courts because I am not as familiar with them.

Further, I understand that there are certain reasons why a witness is not ready, and it may not be necessary to disclose that. I think the courts have recognized that. I am not stating this and asking you to adopt it because it can be remedied right

away, but personally I could never see why the court should not control the calendar in criminal cases.

Now, I did it myself when I was holding criminal court in New York, and it so happened that the district attorney was a good friend of mine and we adopted that practice. The result was that every indictment was dismissed in open court and the court took the responsibility for it and not leave it with the district attorney. Then you adopt that calendar practice and the court has the responsibility rather than the district attorney. You put it in the hands of the court and then he is to blame for the delays. Then there will not be so many improper reasons for the delays, and most reasons are improper.

It relieves the district attorney of a great responsibility by giving the court control over this calendar. The court can then find out why cases are not tried and if they are not going to be brought to trial they can dismiss them.

It relieves the prosecuting attorney of a great deal of responsibility. That is the reason why I would think that would be best because it would give the court some control outside of the mere motion to dismiss. Anyhow, they are never dismissed.

Mr. Medalie. You are just about wrecking the antitrust division, Judge.

Mr. Wechsler. The motion to dismiss is available only in the case of a defendant who has counsel, anyhow. I think we must be careful not to proceed on the assumption that the great bulk of the defendants in criminal courts are represented by able counsel. Most of them are not represented by counsel at all. Of those who are represented by counsel most of them are not represented by able or industrious counsel for the simple

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reason that lawyers, like everybody else, have to live, and because of the fact that in most of these cases there are no fees.

I know of at least one case in the federal courts not far from Washington where there is now a man who has been in a detention place for 11 months. The reason why he has been there is because the United States Attorney has no desire to bring the case to trial. He has no lawyer or anybody else who understands that there must be a motion to dismiss.

I think it would be a great improvement to provide some method for remedying situations like that.

Mr. Medalie. There is only one way to remedy a situation like that and that is to have your calendar of cases. So far as the district attorneys are concerned, I mean district attorneys who want to get them out of the detention room and clean up the jail calendar. I think that it can be done.

Mr. Youngquist. We have a statute in Minnesota which requires that criminal cases where the defendant is in jail shall be tried first.

Mr. Crane. We have that, too.

Mr. Youngquist. When I was prosecuting attorney out in the country, there the court took charge of the entire calendar, criminal as well as civil; but he always gave particular consideration to the wishes of the prosecuting attorney in setting the criminal calendar, because the prosecuting attorney had so many cases to try that they would do it in that way.

I do not see that the government would be in any danger in having the same rules apply as to the calendars for criminal cases as in civil cases.

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Mr. Crane. How about bail cases? I am not speaking about the Federal Government but the state government for the reasons that I have stated. I do not know about the Federal Government, but I do know that some of these bail cases are very bad indeed, and some of them were held up for years and just lost sight of.

Mr. Holtzoff. I do not think that is true of the United States Attorney's office.

Mr. Crane. No, I do not think so. I said that, but from the bench on the Supreme Court I held court in Kings County and it so happened that the jail was back of the courthouse and I went there and went from cell to cell getting some information, and there was a man there who was never brought to trial for nearly a year and 11 months. I notified the Governor about the district attorney. Reasons are not important now, but there he was.

The courts have nothing to do with these bail cases and nothing is said about it. They are moved by the district attorney.

I am not saying that about the federal system because I would like to know more about it and the Attorney General's practice. I am not advocating what I am saying for the federal courts, but I do think that we should not go along blindly and just go on as we have done because everything seems to be all right and no one has questioned it.

Can't we inquire about it and see if it could not be done on the same basis as the civil procedure where the court has control over the calendar? Then no one is to blame except the court.

Mr. Youngquist. I would like to ask a question. When the

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written accusation is filed, is the case automatically on the calendar?

The Chairman. Mr. Robinson says this originates largely from the experience of the director's office. I would like to ask Mr. Tolman to state, if he will, what the practice is.

Mr. Tolman. I think that as a matter of fact there is a great deal of variance with calendar practice in civil and criminal proceedings in the district court. The difficulty arises because of the conditions in the districts such as Mr. Holtzoff has pointed out before. There are places where the court is held only at stated intervals and when the judge may be in the district for only one or two days. On the other hand there are districts like the Southern District of New York where the court is in session most of the time. It seems that you require differences in calendar practice.

I think that as far as the criminal calendar is concerned there is not any practical difficulty about arrangment. The United States Attorneys and the judges get together and work out a system that is most satisfactory. However, there is once in a while some difficulty. There is some delay in jail cases. In those instances, our office, the Administrative office, has been cooperating with the United States Attorney and the judges to work out such difficulties.

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We have found out that if the United States Attorneys, as a practical matter, control the calendars it does not cause trouble because the judges assume that they have that inherent power and the United States Attorneys recognize that they have the inherent power to say what the practice shall be.

I think that though there is occasional trouble the thing

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has worked out very well.

The only thing that I think the committee could do would be to possibly state that the control of the calendar is in the hands of the court, as Judge Crane advocates. I think, as a matter of practice, that the court will leave it, where the situation is satisfactory, in the hands of the United States Attorney.

Mr. Glueck. I inquire whether Mr. Tolman or anyone else in that office has available statistics on the point raised by Mr. Wechsler as to the extent to which there is an unreasonable detention in federal cases.

Mr. Tolman. I do not think we have any statistics with regard to the time intervals.

Mr. Holtzoff. I have some information on that. There have been some delays, I think.

I am in full accord with Mr. Wechsler that there should be some remedy, bearing in mind the fact that the defendant is not representedby counsel. However, my observation has been that delays are not due to United States Attorneys. They are due to two facts: first, the interval between the terms of court in rural districts, and secondly the present inability to waive a jury trial. That may be corrected by the waiver of a jury trial.

There are some cases where the defendant wants to plead guilty or the defendant is awaiting the grand jury.

In one or two districts we have haddelays due to the dislike of the judge to try criminal cases. I have in mind a judge who is not dead, but who would pass all criminal cases over the term, because he had a heavy civil docket. We got the

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United States Attorney in and protested because we had so many prisoners in jail.

In any event, one of the checks we have is that the Bureau of Prisons here in Washington keeps a check on the federal jail population, and the Director of the Bureau of Prisons always calls the Department's attention to a situation where a particular prisoner is being kept in jail too long.

So I do not think you have any trouble except perhaps in isolated cases where the United States Attorney is postponing a case because he wants another case to be tried first; but I think that delays--and there are many of them in jail cases--do not grow out of this situation.

I do think the fact that subject to this inherent power of the court, that the control of the criminal calendar should be with the United States Attorney. The United States Attorney parcels out his cases among his assistants. He knows when the witnesses will be available. You will create havoc by having the court take care of that, having the court set cases in disregard of the assignment of work as between the various assistants of the United States Attorney, and in disregard of the availability of witnesses.

We had one district, and the judge is not there now, where the court set the criminal cases. The trouble was that the United States Attorney or his assistant could not know and if the witness was not there on a particular date the judge arbitrarily dismissed the case. We had all kinds of complaints against that judge because of the way he acted in cases in controlling the criminal calendar.

I do not think any evils occur from the control by the

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United States Attorney, because of the departmental supervision. However, I do think that the matter that Mr. Wechsler called attention to should be taken care of, but I do not think theremedy is in the control of the calendar by the court.

The Chairman. What about this phase of it? I know of a manslaughter case involving the mother of our next-door neighbor where the trial was called and where the case was puton the calendar nine times and then each time when the single witness to the accident from Buffalo came down the prosecutor would adjourn it, with the result that finally the witness said he would not come in.

Mr. Holtzoff. That does not arise in our federal system, because in the federal system most of your cases are investigated by the investigating agency, and you do not have that kind of problem.

Mr. Waite. With respect to that situation, naturally I agree with Judge Crane that the responsibility for the procedure should be centered in the court. I do not know much about the federal situation, but I do know that in the state courts we find that where the responsibility is not on the court that the actual court does not know much about what is going on and the calendar falls down.

The court relies on the prosecutor and the prosecutor perhaps relies on the court to keep the docket up, causing a lag of cases or they forget about it and the files are lost, and in places like Detroit there is truly a scandalous situation.

9 Now, it seems that we might properly center the responsibility on the judge and give him the opportunity to carry out that responsibility effectively by requiring the district attorney

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to file with the judge periodic reports of the status of every criminal case on the docket; when the arrest occurred; when the indictment or other accusation was filed; what the situation is, and in the case of long overdue cases to state why it is not up to date.

I do not know whether it would be in order at this time to do that, and I suspect that it is out of order, but at the present I would like to make a motion to the effect that the reporter consider a section requiring such reports from the district attorney.

Mr. Seasongood. I would like to make a motion, to bring the matter to an immediate head or at least to present something. I move that we write into Rule 40:

> "All pending criminal proceedings shall be placed upon the calendar and precedence shall be given to criminal proceedings."

The Chairman. Aren't we up against the practical difficulty that in many districts where there are more than one judge that one will work on the civil calendar and one will work on the criminal calendar, and it would raise havoc if they were compelled to defer the civil list and the equity list and the admiralty list until all criminal work was disposed of?

Mr. Seasongood. If you say that one judge is working on criminal cases that would not affect the civil cases at all, would it?

The Chairman. It would as you stated it.

Mr. Seasongood. With the two judges, for example?

The Chairman. Yes, as you stated it, because it would call for all criminal matters to be disposed of before any other

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matter could be taken up.

Mr. Crane. I did not mean that.

The Chairman. Couldn't we incorporate Mr. Waite's idea in it?

Mr. Crane. Yes, I think it is a good idea. I made that suggestion and I included jail cases, but as long as you have the judge exercising discretion that is all right, but why have a judge sitting in court and have nothing controlled by him except the defendant's move to dismiss and have the control in the absolute discretion of the district attorney? I am not saying the Attorney General, because I am not so familiar with that.

But there in the same court the judge sits on the civil side, in the very same court, and makes the corporation counsel and the attorney general of the state toe the mark in civil cases, where millions of dollars are involved, and we get accustomed to that. There he knows all about it.

Why not that same thing in the criminal case? Those things are all in the open. They are a matter of record and anyone can be heard. After all, publicity is the salvation for a lot of our rights.

Mr. Medalie. I think that we are talking about an imaginary evil.

The Chairman. Would you say that is so in a district like mine where there was no criminal case tried for twoyears?

Mr. Medalie. Did the defendants want them tried or the government want them tried? Or was it that the courts would refuse to try them?

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The Chairman. There was no case tried for two years.

Mr. Medalie. Let me say this: If we are going to draw up rules for criminal cases, what right have we to draw up rules with respect to civil calendars? Can we say here that criminal cases shall have precedence over civil cases? What do we have to say about that? Do we have anything to say about it?

Mr. Glueck. Doesn't the Constitution guarantee a speedy trial?

Mr. Medalie. That is an entirely different matter. We are drawing up rules for criminal procedure, and if we begin to tinker with the whole calendar of the court then we are drawing up rules for civil and criminal procedure. I do not think we have a right to do that.

Mr. Wechsler. The court has jurisdiction over both, and if there is a relationship between the two, to which we call attention, I do not think the court is going to feel that we have exceeded our power in making suggestions involving that situation.

Mr. Medalie. Now, let us see what happens here. In New Jersey you say that for two years no criminal case was tried.

The Chairman. That is what I have been told. However, that was several years ago.

Mr. Medalie. That means that you have a man in jail for two years. I just cannot believe it; it can't be.

The Chairman. Mr. Tolman says that he does not think that there is a single district where that condition prevails now or where due precedence is not given to criminal trials.

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Mr. Medalie. In a civil case either the plaintiff wants a trial or the defendant wants a trial or neither side wants a trial. I never heard of judges getting very much excited about cases in which neither side did not go to trial. The case might have gone on the reserve calendar. That is what happens under the practice that we have in the Southern District, where after three tries and the court is not satisfied it puts the case off the calendar. Nobody is affected by that except the mere listing.

If the government does not want to try the case and the defendant is out on bail and if he is not asking for a trial, I do not think there is anything to get excited about unless the government is corrupt, which is an entirely different proposition.

Mr. Crane. I thinkthat Mr. Waite had a very good suggestion and I think he should make it in the form of a motion.

Mr. Waite. I thought that it was out of order.

I move now that the reporter be requested to draft a section requiring the district attorney to report periodically to the court as to the status of every criminal case listed in the court.

Mr. Glueck. In writing?

Mr. Waite. In writing.

Mr. Glueck. Would you say quarterly?

Mr. Waite. I should say that it should be accompanied by an explanation of the reasons for what may be any undue delay.

Mr. Glueck. Do you want to say periodically, and for the purpose of being more specific would you say quarterly or semi-annually?

Mr. Waite. I would leave it to the reporter to figure

out what may be a practical time.

Mr. Wechsler. I second the motion.

Mr. Holtzoff. The Department of Justice now has a system whereby every United States Attorney every six months sends in an individual report of every case in his office which is older than a certain stipulated period.

Mr. Crane. Then why not have it in the rules? Do you have any objection?

Mr. Holtzoff. No.

Mr. Medalie. Are these reports to be made public? Certainly there may be some reason that they do not wish to disclose.

Mr. Waite. My motion was that it should be made to the judge in order that the judge may have the facts in order that he might more properly carry out his responsibility. That is, it would be a report to the senior district judge for him to know.

Mr. Crane. It would be a court record.

Mr. Seasongood. For administrative purposes.

Mr. Crane. If it is a court record, what is the harm in it? There cannot be, because every lawyer can go in and read every indictment filed and find out the date, and so on. That all is apublic record. Anybody can see your record in court.

Mr. Medalie. As for the reasons given there may be cases where you do not get the correct reasons because they do not want them disclosed. The reason which would be given may be a false reason or a diplomatic reason. We know perfectly well that there are certain reasons why certain cases are not tried

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and which are very good reasons and which you do not want to make public.

Mr. Wechsler. There are also reasons that are bad reasons.

Mr. Waite. The purpose of my motion was to give the judge information upon which to act. I take it that he can call in the district attorney and ask him his reasons for the purpose of finding out what the trouble is. I do not have in mind that this is for the benefit of the defendant but for the benefit of the judge. That is my suggestion.

Mr. Seasongood. I would like to amend the motion that precedence shall be given to criminal proceedings. You have it in the Court of Appeals rules. I do not see why you should not have it here. In our district criminal proceedings are always given precedence. If you do that you would only be following the usual procedure.

Mr. Waite. I suggestthat you do not take this in connection with my motion because it seems to me that they are entirely two different propositions. However, I agree with you in what you say.

The Chairman. Are you ready for the question? That is Mr. Waite's motion.

Mr. Glueck. May I ask a question?

The Chairman. Yes.

Mr. Glueck. How far back in the proceeding is it contemplated that this report shall cover? For instance, would you include the time between the arrest and the formal hearing?

Mr. Waite. Yes, it would cover every criminal case before the court.

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Mr. Glueck. Every step?

Mr. Waite. If the indictment has not been filed the court is entitled to know whether it has been and be in a position to inquire why it has not been.

Mr. Crane. That was not my idea at all. I thought that the court would come into the picture when there was an action brought such as an indictment filed or, in the case of a lesser crime, an information filed.

I am afraid that you are going beyond that. It is not the court's power to say or to see that people are indicted, but it is the court's power and it is the court's jurisdiction after an indictment is filed and before the trial begins to control that. However, I think the other matter is a responsibility of the district attorney or the Attorney General as to whether a man shall be indicted or whether he shall be prosecuted in some instances. We have to leave some of these matters to the discretion of the district attorney.

However, when it comes to the question of an indictment which has been filed and it is a public matter in the court, then the court's jurisdiction begins and I thought Mr. Waite's suggestion, at the beginning at least, was good, that it be sufficient to make reports of all those matters pending in court.

Mr. Waite. Don't you agree that the court is entitled to know how many persons have been arrested?

Mr. Crane. I think that is true, but I think that should come in in other ways by making reports, but not to the court. That is a matter for the grand jury, and although the grand jury is a part of the court, it is not a part of the court's duty

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to see whether or not an indictment is found; that is the Attorney General's work or the district attorney's work. I think that we should have ways to limit that report to the court on those matters which the court can see and which the court can control effectively, such as the calendar.

Mr. Medalie. I do not agree with you. One of the things that frequently happens in federal court is that cases often start with the United States Commissioner. A man has been arrested and arraigned before a United States Commissioner and no action has been taken for a long time, or the Commissioner is holding the man for the grand jury, or the defendant is awaiting a hearing before the Commissioner or awaiting action before the grand jury. That man is entitled to action, and if he does not get it he is entitled to a dismissal of the proceeding.

Mr. Crane. That may be.

Mr. Medalie. No, that is a fact which is more important than all this talk about the calendar, which I think exceedingly unnecessary.

Mr. Crane. Then I withdraw my remark.

Mr. Glueck. I think that what we are really getting to--and I think it is very important--is some sort of systematic superintendence of the processes of criminal justice by a neutral agency, by a judge, and if there is anything that the entire process needs it is that. The very fact that there is knowledge on the part of the officials all the way down the line that there is such a person, such a body that may interpose or may ask embarrassing questions, should have a very salutary effect upon the whole thing.

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Mr. Holtzoff. The Administrative Office which has been established two years functions largely in matters of that respect in the federal court.

Mr. Medalie. We are dealing with a practical situation. In the case of cases before Commissioners in which no action is taken, or where the Commissioner has taken action and sent the case to the grand jury and no action is taken, we should provide for a procedure for the dismissal of the matter and have it come before the judge for that purpose or have some action taken. I think that is far more important than all we are talking about with respect to calendars where each party is able to take care of himself and where the man is not in jail.

Mr. Crane. I withdraw my objection as to the limitation on Mr. Waite's motion. I agree with it.

Mr. Glueck. May I make a distinction between the work of the Administrative Office and the proposed work of the judge? The Administrative Office deals with processes of justice in large, statistics and such, whereas the courts will deal with particular district attorneys. The judge will deal with specific instances in his court.

Mr. Tolman. The Administrative Office goes much farther than that, and where there is an individual instance of injustice they try to reconcile it.

Mr. Glueck. I do not see how they can do that in individual cases.

Mr. Tolman. They do. In very glaring instances we try to do our best to do something about it or we report it to the circuit council in the circuit, which consists of the circuit

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judges. They have a great deal of powerand control of the district in their circuit and they can direct the district judges to remedy any specific situation.

Mr. Glueck. A situation?

Mr. Tolman. Yes. They may not direct specific cases.

Mr. Crane. That is an idea of having it done by administrative procedure outside the courts. It should have been taken care of by the courts long ago.

The Chairman. Are you ready for the question?

Mr. Medalie. Do we have to draft any rule setting forth the procedure before the Commissioners?

Mr. Robinson. That is taken up as a special matter, and the next rule takes up the question of dismissal where there is a delay in prosecution.

The Chairman. Are you ready for the motion?

Those in favor of it say aye.

(There was a chorus of ayes.)

The Chairman. Those opposed.

(Mr. Medalie said "No.")

Mr. Medalie. I wish to be recorded as saying "No" because I think that this is a futile rule.

Mr. Dean. I think that in discussing this question we might get a lot of information with regard to how it would operate in a given district. For instance, a district where you have a single district judge and several other district judges and how it would operate in a district where you have only one. I wonder if we could not get any expression from the senior circuit judges, who meet here the latter part of this month, and also from the Administrative Office as to what

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their real problem is.

The Chairman. Would it not facilitate the matter to get the views of the director of the Administrative Office, who is here, rather than bother a conference which has a very busy calendar which must be disposed of in less than a week?

Mr. Crane. I think, Mr. Dean, that this was just suggested to the reporter. Anyhow, I would like to get more information.

Mr. Glueck. We may get more statistics from the Bureau of Prisoners or Department of Justice, anyhow. I agree with Mr. Dean.

ons?

In fact, in each of these I should prefer to have extracts related to crime surveys, statistical reports or expert opinions than get suggestions made here and there by some judge or some United States Attorney.

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Mr. Robinson. Those will be in the next edition, the next draft.

Mr. Glueck. That would be a tremendous help because then we would have the raw material which would tell us as to the real issues involved, the fighting issue, the evils to be remedied.

Mr. Robinson. We would be getting this draft rather voluminous.

Mr. Seasongood. I would like to move that we add to Rule 40:

"Precedence, save and except in exceptional instances, shall be given to criminal proceedings, but where there is more than one district judge in a division, criminal and civil cases may be tried concurrently."

The Chairman. Is the motion seconded?

Mr. Orfield. Second.

Mr. Youngquist. I would be afraid of that.

The Chairman. May we have it put then in the form of an instruction to the Reporter to draft a rule embodying that provision? I think it would be well to get it before us.

Mr. Seasongood. That is perfectly agreeable to me.

The Chairman. All those in favor of the motion say aye.

(The motion was agreed to.)

The Chairman. That brings us to Rule 42, gentlemen.

Mr. Dession. Mr. Chairman, before we leave this I want to suggest a possible rule directed to this same problem of delay. I do not know what you will think of it but it occurs to me that inasmuch as most of our defendants are pleading guilty and one source of delay is the fact that in any important division of a

district there may not be a criminal term for some months coming up, when a man is there ready to plead guilty and waiting, is there any reason why we could not provide this: If a prisoner wants to plead guilty, wants to waive jury trial, so the only problem now is to get him arraigned, why could not he be taken before the court which would be in session in some other division of that district, possibly even in the next district, in any case the nearest court which is now in session having a criminal term, so that he could be arraigned, plead guilty, and start serving his time, if any, or if he is going to be on probation, why leave him waiting in a county jail several months simply because there is no court?

Now this has been done in England, I understand. I do not know that it has been done in the United States. Maybe it has somewhere.

Mr. Holtzoff. I second the motion.

Mr. Longsdorf. Mr. Chairman, may I borrow your word "invite" and invite Mr. Dession to inspect the system we use in California. I do not think we can do it here, but we might look at it. There, a plea of guilty may be interposed to the complaint lodged before a committing magistrate, and if the complaint is sufficient as an information, it, with the plea of guilty, is certified to the superior court to verify the sufficiency of the complaint as an information, and then pass sentence on the plea of guilty.

Now, it took a great deal of trouble to get that introduced in California, and I do think it is working pretty well.

The Chairman. Mr. Holtzoff suggests that the United States Commissioners are not all up to that grade.

Mr. Longsdorf. Oh, I know.

The Chairman. That is, practically.

Mr. Holtzoff. That is, practically.

Mr. Longsdorf. I doubt that it can be done.

The Chairman. Why not optional, and let a judge perhaps designate such commissioners as are willing to perform such function?

Mr. Holtzoff. It seems to me that the suggestion that a plea of guilty could be taken in any division of the district would solve the problem much more effectively. Except perhaps in the month of August the judge is almost always in session in one division or another for some time every month, and we do have a statute which guarantees to the defendant a right to be tried in the division in which he is indicted, but if he wants to waive indictment or ~~wants to waive or~~ wants to plead guilty after he is indicted I think there ought to be a provision whereby he can be brought from one division to another, and that would obviate a lot of delays.

Mr. Dession. I think it would.

Mr. Youngquist. I have an impression that is permissible now. At least it is done in some districts.

Mr. Holtzoff. It is done in some districts. In one of the districts of Georgia they have a practice which grew up as a matter of ~~mistake~~ gradual development, that no matter which division the court is sitting in, the grand jury hears cases from all divisions, can indict for the whole district, and then they distribute those indictments among the various divisions, but the arraignments have to be made in the divisions.

Mr. Dession. That is the hitch, yes.

Mr. Holtzoff. Unless a defendant waives his right to be arraigned in a particular division. Now of course the defendant who is not represented by counsel does not know that he can waive that right and he just stays in jail and waits until the court comes to his division, and for that reason I think this proposal is a very excellent one.

The Chairman. Are you ready for the motion?

(The motion was agreed to.)

The Chairman. Rule 42.

Mr. Robinson. This has already been dealt with at least in part in our discussions, "Consolidations; Separate Trials."

Looking at line 8, paragraph (b), first, does that or does it not change the present federal law?

The Chairman. I wonder why that cannot be combined with the one we had last night.

Mr. Robinson. That is joinder of offenders. This is a matter of joinder of offences or of trials.

Mr. Dean. I think we also discussed consolidation of separate indictments, though, did we not, under that section last night?

Mr. Youngquist. Yes.

Mr. Crane. What number?

The Chairman. Rules 20 and 21.

Mr. Holtzoff. I think this was consolidated and made a subparagraph under 20.

Mr. Robinson. Now, 20 is just the joinder of defendants. That would be the inference. We have another rule on the joinder of offences, but I suppose--

Mr. Holtzoff (interposing). Well, wouldn't it be a good

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idea to have joinder of offences, joinder of defendants, consolidation of trials and separation of trials all in a single rule, possibly divided into paragraphs?

Mr. Robinson. That is what I think would be desirable, yes.

Mr. Holtzoff. I so move, Mr. Chairman.

Mr. Wechsler. Seconded.

The Chairman. Any discussion?

(The motion was agreed to.)

The Chairman. Is there any discussion on this rule before we pass it to the Reporter for combining?

Mr. Medalie. Why do we say "involving a common question of law or fact," when we have a statute, section 557 of Title 18?

Mr. Robinson. It is set out there.

Mr. Medalie. Yes. It has language that is seasoned and under which we have operated pretty well for almost a century.

Mr. Holtzoff. I am just wondering whether if we do not put that into the rules that statute would not be deemed repealed, because these rules have the effect of an act of Congress.

Mr. Medalie. Yes. Why do we have to repeal the statute? We want to keep it alive in the rule, and this is a seasoned statute that has worked magnificently.

The Chairman. It is suggested we use the language of 557 rather than the one we commonly use in civil actions, "the common question of law and fact."

Mr. Robinson. I would like to say to Mr. Medalie that every provision of section 557 will be written in whatever rule

we draft, as far as that is concerned, and the plan is to go a little bit beyond some of the provisions of 557 with regard to liberality of joinder.

Mr. Medalie. Well, have we made it more liberal in this Rule 42?

Mr. Robinson. This section 557 is set out on your left page.

Mr. Medalie. Yes.

Mr. Robinson. In connection with several rules and this consolidation of joinder rule in one rule will mean that whatever provisions of 557 are not taken care of here and are taken care of in some other rule will be brought together in one joint or uniform comprehensive rule.

Mr. Medalie. What is the nature of the language--"common question of law or fact"?

Mr. Robinson. Well, that was just again to submit to you the Civil Rule so you could see whether or not you thought there was any carry-over and desired analogy to follow.

Mr. Medalie. (Reading)

> "two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offences."

I think that is broader than this "common question of law or fact."

Mr. Longsdorf. Yes.

The Chairman. It is understood that the rule as redrafted will safeguard all of section 557.

Mr. Robinson. That is right.

Mr. Youngquist. May I ask a question of the Reporter?

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You say "when criminal proceedings * * * are pending." I suppose that means criminal proceedings against a single individual or group of defendants?

Mr. Robinson. Line, please.

Mr. Glueck. The first line.

Mr. Robinson. That would have to be, yes, and will be so stated when the rule is drafted.

Mr. Dean. What is the necessity for the phrase of section 557 which says "which may be properly joined"? Isn't 557 without that also a classification of what is proper to join?

Mr. Robinson. It seems to me so, and certainly that clause gives the same difficulty in interpreting this act of 1853.

Mr. Dean. I do not recall, but in reading it here, it does not mean much to me, because then you would have to resort back to a large body of case law to determine what you mean, and what may be.

Mr. Robinson. That is right. There has been difficulty in the case law on that.

Mr. Wechsler. There has been difficulty.

Mr. Robinson. Yes. I have observed it.

Mr. Dean. Isn't this sufficient to indicate what is properly joinable?

Mr. Robinson. I think so. In other words, you are familiar with the California statute. There is a discussion comparing this statute with the California statute. Roland Perkins of Iowa made a careful study of it in the Iowa LAW REVIEW some years ago and he pointed out that the California

statute omits that clause and otherwise is more comprehensive than this. We had that on the other question yesterday, too.

Mr. Dean. I suggest then if we retain 557 we might very well consider omitting that phrase.

Mr. Robinson. That is what we have done.

Mr. Dean. And just use this language of the statute.

Mr. Medalie. Yes, I think we could leave that out.

The Chairman. All right.

Mr. Robinson. It sort of begs the question.

Mr. Medalie. The definition is in the section.

Mr. Dean. Yes.

The Chairman. Go to Rule 43.

Mr. Youngquist. Does 42 (b) change the present practice with regard to separate trials?

Mr. Robinson. That is the question I asked of Mr. Medalie. I would like to know what your view is on that.

Mr. Medalie. Well, that is all for the benefit of the defendant except occasionally for the benefit of the Government when having indicted 8 people one of them has made a perfectly legitimate bargain with the Government to be helpful, and either not to be prosecuted or to be treated with leniency if he becomes a witness or gives other aid. That has been in operation all the time and nobody can ever be prejudiced by not being tried, nor can any defendant be prejudiced when he is tried because someone else is not tried with him, because that other person might never have been indicted with him, even though properly indictable.

Mr. Robinson. The question was whether this was the present law.

Mr. Medalie. I understand that it is.

Mr. Youngquist. I assume it to be a law, but I wanted to make sure.

The Chairman. Any other remarks?

Mr. Longsdorf. Before we pass 42 I want to call attention, and this is for the benefit of the Reporter, if he needs it--I doubt that. There are consolidation statutes all over the United States and a lot of them are very loosely drawn, ambiguous, and the lawyers and sometimes the courts have managed to get confused between consolidation of cases and consolidation of trials, which leaves the two consolidated cases separate to all intents and purposes but merely tried together.

Now on the civil side I know that there were a lot of reported cases where the courts had to straighten that thing out. I think just a little bit of care in the choice of words would prevent that sort of thing happening.

Mr. Robinson. In Massachusetts they handle that very well. (Commonwealth v. McMichael.)

Mr. Longsdorf. Down in Texas they have got a consolidation statute that is just tricky. The consolidation there results in two civil cases being merged into one, and if you did that in a federal criminal case you would amend both indictments.

Mr. Robinson. That is right.

Mr. Medalie. I would call attention again to the excellent New York statute of recent vintage (1936), section 279 of the Code of Criminal Procedure of New York, which was the result of a study of all the existing federal and state

statutes having the same object in view,and having the benefit of all that experience it has worked well and nobody has found any hole in it.

Mr. Robinson. Judge Crane used that statute very effectively in the Lucciano case.

Mr. Medalie. The statute was really prepared with a view to Lucciano.

Mr. Glueck. Now it comes out!

The Chairman. Rule 43, gentlemen.

Mr. Robinson. This question of how far we should go with rules of evidence has been decided on the conservative side, subject to your amendments. The reason for that is, first, the Civil Rules as you see are quite conservative, and this rule stays closely to the Civil Rule on the same subject.

The second reason is, as you know, the American Law Institute is now engaged in a restatement of the law of evidence, of which Mr. Morgan is reporter and therefore it will be a good job, and I think it would be a little bit presumtuous of us to go more far in drafting a rule on evidence until we have the benefit of what that American Law Institute draft will contain; so apart from that as a general statement, I do not believe I have anything further to say--it is just subject to your own examination--except to call your attention to rule 43, page 4, on the right, to recommendations that have come in from various sources, one with regard to the exclusion of illegally obtained evidence, and the other with regard to comment by the court and counsel on the failure of the defendant to take the stand.

In other words, rule 43 (a). At the end of 43 (a), for

your consideration, the proposal reads:

"Evidence shall not be excluded solely because of the fact that in a search or a seizure or other method by which it was obtained there was a failure due to error made in good faith and the exercise of due care to meet all the requirements of the law. Admissibility in each case shall be subject to the discretion of the court. The issue of admissibility shall be raised and determined prior to the trial."

Of course probably that last sentence should be amended, "unless no previous knowledge thereof had been secured by the defendant."

Mr. Holtzoff. I am very much afraid of that, and personally I am in favor of this rule as it is now proposed, but I am afraid that the first paragraph of page 4 might result in Congress rejecting these rules if that paragraph were in them, because it has been the traditional rule of the federal courts as distinguished from many States that evidence illegally obtained is inadmissible. Justice Holmes has emphasized the reason for that, and while there is much that is cogent that may be said in support of the Reporter's draft, and if we were the final arbiter, I would vote for it, I am afraid Congress would reject these rules if this paragraph stays in.

Mr. Robinson. May I suggest for your attention that to consider this question carefully requires discrimination between the types of cases of illegally obtained evidence. There are of course cases in which the violation of the rights of the individual are very serious, very flagrant, and which is inexcusable. On the other hand a case that was called to my

attention at Baltimore in a conference there with the United States attorney a few weeks ago involved a search warrant in which the only mistake was, although the location of the house to be searched was clear enough to particularize it in all details, there was one detail in which the description did not happen to be accurate; that is, it was stated to be on a certain road, whereas that road had had its name changed just a short distance away and was called another road; and the result was that although the search and seizure were made by the officers of the law with due respect for the rights of the individual as far as they could discover them, still that error meant that when the case came up before Judge Chestnut, by the way--and he of course properly following precedent,--he threw the whole case out.

Now in considering this matter of illegally obtained evidence I hope you will distinguish between the cases in which there is a flagrant violation, the sort Mr. Justice Holmes mentioned, that you referred to, as contrasted with what I should say is a technical rule which affords no room whatever for emotionalism to come in to cloud our practical reason.

Mr. Holtzoff. I think Judge Chestnut, for whom I have a tremendous amount of admiration, should not have vacated the warrant.

Mr. Robinson. Suppressed the evidence. It was not vacating the warrant.

Mr. Holtzoff. Well, he should not have suppressed the evidence. I do not think the misdescription of a street by using the old name instead of the new name of the street should have been held sufficient ground for suppressing the

evidence.

Mr. Robinson. That was not quite the case, but even if it was probably he was following the precedents very carefully.

Mr. Holtzoff. Well, assuming however that evidence is illegally obtained, to revolutionize a doctrine that has been sanctioned by the outstanding members of the Supreme Court for years and years, including the present Chief Justice, I am afraid is going to lead us into trouble.

Mr. Crane. I think that you are right about that. Excuse me for putting it that way. I am quite convinced you are. Not only that but the question has been emphasized to make it conspicuous in New York State because we refused to follow--repeatedly refused to follow, openly, the Supreme Court rule in the ~~Allen~~ Adams case away back in 100-something.

Mr. Medalie. An address.

Mr. Crane. Yes, where they broke into an office and took all his private papers and violated every rule of security of your own.

Mr. Medalie. Lottery records.

Mr. Crane. Lottery records and things of that kind. The State court would not inquire into how evidence was obtained, and it was all permitted in evidence. Now, that has not been the rule in the federal courts, and they have a practice, as we all know, of striking out or prohibiting such evidence beforehand and making you return the property and making an order that it shall not be received in evidence, and it is so emphasized by the difference of opinion on the subject, and it is openly done, because when Cardozo was in our court, and afterwards when he was down here and I suppose had to follow

this rule, we discussed it openly, and deliberately refused to follow the Supreme Court on that particular.

Mr. Medalie. You followed Wigmore instead?

Mr. Crane. Well, don't say that, now. My, grief! Don't get me going on that. (Laughter.) It has been done so openly that I would feel uncomfortable, because there is much to be said for this Supreme Court rule. We followed our own precedents and reasons for it, and yet I would not feel comfortable sitting here and voting to do anything contrary to what the United States Supreme Court has decided.

Mr. Glueck. Not only that, Mr. Chairman, but in the mental climate or the political climate of today it seems to me we ought to go very slow in modifying in any way any constitutional safeguard.

Of course, as I think I pointed out previously, and of course you all know this, it always struck me as a very glaring inconsistency of the federal practice that you can kidnap the defendant himself into the jurisdiction and then try him and that is all right, but if you merely seize his papers, that is all wrong. It seems to me the former is an a fortiori case, and I agree with Judge Crane and with Mr. Holtzoff that we had better go very slow on this thing.

There are arguments on both sides, and I have some doubt whether even the very careful language used in lines 4 and 5 of rule 42 on page 4 would not be abused in practice; that is, whether you could not draw in under that formula some "rather dirty business," nevertheless, to use Mr. Justice Holmes' classic remark.

Mr. Robinson. I would be very glad to withdraw it.

Mr. Crane. That remark was on wire-tapping.

Mr. Glueck. Wire-tapping, yes, but it is all in the family.

Mr. Robinson. We could discuss elsewhere the rest of the rule, but if that is the sentiment of the committee, I would be very glad to withdraw it. It was just my duty, I think, to place the matter before you, because we were requested to.

Mr. Crane. Yes.

Mr. Robinson. And especially with the New York jurisdiction heard from, which is just what we wanted to hear from, because of the two cases of Devore and Adams which they had there, I would suggest we save time, Mr. Chairman, by simply striking this as not being within the scope of our work.

The Chairman. Does someone move to strike 43 (a)?

Mr. Holtzoff. I so move, Mr. Chairman.

Mr. Medalie. 43 (a)?

The Chairman. That is on page 4.

Mr. Longsdorf. Mr. Chairman, before we get a motion on that, here is a thing that has been confronting us all the way through these rules and always will: There are a lot of things governed by laws which are alike in civil and criminal cases, and when you go down to lay out a rule on evidence like 43 of the Civil Rules and then lay down another rule for evidence in the criminal rules, I doubt whether human wit and ingenuity are equal to the task of keeping out of trouble.

Now, I do not want to stir up anything by quoting Dean Wigmore. He has a pretty high standing. I had a letter from him while the Civil Rules were under consideration, and he indicated pretty plainly that he thought evidence was a hot stick

to pick up. Those however are not his words, they are mine.

Mr. Youngquist. I think with respect to 43- (a) we ought to keep thinking about it.

Mr. Medalie. That is the supplement, 43 (a)?

Mr. Holtzoff. That is on page 4.

Mr. Dean. On page 4 of 43.

Mr. Youngquist. That is the one I refer to, yes. I think we ought to keep thinking of it to see if we can devise some amelioration of the harshness of the rule, so far as the Government is concerned, that now obtains. We might consider putting something in, but I am going to vote for the motion.

Mr. Robinson. That is, to strike out at this time.

Mr. Youngquist. Yes.

Mr. Waite. Mr. Chairman, in respect to that motion to strike out, is it intended to cover lines 7 and 8? There seem to be two matters covered by 43 (a). One is the admissibility of the evidence and the other is the point at which the objection must be raised. I take it that that last sentence, "The issue of admissibility shall be raised and determined prior to the trial," is far broader than the rest of the section.

I do not know whether it was intended to be, or not, but there is that very serious and somewhat disputed question as to whether an objection must be raised prior to the trial or may be raised during the trial. I think we might consider that separately from the rest of the problem.

Mr. Medalie. I understand we have judicial decisions on that which generally require the raising of that issue--that is, by motion to suppress--prior to the trial, and the courts

have also held that when your attention was first called to it at the trial--

Mr. Robinson. That is, the defendant's attention?

Mr. Medalie. Yes. Then he may take advantage of it at the trial. That is that Wall case. I will think of it in a minute--one of the early cases in the Supreme Court of the United States.

Mr. Dession. The Weeks case?

Mr. Medalie. No. Weeks was the first case that brought the thing up.

Mr. Waite. People against Adams?

Mr. Medalie. People against Adams simply said that New York could do that sort of thing.

Mr. Waite. The Adams case if I remember right strongly intimated that you have got to raise the question before the trial, and in the Weeks case they said you did not need to.

Mr. Medalie. The Adams case was a New York case that went up on writ of error to the Supreme Court.

Mr. Waite. Yes.

Mr. Medalie. They were not deciding, though they said practically whatever New York said on that was all right. That is the net effect of that case. In Weeks they were free to decide the federal rule.

Then came a case shortly after that, about 1918 or 1919, in the Supreme Court, which said that while you had to raise the question before trial, it being called to your attention that a government agent had sneaked into the man's office and gotten a job and in that way gotten out the documents, and he could not know it until the trial, that raising the objection at

the trial was timely. I think that is what they held, and along that line it was allowed--a reasonable chance for the defendant to raise the question if he did not know about it.

Mr. Robinson. That was the clause that you heard me use when I read it in line 8.

Mr. Medalie. Now, for that reason I do not think we need deal with it at all, because judicial decision takes care of that judicial experience, will go along with it or modify it, and we ought not to straitjacket these things in first.

Mr. Glueck. That is right.

Mr. Waite. It seems to me we ought to have a rule one way or another so that the matter is settled, even if the rule simply repeats what has already been said in judicial decisions. Of course many of our rules here do simply do that.

Mr. Medalie. It is really a difficult thing.

Mr. Glueck. Yes.

Mr. Medalie. In matters of that kind, it is difficult to predict what the future experience might teach us by way of modifying existing rules. I do not think we ought to take a chance on that.

Mr. Glueck. For instance, suppose that the defendant does not discover that this happened until after verdict and judgment. I do not think there are any decisions on that yet, but after all it cuts to the substance of his case.

Mr. Waite. In one state there is a court decision, if that goes in without objection, you cannot take advantage of it later on, no matter why you did not object.

Mr. Glueck. Even though he shows that it was no fault of his not to have known about it earlier?

Mr. Waite. Yes. It has gone in without objection.

The Chairman. Now, are you ready for a vote on the motion to strike rule 43 (a) on page 4?

(The motion was agreed to.)

The Chairman. What is your pleasure with respect to the last section, 43 (d), on page 4?

Mr. Medalie. Well, have we passed on 43 (a) on the first page?

Mr. Robinson. We will go back to that.

Mr. Medalie. Oh, all right.

Mr. Seasongood. Like Mr. Coolidge said of the preacher who preached on "sin", I am against it. I am against this 43 (b). I do not believe it is constitutional. I know the Chairman does not want any long argument, and I won't make any. I think it is both unconstitutional and unjust.

Mr. Youngquist. (a) or (b)?

The Chairman. (b).

Mr. Seasongood. (b).

Mr. Robinson. The supplement.

Mr. Seasongood. I think it is unjust because a person may not be guilty of the particular crime but if he takes the stand he may be asked about previous convictions, and it is quite possible the jury will say, "Well, if this bird has been in trouble so many times before, it won't hurt to put him in again," whereas he may be guiltless of the particular offence.

I also think it is unconstitutional, because nobody may be required to be a witness against himself, and if the court and/or the prosecutor may urge that there is something against him from his failure to testify he is in effect required to

testify. The statute of the United States as I read it before says that he may at his request and not otherwise, carrying out the constitutional provision.

We have a special provision in Ohio, which I mentioned also on this point of depositions, which it might be all right to refer to for the convenience of the committee. That is Article I, section 10, which says:

"Provision may be made by law for the taking of the deposition by the accused or by the State to be used for or against the accused, of any witness whose attendance cannot be had at the trial, on which, securing to the accused means and opportunity to be present in person with counsel at the taking of such deposition and to examine the witness face to face, as fully and in the same manner as if in court."

I thought the Reporter might have that to follow.

Mr. Robinson. Yes.

Mr. Seasongood. Now this is where it comes in:

"No person shall be compelled in any criminal case to be a witness against himself, but his failure to testify may be considered by the court and jury and may be the subject of comment by counsel."

There has been a decision of the Supreme Court of South Dakota, which I can supply. I do not believe I have it noted here, but there is one that is reported in A.L.R. 2.

Mr. Robinson. We have it.

Mr. Seasongood. You have it?

Mr. Robinson. Yes.

Mr. Seasongood. In which it was held that, in the absence

of a constitutional provision the permitting of the court to comment or counsel to comment on the failure of the defendant to testify is a violation of his constitutional privilege.

Now, this is going to be one of the most controversial things that you will raise. It is not of enough importance to my mind to warrant inclusion, even if it were otherwise satisfactory, because we have been told the United States secures convictions or at least persons are found guilty or plead guilty in 92 or 94 percent, and where you have got so much that is useful and good I do not see the use of injecting this controversial question, which is very serious. I mean in the light of this Bruno case which I referred to before, and what we know to be the temper of our Supreme Court to uphold to the utmost the constitutional privileges, the Bill of Rights, and the privileges of the citizen, I think it would be a mistake to include it.

Mr. Waite. Mr. Chairman, I do not need to point out to this group that the unconstitutionality of that provision is highly disputable, and I think that if we here think that it is a desirable provision we ought to leave the question of the constitutionality to the Court where it belongs, because there is sufficient uncertainty of its unconstitutionality to justify our giving it approval.

Well, if any of you were present at the American Law Institute where this provision or a similar provision was discussed, you may remember that I am very vigourously in favor of it, and it was approved at that meeting, but I would like to suggest this, that if we adopt it, as I hope we will, we meet the objection that Mr. Seasongood raises.

The basic objection from the point of view of practicality of such a provision is that if the witness does take the stand he will be questioned as to his prior convictions on the ostensible ground of attacking his credibility, and that is the reason that is given by many defense attorneys for keeping their particular witness off the stand.

So I move that if we adopt it we add to it a proviso that if the witness does take the stand he shall not be cross-examined as to his prior criminal record.

Mr. Wechsler. Then you have a law as well as a provision.(?)

Mr. Waite. You have a certain amount of loss, and I question how much loss that is. The question is whether that interrogation of him as to his criminal record is really proper. It is really not an ostensible breakdown of his credibility, it is an attempt to get into evidence what is not properly to be put into evidence--his prior record.

Mr. Crane. I think the amplification of this statute in our State, which is that they shall not comment, and the judge shall instruct the jury that they must not draw any inference of guilt, that it is continuously disobeyed by the juries, because it is inconsistent with human nature--something stated, of which the defendant has personal knowledge, and is so connected with him that he sometimes is the only one who would know whether it were true or false, and how can the minds of 12 ordinary men, with the transactions as they are conducted in life, be impartial to a man who knowing this, having this special knowledge, refuses to open his mouth?

And therefore I think it works--I know from experience that it has worked great harm to a defendant, moreso than

bringing up all his past criminal record, that he has refused to take the stand, and the attorneys will not take the responsibility of advising their man not to take the stand in the big cases, but in the big cases in New York where a man has refused to take the stand it has damned him and convicted him more than the evidence against him. If he had come forward and said, "I am guilty. I am awfully sorry. I have made an awful mistake. Show me some mercy." He would probably be acquitted in spite of his plea.

But when he just went out, kept his mouth shut, and was through with it, it has worked just the other way, so I am in favor of this, except I do fear the comment end of it by the judge and by the prosecution, because that many times is going to go too far. I would like to see, personally--it is only a suggestion--that he may take the stand, and the jury may draw such inferences as the human mind would draw under such circumstances, but that we had better let it stay there.

When the judge begins to comment and the prosecutor begins to comment you do not know how the changes will be rung upon it, will be very unfair. Now the main objection from my experience is not because of the criminal record but sad to say of men who have been willing--big men, clean men, for a sum, or in one instance in a case I was on personally when I was a young man at the bar where a contractor had a million dollars for laying sewers in the City of Brooklyn and he only laid one block, and they indicted him. They said he had bribed the comptroller. I defended the comptroller.

He never had more than $10,000 in his life. I in my ignorance of youth supposed he was telling me all about it,

and his bank account was all right, but they sprung at the end of the week a bank account of $50,000 or $60,000, and he said he would go to jail before he would tell where he got that money--told me so. But now it turned out, and it was true, too, that he had never taken a bribe, and I acquitted him, but all the same he did not tell where he got the $50,000, when I put him on the stand; but the $40,000--he was a bookmaker for the mayor and most of the officials of the city, and he had a list of what he paid them, and letters, and everything else, and he did not want to take the stand, he would rather go to jail than peach on all his friends and associates. And what are you going to do? So there are lots of reasons.

In another instance a father was appointed to protect his son. So I think it is a wise thing to say, let them draw the ordinary inference--anybody. If a man does not want to take the stand, well, it is up to him, and let him stand for the inferences, but when you come to ringing the changes as a prosecutor will do--should do, perhaps- in a court, I do not know; I am afraid of it.

Mr. Youngquist. Mr. Chairman, I was going to say, I think so long as we have in the Constitution the provision, he shall not be compelled to testify against himself, we should not by indirection undertake to weaken that protection. So far as the practical side of it, as Judge Crane has said, in a number of cases that I have tried in which the defendant did not testify, I found it wholly unnecessary for counsel to comment or for the court to comment. The jury made their own comments after they got into the jury room.

I have never found it to be any serious obstacle to

getting a conviction in a proper case. About six years ago I with a group of other attorneys were defending one of the few cases in which I have been on the defense, a man in a very important criminal case, and there we had the problem confronting us, whether to put the defendant on the stand or not. In fact he would have been the only witness. We finally reached the conclusion that he should not be put on the stand, and that I think is one of the hardest decisions I ever made, so far as I was concerned, by reason of my past experience as a prosecutor and my knowledge that, as Judge Crane has indicated, the failure to take the stand is the most damning evidence against the defendant in the eyes of the jury.

So I do not think we need this. If we put it in you may be sure of one thing--there will be fireworks in Congress, as brilliant as on any other provision that we undertake to recommend.

Mr. Seasongood. Fire-works in the Supreme Court.

Mr. Youngquist. We will never get that far.

Mr. Longsdorf. May I add to that, Mr. Chairman? With apology to Mr. Waite, I know we all want these things in, in a way that will be just, but I think we ought to be very wary about passing on to the Supreme Court a doubtful and dangerous constitutional question that does not come up in the regular order of litigation.

We might embarrass the Supreme Court by forcing it in the consideration of these rules to decide a question that is not ready to be decided, even by implication.

Mr. Wechsler. May I ask a question, Mr. Chairman, about the operation of a provision of this sort in jurisdictions where

it is the law? Does the permissibility of this inference in any way relieve the prosecution of the burden of establishing a prima facie case against the defendant without the benefit of this inference?

Mr. Medalie. No.

The Chairman. I come from a very conservative State that is so conservative that by judicial decision they won't compel a man who never made a salary of more than $7,500 a year but who has visible means of from 8 to 10 million dollars to tell a legislative committee where he got it! So I say it is a conservative State so far as private rights are concerned.

Nevertheless we have had this statute for 30 or 40 years, and I have never known of a case where it has worked any injustice to the defendant but on the contrary it gives him a chance that otherwise his counsel might not let him take if the statute were not there--the very issue that Mr. Youngquist raised, of counsel having to make that decision.

This statute helps the counsel make that decision.

Mr. Longsdorf. Mr. Chairman, we have in California the constitutional provision, lately amended in that respect a few years ago, almost identical with the one Mr. Seasongood read to you, and the legislature has supplemented it with appropriate legislation, and the judges and the district attorneys do now comment upon the failure to testify, and I will venture to say that in my opinion the sentiment of the public throughout the State approves that, and I think the judges approve it.

I think the concensus of opinion is that by suitable comment on the failure to testify the court very often protects the defendant against damaging inferences. I know that

is what some of the judges think. They have said so to me.

The Chairman. This is the type of question that we could discuss indefinitely. We all have convictions on it.

Mr. Longsdorf. But we did have to amend our Constitution to get it done.

Mr. Youngquist. You did?

Mr. Seasongood. So did we.

The Chairman. Are you ready to vote on it?

Mr. Medalie. Before you vote on it I just want to be recorded on one thing in connection with this. What has been said about the need of it is due wholly to a belief that is not well founded.

The prosecution does not lose cases because the defendant does not take the stand and the district attorney is not allowed to comment on it.

Mr. Crane. Right.

Mr. Medalie. If he loses his case it is because he hasn't a good case, it is not a convincing case. Now it is a fact as everybody here has pointed out that that jury knows the defendant has not taken the stand if not even a word is uttered by anybody, that he is the one person who could speak, and no matter what is said to them by the judge they even go so far as to discuss the fact that he did not take the stand.

There is no need for this rule comparable to the dangers of putting it on the books. Now, as to Mr. Waite's suggestion, making a concession to defendants, which as I understand is the English rule, that if the defendant takes the stand he cannot be asked about prior convictions, is nothing but a windfall for habitual criminals and men who have been previously

convicted. In most criminal cases the defendant does take the stand.

Now, what you are doing if you put in this additional proviso is protecting a man with a record, who is going to take the stand anyhow, against an inquiry as to his credibility or his character, and I do not think we ought to do that.

Mr. Waite. Well, I think myself we ought to do that independently of this rule, but my suggestion is that we can get this rule accepted more readily if we have that proviso attached to it.

Mr. Youngquist. At too great a cost though I think to the prosecution.

Mr. Medalie. You say that was not the English rule?

Mr. Holtzoff. In England they cross-examine a defendant as to his prior convictions if he takes the stand.

Mr. Medalie. I understood they do not.

Mr. Seasongood. I understood not.

Mr. Waite. That was my understanding.

Mr. Crane. They have it limited in some way, I know that.

Mr. Seasongood. Yes.

Mr. Holtzoff. There may be a very recent change.

Mr. Crane. I agree fully, just speaking from experience and not from books, that there is difficulty with convicting a defendant when he does not take the stand. The evidence must be strong enough to convict him, and this present rule now works greatly to his detriment if he does not take the stand. I am sure of that, and yet it does seem ridiculous that we could not put into the English language what absolutely

takes effect, for reasons I have stated, that the jury make that strong evidence against him when he refuses to answer the accusation, the facts of which he knows.

Mr. Youngquist. There is nothing in the rule, is there, Fred, outside of this supplement to 43 (b),dealing with consideration of the fact of his failure to take the stand?

Mr. Robinson. No, there is not.

Mr. Youngquist. Mr. Chairman, if there is no other motion pending, to bring it to a head I move that we--

Mr. Waite (interposing). I have a motion, Mr. Youngquist, that before we pass on this, to adopt it or reject it, we amend it by adding the proviso, if he does take the stand he shall not be cross-examined as to his previous criminal record.

Mr. Wechsler. May I ask if Professor Waite would accept an amendment to that proposal, that further consideration be given to other protection with reference to impeachment that it might be desirable to provide?

Mr. Waite. Why, certainly.

Mr. Wechsler. I am not sure. I intended to support that motion, but I am not sure that the single item of protection to which you have referred would satisfy me.

Mr. Waite. Yes, I would be very glad to accept that.

The Chairman. You have heard Mr. Waite's motion.

(The motion was LOST.)

The Chairman. Are you ready for the motion on the rule as it stands? We have a motion to strike.

Mr. Youngquist. Yes.

Mr. Glueck. I move it be stricken out, Mr. Chairman.

Mr. Youngquist. Second.

Mr. Crane. What is the motion?

The Chairman. The motion now is to strike this rule (b) as written.

Mr. Youngquist. The supplement.

Mr. Robinson. Just one word, here. It is not my duty to speak for or against it, but it is my duty to report to the Committee. I have not had a chance yet because the discussion has not called for any information from the Reporter's office, but I should say this is presented because it has been recommended from a good many sources. All the crime surveys have endorsed this proposal, and the various studies such as the Attorney General's survey of crime, and the studies of the judicial section of the American Bar Association, so there is quite a bit of popular sentiment on the matter, that I thought I ought to mention to you as no doubt within your consideration.

One other point has not been mentioned that I can state briefly. At the meeting in New York in June, at which general problems were considered by the annual conference of the Second Judicial Circuit, the question came up of the effect of the present state of the law in police activities, and the view was stated there or pointed out that "third degree" by police officers has a distinct relationship to this rule, that the existence of the rule, the absolute immunity of a defendant from making any statement or being called upon to answer anything in a court tends to cause police officers to beat them up and otherwise violate their rights, because a defendant can say, "You can't make me talk. I don't have to say anything. If I don't talk now it can't be commented on

later in court." That relationship was commented on and discussed with pyrotechnics on both side.

Mr. Crane. Who was telling you that? Who was telling you that?

Mr. Robinson. I am sure I remember who.

Mr. Crane. Did he ever have a criminal case in his life?

Mr. Robinson. Oh, yes.

Mr. Youngquist. Where was this? at the conference?

Mr. Crane. The man was most strongly imposed upon, I reply. What was that?

Mr. Robinson. The National Commission on Law Enforcement and Observance is the chief source of that view.

Mr. Medalie. I think it is a paper view not founded on experience with the police.

Mr. Crane. I do not think that is any reason for it.

Mr. Dean. If he were beaten up wouldn't he be much more inclined to tell about it on the witness stand?

Mr. Crane. Surely.

Mr. Robinson. Oh, no. That is not the question, at all. It is not a matter of his not wanting to tell about being beaten up.

Mr. Medalie. The Commission is supposed to have studied this constitutional question very thoroughly, and therefore they said "They will beat the fellow up before they get to the court."

Mr. Robinson. That is a very striking statement of the views presented to the Commission.

Mr. Dean. Have you considered the fact that the way that is now worded, "comment by the court," that it produces a lack

of uniformity? If I were a judge and I were commenting on it, I would make an entirely different comment on his refusal to take the stand.

Mr. Crane. That is the point.

Mr. Dean. To-wit--I would say, "Gentlemen, he may have very good reasons,"--I would say it underlined if possible--"for not taking the stand." Now that is one form of comment.

Another form of comment by the court would be adverse to the defendant. In other words, as it is now written--and I think I have seen it in other forms--I do not recall--that inference may be drawn on something.

Mr. Robinson. As to form, this is a form commonly proposed.

Mr. Holtzoff. I would like to supplement Mr. Robinson's enumeration of the various organizations that have endorsed this proposal, by saying that the Attorney General of the United States has on a number of occasions recommended legislation similar to this proposed rule.

Mr. Robinson. Successive attorneys general.

Mr. Holtzoff. Successive attorneys general.

Mr. Crane. What has happened to them? What has happened to the recommendations?

Mr. Holtzoff. The bill did not pass.

Mr. Medalie. I think that is a good caveat for this rule.

Mr. Dean. I think that is the best argument against it.

Mr. Orfield. I would like a point of information. The code of evidence of the American Law Institute suggests the Reporter's rule as Rule 201. I was wondering what the 1941 meeting had done with that rule.

The Chairman. Do you remember, Mr. Waite? Were you at

that meeting?

Mr. Waite. I could not hear Mr. Orfield's comment.

Mr. Orfield. What did the 1941 meeting of the American Law Institute do with the proposed rule of the code of evidence, section 201, which states the Reporter's rule, does it not?

Mr. Waite. Yes. During the period I was there they did not get to it, and I do not think they got to it afterwards. I am not sure of that. I might say this, that at an earlier meeting of the Institute the matter was brought in by the committee. There were 9 on the committee, and there were 7 different ideas as to what should be done. Some of them thought there should be no comment. Some of them thought that everybody should be allowed to comment. One man thought the judge should be allowed to comment but nobody else. Another one felt the prosecutor should comment but nobody else. Another thought that only the counsel for the defense should be allowed to comment, and if he did comment then the others might be allowed to make comment.

Well, the matter came to the floor of the Institute and was very vociferously if not intelligently discussed and the ultimate vote as I remember it was 92 to 45 in favor of the rule as it is proposed here.

Mr. Crane. Why not go the whole way with it? A judge from the northern part of the State came down to New York City to hold court and they gave him the criminal court, and so when the prosecution closed their evidence the defendant's counsel arose and very respectfully said, "We rest." "Well," he said, "aren't you going to put any evidence in?" He says,

"No." "Well, then," he says, "I shall have to direct a verdict of guilty"--which he did. (Laughter.)

I was requested to go see him and tell him this was a criminal case--which I did.

Mr. Wechsler. If the jury is permitted to draw the inference which Judge Crane calls the "normal inference", and if the court is to be permitted to comment generally on the evidence, then I do not see the plausibility of refusing to permit the court to comment upon this item of evidence, because actually the failure of the defendant to take the stand is now becoming an item of evidence in the case, which as a matter of logic it is; so I should think that the particular provision here with reference to comment should go out in any event and that we should take up the general problem of comment by the court when we get to it, since there is a power to comment in the federal courts now.

On the other hand, with reference to the substantive provision itself, apart from the comment part of it, I find it hard to make up my own mind, for this reason: Everybody agrees that an inference is drawn. The effect of the rule that it shall not be drawn is that the jury is required to disobey the instructions of the court or else an occasional jury which is conscientious abides by the instruction of the court, with the result that certain inequality is produced in the administration depending upon that one fact about the attitude of the particular jury.

On the other hand, in spite of the fact that I am therefore disposed to favor this on some conditions, if it stands in its nude form as at present without protection that Prof. Waite's proposal injected into it, I should feel obliged to

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oppose it, because it amounts to compulsion.

(The question is called for.)

The Chairman. All those in favor of striking the rule under discussion say aye.

(With a show of hands, the motion was agreed to.)

Mr. Crane. Now, I am voting that way just at present. I think sometime perhaps something will be done with it, but I think we had better not get into this mix-up just now when we are preparing something for the Supreme Court, and let it develop so as to be taken up later on by an addition, if sentiment is strongly in that direction. The American Institute is trying to deal with it. The American Bar Association is.

Mr. Waite. Mr. Chairman, a while ago you suggested we might bring matters in the alternative to the Court. I myself feel that we are making a great mistake in rejecting this. I think it will bring criticism on our whole proposal. We will be considered unduly conservative and anachronistic, which will hurt everything we have done.

At any rate there is undeniably a very strong sentiment outside of this room in favor of some such provision as 43 (b). I would like to move therefore that the Reporter be authorized to bring in an alternative section for submission to the Court.

Mr. Glueck. Second.

The Chairman. An alternative to what?

Mr. Waite. That is, bring it in in two forms.

Mr. Wechsler. An optional section.

Mr. Waite. An optional section such as we brought in and authorized him to bring in in one other respect--I have

forgotten now what it was.

The Chairman. I am wondering how we could do that. In the other instance, we agreed that the subject matter should be covered but suggested two ways in which it might be covered. Now, here, by a very preponderant vote, the Committee have indicated a desire not to cover the subject. The matter might be canvassed by taking the matter informally up with the Chief Justice to see whether he would desire to have us submit it for their consideration. Our report of course to them will be confidential, and they can tell us very briefly whether they want it in or not.

Mr. Wechsler. Mr. Chairman, I wonder if we could have a separate vote on Mr. Waite's proposal as a proposal rather than as an amendment?

The Chairman. I see no objection to that.

Mr. Wechsler. That is, that there be a rule of the sort that Mr. Waite has in mind, which will convey maybe the same thing, but there might be some opposition to the amendment by some people who prefer this proposal in its present form.

The Chairman. Mr. Waite moves that rule 43 (b) be submitted in the present form, plus--

Mr. Waite (interposing). Plus the proviso against cross-examination as to his previous record.

Mr. Glueck. You mean you want to make it broader, do you not, Mr. Wechsler?

Mr. Wechsler. Further protection as to impeachment, to really think through the impeachment problem so that what we would do in effect is this--we would not close our eyes to the fact that juries draw these inferences, and that to set

ourselves sternly against having juries draw the inferences may be asking more of human nature than we can ask, with the result that we get into a situation which in practice is paradoxical and unequal in administration but which on the other hand facing the problem as such would attempt to work out protections for the defendant with reference to the great problem of impeachment, where I think the real problem exists, and I am not content to see it confined to a criminal record, because I think there are other situations in which the defendant is in an unpopular position where if he takes the stand he can be cross-examined in a way that will destroy him on an unjustifiable ground.

Mr. Glueck. Suppose for instance this were limited to comment by the court, and suppose the court were required in line with what Mr. Dean suggested to comment on the various reasonable interpretations of the defendant's failure to take the stand; he might have good reasons as well as a bad one, and so forth. Now, that is the sort of thing you have in mind I take it among the various possible protections.

Mr. Wechsler. I can see a provision of this sort which in actual administration would be a very civilized thing and which would avoid what seems to me the sham of the present situation. I am not impressed with the argument that we should not sanction this because it happens anyhow. The very fact that it happens when it is not now sanctioned by law seems to me to point to a problem that calls for very serious attention, and therefore I have in mind that it may be possible to devise some method of dealing with the problem that will be true to the facts of life and will not significantly diminish

the burden that the prosecution has of establishing a case without this inference, and still will avoid the sham of the present situation and protect the defendant.

The Chairman. Now, you have heard the motion as made by Mr. Waite, enlarged by Mr. Wechsler.

(The motion is LOST.)

Mr. Glueck. In general, Mr. Chairman, are we precluded forever from reconsidering certain aspects of this whole business?

The Chairman. Oh, no.

Mr. Crane. I am very doubtful about it. I wrote just the other way to Mr. Holtzoff when I wrote him with reference to this. I am very much perplexed about it. I do not know, and I am just voting this way now to be safe, that is all. I would like to see it discussed further on more information, or perhaps have them speak to the Court about it as you suggest, to see how far we should go in adopting a question of this kind.

I think it is not answered by saying that some of the States are using it, because I would like to see what happens in more of our large populous cities.

Mr. Longsdorf. Mr. Chairman.

The Chairman. Mr. Longsdorf.

Mr. Longsdorf. May I explain my No vote?

The Chairman. Well, I do not think we need it, because these votes are all tentative.

Mr. Longsdorf. Well, all right, then.

The Chairman. And that goes to this motion and to all the other motions. I do not think any of us should feel bound, having voted one way, and that you have to continue to vote

that way. I think it all ought to be left entirely open.

Now, may we dispose of the rest of this rule? Is there anything else?

Mr. Robinson. Paragraph (a), "Form and Admissibility."

The Chairman. Going back to page 1 of the rule.

Mr. Robinson. Rule 43 (a), page 1, admissibility. The only question that should receive your consideration is in line 5. "Admissibility under the" should be "under the Constitution and laws of the United States," just leaving out the bracket and substituting "laws" for "statutes".

Mr. Medalie. Why do we need this subdivision?

Mr. Robinson. Well, that is just for you to decide.

Mr. Holtzoff. I think this is very desirable for this reason, George, because the Civil Rules have introduced more liberal rules of evidence than have ever obtained or prevailed in the federal courts heretofore.

The civil rule--and this is the same--provides that if either under the federal or the state law evidence is admissible it may be admitted. In other words, whichever of the two rules favors admissibility should prevail in the federal courts.

Mr. Medalie. Well, that is the question of privilege.

Mr. Holtzoff. I beg pardon?

Mr. Medalie. Confidential communications. Suppose the federal law is, as some people consider, illiberal. That is, it is a rule of exclusion.

Mr. Holtzoff. Yes.

Mr. Medalie. And the state law permits it, or the other way around, which is supposed to be the liberal rule. Wigmore thought rules of exclusion sometimes were exceedingly

enlightening.

The Chairman. The rule that lets evidence in is the favored rule.

Mr. Medalie. That is what this rule provides for?

Mr. Robinson. That is right.

Mr. Holtzoff. Yes.

Mr. Medalie. That is supposed to be the more liberal attitude? By "liberal" you mean letting it in?

Mr. Holtzoff. Yes.

Mr. Medalie. That does not necessarily mean liberal.

The Chairman. Oh, no.

Mr. Medalie. That might be conservative rather than liberal. I think they bit off too much in the civil rule.

Mr. Wechsler. Well, anyhow, Mr. Chairman, the problem is not the same here as it was in the Civil Rules. I can see a reasonable basis for the rule that in civil litigation to favor admissibility in general is sound, if the exclusionary rules, except those that are so universally accepted that they everywhere obtain, do more harm than good; but I do not see that in criminal litigation at all, because there are a number of rules of evidence which are special rules designed to take account of the special protections that are required in criminal cases.

For example there is a rule of evidence enacted by Congress which has been interpreted to preclude the admission of evidence obtained by wire-tapping. Under this rule we would adopt the law in those States that holds the evidence admissible, and thus abandon the policy of an act of Congress because some particular State happens to have adopted a different policy

with reference to its own courts. I do not see how for a moment we can on all the complex issues of criminal evidence once and for all favor admissibility wherever there is a rule sanctioning admissibility, even though that may have merit in civil cases.

I do not pass on that at this time. I think we have no escape from following one of three courses of action. I think we can leave evidence entirely alone under these rules. There is no compulsion on us to take them up. I think second that we can examine the special rules of evidence in criminal cases that exist in acts of Congress or by federal decision and decide whether we want to change any of them, or propose that any of them be changed, or, third, we can develop a code of evidence.

Now I think the third proposal or possibility is as impractical as the first--I mean, is as impractical as this approach. I think the first is a practical view of it but may result in leaving untouched problems in connection with which we could be helpful.

Therefore I would propose that the problem of criminal evidence be surveyed by the Reporter with attention to whether or not there are particular rules of evidence in the federal courts that ought to be touched by the rules. If there are we can consider them, when the question comes up. For example there is a special rule of evidence in perjury. I think it is an utterly nonsensical rule of evidence. I think it should be abolished.

I have in mind the two-witness rule and further question as to the possibility of obtaining a conviction by proving

inconsistent statements of the defendant. I think perhaps that second aspect of the rule was demolished by the opinion of Mr. Justice Murphy at the last term; I am not sure. That is typical of anachronistic rules of evidence in criminal cases that survive in the federal system. If we can get rid of them perhaps we ought to do it, but I do not think we ought to follow this method, and I do not think we ought to draft a code of evidence and perhaps we ought to leave the whole subject of evidence untouched.

Mr. Youngquist. If we do that, what rules of evidence will prevail?

Mr. Wechsler. Those rules which now prevail. There is I admit the same doubt in particular situations, whether the federal rule prevails or whether the rule of the State in which the court is sitting prevails.

Mr. Youngquist. Normally the rule of the State in which the court is sitting prevails, but then we have these constitutional prohibitions such as we are adopting, which you mentioned, which modify the State rule to that extent.

Mr. Wechsler. There may be other special statutory rules that supersede.

Mr. Youngquist. Yes.

Mr. Medalie. When you talked about perjury you really were not talking of rules of evidence. You were talking about a rule for testing the sufficiency of a case.

Mr. Wechsler. Well, I think it is a rule of evidence.

Mr. Medalie. Is it?

Mr. Wechsler. I think it is.

Mr. Youngquist. No.

Mr. Medalie. I should not call it that.

Mr. Wechsler. It is a rule.

Mr. Medalie. Let us take the accomplice rule we have in States. You cannot go to the jury unless the accomplice has some form of corroboration.

Mr. Youngquist. Yes, that is right.

Mr. Medalie. Also on the corpus delicti, you have got a rule that is not the rule of evidence but a rule requiring certain evidence before you can go to a jury.

Mr. Crane. You have got to have some corroboration.

It is half past 12.

The Chairman. Judge Crane's motion prevails.

(Whereupon, at 12:30 p.m., the Committee recessed until 1:30 p.m. of the same day.)

NJC

AFTERNOON SESSION

The proceedings were resumed at 1:30 o'clock p.m., at the expiration of the recess.

Present: Same as the morning session.

The Chairman. Let us proceed.

Mr. Crane. I made a suggestion in reference to this question of the evidence in criminal cases by quoting or referring to what we had in the State of New York, saying that the rules of evidence in civil cases are applicable to those of criminal cases except as modified by this code, and I should think that that would cover it here and would take in the rules of evidence in civil cases in the Federal courts and not leave it open to something that the States might have.

Mr. Medalie. You now have rules of evidence in civil cases covering the practice in Federal courts. That rule is a rule which also abrogates rules of evidence in the Federal courts where there are rules of exclusion, whenever there is a state rule that is a rule of admissibility.

Mr. Crane. Can we improve on it?

Mr. Medalie. I thought we said we did not want this kind of thing in which the state courts could admit evidence excluded under existing rules or statutes.

Mr. Crane. You have to adopt rules applicable in the criminal courts.

Mr. Medalie. If you adopt no rules of evidence, you adopt whatever existing rules of evidence are in criminal cases in the Federal courts.

Mr. Youngquist. Isn't this the situation now? The applicable rules in criminal cases in the Federal courts are those of

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the state courts except as they may be affected by a specific Federal statute, such as wire tapping that we spoke about? Isn't that the case?

Mr. Medalie. Yes.

Mr. Dession. I think that is changed a little. In a general way they are supposed to be following the rules of the States, but I think the fact is that the Federal district judges are feeling fairly free to pick and choose. I think they are developing a common law of their own. I do not mean that they are not following the State in a good many instances, but I do not think they feel obliged to whenever they do not like the state rule.

I am bothered by this section because this restricts your Federal court where there is a state act, where usually there won't be -- in general there is no statute. Now, the alternative is to follow the law of the State.

Do we want to tie the Federal judge down to the rule of the particular State in which he is sitting? I do not think so. I would rather leave him free, as he is now, to work out the best common law he can.

The Chairman. How about the Tompkins case? Wouldn't that come in?

Mr. Wechsler. I do not think the Tompkins case comes in, because they are prepared to proceed with this as a procedural problem.

Mr. Seasongood. I feel very definitely you should not, along the lines suggested by Mr. Wechsler before luncheon, adopt the Federal rules on that in the United States courts. The difference between civil cases and criminal is manifest.

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Under the case of Erie against Tompkins it is intended that questions of law shall be tried by the laws of the State, in order that the removed case may be reached with about the same results as if it had not been removed.

In criminal law you are dealing with crimes, and your Federal law should be uniform, and your man should not be found guilty under one state of evidence in one jurisdiction and not in another. It works against uniformity in your Federal cases.

The Chairman. But have we anything that can be called a Federal code of criminal law?

Mr. Seasongood. Well, maybe we should have some, as suggested, but I do not think any blanket taking over the rules of the State would be consonant with the idea of getting uniform Federal practice. I think it would be a very happy result if a thing were a crime by reason of some particular evidence in one circuit and not in another.

Mr. Wechsler. If it might be a solution, Mr. Chairman, I should like to advance this tentatively and hesitantly: Take the following action. First have a study made of typical Federal evidence problems, in which I assure you there are some problems, and have them brought to our attention for our consideration and perhaps for a settlement by particular rule; but there will inevitably be a large residue of problems that will not receive attention in that way, and those we would not want to take up in detail.

They could be handled not by this kind of adjustment, but, following Mr. Dession's suggestions, by following the general rule in the Funk and Wolfle cases.

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That would be one to achieve relatively broad conception of admissibility, but would still require the consideration by the courts of particular problems as they arise, free from the limitations of the particular state rules in the jurisdiction

2 in which they are sitting.

In other words, we would say we cannot develop a Federal code of evidence because it is too big a job. It is a job as big as the rest of the undertaking, but we can set forth a formula which would set the stage for such, and that is precisely what the Supreme Court had in those two cases.

Mr. Youngquist. Wouldn't that have the disadvantage that neither the United States Attorney nor the attorney for the defendant would ever know what he is going to be confronted with?

Mr. Wechsler. That is the situation at the present time, Mr. Youngquist, and we will continue it.

Mr. Youngquist. If I understand correctly, the judges are supposed to follow the state rules of evidence.

Mr. Wechsler. Subject to the qualifications that were read into that duty by the Funk and Wolfle cases.

Mr. Youngquist. How extensive will the qualifications be?

Mr. Wechsler. Well, as I recollect -- and it is difficult to phrase this simply -- the point of those cases was that the judges should be free to follow rules which have achieved dominance in the system throughout the country, without regard to whether they are applied in the particular jurisdiction in which the court is sitting; or, more specifically, whether they were applied in 1789, which was the crucial test in the earlier cases.

Mr. Glueck. What do they mean by "dominance" in that

connection? They do not mean numerical dominance, so many States for this rule?

Mr. Wechsler. No. I think what they meant is this. You might have a common law rule of evidence which time had cast into the discard. The statutes indicated that there had been large-spread acceptance of another rule. The Federal courts were to be free,without legislation, to accept that view, but I do not think it was conceived of in terms of a counting of heads, but in terms of judicial practice.

The Chairman. Didn't it mean, roughly, to follow the majority rule as laid down in Wigmore?

Mr. Dean. Rather than Wigmore himself.

Mr. Holtzoff. Wigmore is in the minority a great deal on those controverted questions.

Mr. Seasongood. That is no objection. A minority is very frequently right.

Mr. Youngquist. I do not see why we should establish a different basis for the admissibility of evidence than that established by your civil rules, with a single exception, that we should give effect to the specific Federal statutes relating to the exclusion or admission of evidence.

The Chairman. Wouldn't it be well, though, in view of the suggestion that we ought to have some of those specific situations before us, to have a study made and pass this for the time being?

Mr. Holtzoff. I would like to ask a question. If we follow the civil rules it just occurs to me that, for example, in such a case as admissibility of evidence illegally obtained a Federal court in New York would have to admit it and a Federal

court in some other State would exclude it. That would be an undesirable result.

Mr. Wechsler. Precisely. That is the trouble with this proposal.

Mr. Dean. I think that this A. L. I. Code that is being prepared is the first intensive effort to make a code available. I think it will be available in a few months.

Mr. Wechsler. There is a tentative draft available.

Mr. Dean. And that would justify us in passing this thing a while, together with the other reason mentioned.

The Chairman. All right. We will pass Rule 43 tentatively, while the study is being made by the reporter.

Mr. Holtzoff. I think Rule 43 (b) and (c) deal with a different topic, and I am wondering whether the action just now taken should not be limited to Rule 43 (a), because Rule 43 (a) is the only one that relates to admissibility of evidence.

The Chairman. Let us consider 43 (b). Is there anything in there that is objectionable?

Mr. Seasongood. In line 18 it says that the Government may call a person who is adverse and cross-examine him. You cannot do that with a defendant. He does not have to testify.

Mr. Holtzoff. I think that means a hostile witness. I think that is what this means.

Mr. Youngquist. It means a person other than the defendant.

Mr. Holtzoff. Perhaps that could be clarified by using the word "hostile."

The Chairman. "Call a witness other than the defendant."

3 Mr. Youngquist. We had been using the word "adverse"

contradistinction to the word "defendant." I think that is sufficient.

The Chairman. Is there anything further on (b)?

If not, are there any suggestions on (c)?

Mr. Longsdorf. Did we pass (a)?

The Chairman. No. (a) is resubmitted to the reporter.

Is there anything on (c)?

Mr. Seasongood. Well, at some place we have got to consider this thing that has been raised about not limiting cross-examination to a matter brought out in chief. Is this the place for that?

Mr. Robinson. That again was a thing of great controversy in drafting the civil code, you know.

Mr. Holtzoff. My recollection is that the civil rules as originally submitted to the Supreme Court gave a broader scope of cross-examination, and the Supreme Court changed it before it promulgated the rules and ~~admitted~~ omitted that provision about not limiting cross-examination to matters brought out in chief.

Now, I presume that action in changing the proposed rule was approved by the Supreme Court, and I do not see why it should be any different or broader in criminal cases.

Mr. Seasongood. I do not, either.

The Chairman. There is nothing on (c).

Is there anything on (d)? I take it not.

Mr. Dession. Just one question. Would there be any advantage in giving the court power to require affirmation by the witness rather than an oath where the court had reason to believe that an oath would not mean much to a particular witness?

8

Mr. Robinson. It is a little hard to amend that (d) in order to bring that idea out.

Mr. Dession. I have two thoughts on the question of an oath, and one I do not advance too seriously, because I am a little doubtful about it myself, but I would rather get rid of the oath and get the magic element out of it, and have everyone affirm, but I do not suppose that that is a matter to be worried about too much. I think it would make it a little more modern.

My other question is whether the court ought to be able not to accept an oath in some cases or require an affirmation.

Mr. Robinson. In other words, leave it up to the court rather than up to the witness? This leaves it up to the witness to choose.

Mr. Dession. I would not require him to take an oath. My point is, would it be well not to allow him to take an oath when he wanted to let him take an affirmation instead?

The Chairman. In other words, the court would look at a man and say,"Well, it does not mean anything to this bird. All we will have to take from him is an affirmation."

I have had judges in the middle of an examination suggest that the witness perhaps would like to be resworn and start afresh.

Mr. Robinson. Before a jury?

The Chairman. Yes.

I am afraid that would be a very hard rule to write out, Professor. Do you want to try it?

Mr. Dession. Well, you say at the option either of the court or the witness.

Mr. Holtzoff. If a witness has not much regard for an oath,

he is not going to have any regard for an affirmation.

Mr. Dession. I suppose not.

Mr. Holtzoff. Why have an affirmation?

Mr. Dession. I suppose that would work with a man who is religious or a liar. Of course, if he is a liar he would lie anyway. I suppose the purpose of the oath is to catch that fellow who is worried about the oath and who would lie otherwise.

The Chairman. Is there any question on (e)?

Mr. Medalie. Why do we need it, except that it is in the civil rules, and I wonder why we ever needed it in the civil rules? Whatever created the adoption of that as a civil rule? It is just what judges and lawyers ordinarily do. We do not need a rule on that.

Mr. Longsdorf. Sometimes you do it by documentary evidence.

Mr. Medalie. The things they are allowing in (e) are things they are always doing.

The Chairman. Except in some jurisdictions they have a way of saying they won't receive anything on a motion that is not either documentary or taken from a witness in open court.

RULE 44

The Chairman. All right, gentlemen. We will pass on to Rule 44.

Mr. Robinson. Proof of an official record.

Mr. Seasongood. I do not want to be obstreperous, but 43 (e) says:

> "When a motion is based on facts not appearing of record the court may hear the matter on affidavits."

Suppose it is of record. Can't you supply it by affidavit? Suppose you plead former jeopardy or something that is a matter of record. Can't you put that in?

Mr. Robinson. Doesn't the next rule take care of that? It is proof of an official record. That proof of an official record happens to be the same as the civil rule. You notice a long list of United States statutes on Rule 44 to the left, in which many special statutes have been passed to authenticate or provide for the admissibility of official records from various Federal officers.

It may be hoped that we can provide by general rule, such as 44 (a), that official records of that sort may be admissible without special statutes. That is one object of the rule.

4 Mr. Seasongood. Well, that is just how it is admitted, isn't it -- the form of authentication of official records? Why can't you just make a motion and report it with an affidavit and attach a certified copy of the record? This says only on matters not of record.

The Chairman. Well, if you have an authenticated copy don't you hand that to the court without any affidavit? It speaks for itself, and you won't need an affidavit if you have a record, or the record might be a record in the present cause, and the court would have it before him and would not have to have it authenticated.

Mr. Seasongood. No. It takes judicial notice of its own records. Well, maybe that is hypercritical.

Mr. Longsdorf. I would like to call attention to that recently enacted statute making composite records admissible when proved by one foundation witness, instead of calling every

person who contributed to the making of the record. That is a pretty important statute, and it opens the way to proving records of that kind without calling a multitude of witnesses from all over the land that they made the original entry which went into the record.

Mr. Robinson. Is that official records?

Mr. Longsdorf. No. I think that includes private as well as official records. The private records would have to have foundation proof by the persons who made the original entries.

Mr. Holtzoff. There is an Act of Congress, passed three years ago, which governs that.

Mr. Robinson. We have that statutory assistance for us now, which lets in the kind of evidence that was very difficult to get heretofore.

The Chairman. Is there anything further on (b) or (c)?

Mr. Medalie. Are you dealing with Rule 45, Subpoena?

The Chairman. 44 (b) and (c).

If there are no suggestions on those, we will proceed with Rule 45.

RULE 45

Mr. Robinson. Here again it is felt that the procedure under the civil rules would be the same. It could very well be the same for criminal cases. So far we have not found any reason for differing.

Mr. Medalie. There is only one question that would be raised, and that is the quashing of a subpoena for the production of documentary evidence:

"Condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the

reasonable cost of producing the books, papers, or documents."

Now, that will be a great burden on indigents or poor defendants or those who have extremely limited funds. It is a custom to produce records. If they get into the habit of coming into court and asking them to pay their expenses, you are going to have difficulty, because many of them cannot comply with that.

Mr. Robinson. Of course, this is in the discretion of the court.

Medalie. Yes.

Mr. Robinson. Can't it protect an indigent defendant?

Mr. Medalie. Well, it might.

Mr. Robinson. In cases where the court feels that the party can pay, I suppose it could be well ordered.

Mr. Medalie. Well, you have some difficulty with that. Suppose a man is tried in Trenton and there is a record in Hoboken, and he has not the money to pay for the carting of a load of documents. There is nothing to indicate here how that can be looked after.

Mr. Youngquist. Doesn't the Government pay the cost of subpoenaing witnesses for an indigent defendant?

Mr. Holtzoff. Only the witness' fee, but not the cost of preparing voluminous documents. They pay only the mileage and the fees for a witness' attendance.

Mr. Medalie. But there are defendants who are not indigents; they are simply poor.

Mr. Youngquist. Is that provision for reasonable costs in the civil code now?

Mr. Holtzoff. It is in the civil rules now, I think.

I have considerable doubt as to whether this is proper for the criminal rules.

Mr. Youngquist. Has it ever been the practice, prior to the adoption of the civil rules, to pay reasonable costs?

Mr. Holtzoff. Oh, no. It was along in 1938 when the civil rules were adopted.

Mr. Medalie. Of course, even prior to the adoption of the rules, whenever there was a burdensome or an oppressive one, usually issued by the Government in the course of an investigation before the grand jury, and it took practically all of a man's or corporation's records, a motion would be made to suppress or modify the subpoena or to relieve the witness of much of the burden of it. That has been a recognized practice.

Mr. Youngquist. Oh, yes, that would be proper, but has it ever paid the cost?

Mr. Medalie. I never heard about it.

Mr. Youngquist. I never did, either.

Mr. Medalie. Now, of course, it is recent. If someone wanted me to cart my library and my files down to a courthouse in Philadelphia, I think I would like to be paid all the packing expenses and the cost of the truck and everything else.

Mr. Robinson. I think that Federal Statute 656, Rule 45, page 3, to the left, would help to take care of that. It is a statute for indigent defendants.

Mr. Medalie. The trouble is they are not all indigent. A man making fifty or sixty dollars a week is far from indigent, but he cannot afford those expenses. A small businessman making $5,000 a year is not indigent, but he cannot afford such things.

Mr. Holtzoff. ~~That~~ Statute is limited to the witness fees. It

would not apply to such costs as carting a lot of materials down to the courthouse.

Mr. Youngquist. The trouble is the first clause limits it to witnesses.

Mr. Medalie. Now, there are going to be a lot of nice parties on this that the Government is going to pay on anti-trust preliminary inquiries before grand juries. They have not been paying that, have they, except witness fees?

Mr. Robinson. Do you think the court will make them pay it?

Mr. Medalie. The Court cannot say that the American Telephone & Telegraph Company is not going to be paid for it.

Mr. Robinson. It is left to the option of the court.

5 Mr. Medalie. I think some day some of these terrible corporations are going to raise a question about it.

Mr. Youngquist. I do not think there is much danger about that.

Mr. Medalie. You mean they are too anxious to sue the Government?

Mr. Youngquist. I am impressed by the statement you made that the defendant who is not indigent but poor may be subjected to what to him is a burden.

Mr. Medalie. It is easy enough for him to parcel out something which is paid in installments, but this has to be paid for at once.

The Chairman. Well, is there a motion one way or another on this last clause?

Mr. Orfield. I move that it be stricken altogether.

Mr. Holtzoff. I second it.

Mr. Medalie. I think there ought to be another provision,

"may quash the subpoena or modify it or give the witness any other relief that is reasonable." For example, instead of having to produce all of his ledgers or all of his correspondence over the last sixteen years.

Mr. Youngquist. Would not the word "modified" be enough?

Mr. Medalie. Yes, "quash or modify."

The Chairman. Are you ready for the vote? All those in favor of the motion as modified say "Aye."

(There was a chorus of ayes.)

The Chairman. Opposed, "No." (Silence.)

The motion is carried.

Mr. Longsdorf. Is it desirable to make any provision for releasing papers which are of great value or immediately necessary to the witness, for instance, a promissory note of value, not due but which may become due and require presentment, and be tied up in court, or current records or corporate records?

I have never been able to find anything in the books that dispose of that question or give us much guidance.

Mr. Medalie. I think that ought to be covered. It really represents a definite evil around Federal courts.

Mr. Longsdorf. There was one case where they dragged all the books out of one State and paralyzed the business, not only in criminal cases but in civil cases.

Mr. Medalie. It is a burden in criminal cases, because during the progress of investigation it sometimes covers many months, and not infrequently a year or more. Government counsel has papers brought into the grand jury and keeps them.

Mr. Holtzoff. Iwould like to know what right we have to keep the papers.

Mr. Medalie. The theory is that it is a grand jury record. I doubt that it is a sound theory. It will be brought up in discussion if we do not cover it, and I think we ought to do something about it.

Mr. Longsdorf. We had some books that went up as original exhibits on appeal one time, and through some unaccountable way they got lost. They were engineer's handbooks of great value, and he never did get them back.

The Chairman. Is there any way now of requesting such documents once in possession of the grand jury?

Mr. Medalie. You can make a motion, and you get a cold stare from the judge, district attorney, or United States Attorney, who assures them that they are being worked on.

Mr. Holtzoff. I do not think that is true in all districts. In some districts you won't get a cold stare.

Mr. Dean. There is a recent decision of the district court-- I do not know whether it is reported -- in the fertilizer case in ~~district of~~ North Carolina, where the grand jury impounded some records, and they were in the grand jury's custody until the time for trial.

Mr. Holtzoff. Suppose the term of court had ended and the grand jury had adjourned?

Mr. Dean. I think they were deposited with the clerk of the court, but they were in the custody of the grand jury.

Mr. Medalie. Actually, the United States Attorney keeps those papers. There is a reason behind that. In a mail fraud case if you returned the papers to persons who produced them, you would never see them again. On the other hand, there are any number of reputable people who produce papers and can be

trusted. Also, photostatic copies can be made.

Mr. Youngquist. Doesn't that leave it discretionary with the court?

Mr. Medalie. Yes, but I think if we stimulated the court with something to indicate that, it would be better.

The Chairman. Do you want to formulate a proposed rule?

Mr. Medalie. I had better write one overnight. I would rather not do it by casual dictation -- anything that is as complex and technical as this. That might not cover every situation.

Mr. Dean. There are two suggestions I want to make. Is Rule 45 designed to apply to grand jury subpoenas?

Mr. Robinson. I think so.

Mr. Dean. That is what I assumed, but I wanted to make sure.

It is also assumed by everyone that knows subpoena process runs out of the commissioner's office? Is that correct?

Mr. Robinson. It is not provided for here.

Mr. Dean. I just wondered if it might not be read that way and whether we should not make it clear.

Mr. Robinson. Sometimes it is issued ~~to~~ by the clerk of the court under the seal of the court. The commissioner has no seal.

Mr. Medalie. That raises another question of practice. Now, in New York we do not go to the clerk and have him write out the name of the witness that is to be subpoenaed, and I do not think that the defendant in a criminal case ought to be in the position of telling the Government whom he is subpoenaing. The Government does not tell him who they are subpoenaing.

The defendant ought to have the right to issue subpoenas.

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He can get the form from the clerk. In practice in criminal cases in state courts that certainly works.

Actually, in the Southern District we do not have the clerk write who is going to be subpoenaed. He has forms and he uses forms.

Mr. Robinson. The clerk will sign those forms in blank.

Mr. Medalie. Yes, and I do not like to have him put in the

6 position of getting the name. Why should a subpoena for a witness be issued by a clerk in the year 1941?

Mr. Robinson. Don't you think that, much as it is done in state court practice, the clerk can sign the subpoena in blank?

Mr. Medalie. In New York -- I suppose everywhere else -- attorneys issue their own subpoenas.

Mr. Holtzoff. I think that is a minority, just in New York.

Mr. Medalie. I think that is a minority that should be enlarged.

Mr. Seasongood. I do not think so.

Mr. Medalie. You would provide that every witness should become a matter of record?

Mr. Seasongood. It is with us. You have to leave the name with the clerk.

Mr. Robinson. You can see the return at the marshal's office.

Mr. Seasongood. Yes. You can see the praecipe for the witness.

Mr. Youngquist. Under (c) the issue may be made by any person who is a party and there does not need to be a return.

Mr. Longsdorf. May I call attention to what we left

standing in Rule 4? The warrant shall be signed and dated by the clerk, and so forth. That is all you want in the subpoena.

Mr. Medalie. What is the point in having the clerk issue a subpoena?

Mr. Holtzoff. Well, he should issue a subpoena duces tecum, so that the attorney does not issue a long, broad subpoena.

Mr. Medalie. Getting back to our practice in New York, that is exactly what we do.

Mr. Holtzoff. But you do not do it in the Federal court.

Mr. Medalie. The clerk does not protect anybody by issuing a subpoena duces tecum or the ordinary personal subpoena. Nobody gets any protection by what the clerk does. What is accomplished by the clerk's issuing the subpoena practically and actually on the say so of the lawyer? I think it is a very archaic thing.

Mr. Holtzoff. Isn't it intended to protect against unscrupulous lawyers' abuse of process?

Mr. Medalie. Well, an unscrupulous lawyer goes to the clerk and says, "Give me a subpoena duces tecum," leaving in blank the documents to be produced, and then he puts down enough to fill a warehouse.

Where is the protection to the honest witness? I do not think that that practice gives protection to anybody. I do not see why lawyers cannot be trusted.

On the other hand, a person who receives a burdensome subpoena can always move to have it modified. Even if it was not provided, he would still have that right.

Why should a lawyer have to run to the courthouse? I will go back to my district. Suppose he lives in Hudson, Columbia

County. The nearest Federal courthouse is exactly three and a half hours away by train or automobile. Why should he have to go to the clerk of the court and get subpoenas, especially if the case originated in his locality, and he can serve people there. Why should he have to do that?

Mr. Glueck. Doesn't he send his office boy, anyhow?

Mr. Medalie. Well, a lawyer in Hudson, New York, cannot lightly afford, because of the client he is likely to represent, to incur the expense of a railroad ticket to New York and back.

Mr. Youngquist. I think you must have a subpoena issued by the clerk as a foundation for contempt proceedings.

Mr. Medalie. If we provide that you do not need to do that, you can go ahead with that. The foundation for the contempt proceeding is the fact that the person has been served and you have proof of service.

Mr. Youngquist. Of course, you do it in effect, but should you vest a private person with such powers?

Mr. Medalie. He has such powers, except in form.

Mr. Holtzoff. That is the New York State practice.

Mr. Medalie. It works.

Mr. Youngquist. In Minnesota we get a subpoena in blank, whether to a person or a subpoena duces tecum, fill in the name of the person, fill in the documents or objects that wewant brought in, and serve it ourself. The clerk issues the subpoena under the seal of the court, and we fill in the name and material.

If we want to make a return, we can. That would be necessary if there were to be contempt proceedings. Otherwise we do not.

Mr. Medalie. See what happens in a New York case. The lawyer takes a pad that is full of subpoenas, ordinary subpoenas, and subpoenas duces tecum, fills it in, sometimes attaches a long list of typewritten sheets giving the details of what he wants. A process server serves it. No return is made. You do not need a return.

If the witness shows up, well and good. If the witness does not comply with it when he takes the stand and produces only part of the papers, you show it to the judge, offer it in evidence, or whatever you wish.

If he fails to appear, you make an application to the court on your affidavit of service with a copy of the subpoena, and the court takes appropriate action.

There is no mystery about the clerk issuing it, particularly when we know that the clerk really does not have anything to do with the subpoena except give someone a blank piece of paper with his own name on it and the seal of the court, collecting a fee on it.

Mr. Waite. I agree with Mr. Medalie that it is only a matter of form, but I think it is a very important matter of form.

If John Citizen gets an order from Attorney Joe Zilch down in the next corner to appear in court at a certain time and testify, he says, "Who the devil is Joe Zilch? I am not concerned with orders from him."

But if he gets that same subpoena from the clerk of the court to appear and testify, his mental reaction is extremely different.

Mr. Medalie. Now, this is what happens in those subpoenas,

according to New York statute. The clerk issues the subpoena, and he can issue it in the name of the court, and also on a subpoena duces tecum he puts down the name of the judge. All you are dealing with then is the form of the subpoena.

Mr. Waite. I agree with you as to the matter of form, but it is an extremely important matter of form whether the man subpoenaed is ordered to appear over the name of the clerk of the court or over the name of the lawyer Joe Zilch.

Mr. Medalie. What difference does it make if it has the name of the Justice of the Supreme Court, whose name is written in the subpoena and whom he has never heard of? He is allowed

7 to add the judge's name without going there.

The Chairman. The attorneys in my State issue subpoenas attested by the Chief Justice, and we sign the name of the clerk of the court and we sign our own name. Were there any abuse of the subpoena power, the punishment of the lawyer is very much more than ordinary, routine infractions of rules, because the court realizes it is something subject to abuse. I have never known of any man in twenty-five years, except one, who was punished for that.

Mr. Waite. It comes out ostensibly over the name of the clerk or some official. That is what I am driving at. I understand that Mr. Medalie's proposition is that any official name is completely dispensed with.

Mr. Medalie. No. Put that in the subpoena to give it all the form and the pomp it needs. They are printed.

Mr. Waite. Perhaps I do not get the point.

The Chairman. We have everything except the actual signature of the clerk, and that is signed by somebody other than

the clerk.

Mr. Waite. I misunderstood.

Mr. Medalie. It was not the form of the subpoena I was concerned with. I was concerned with the need of going to the clerk and paying the fees for the issuance of papers that the lawyer could issue himself in exactly the same form.

Mr. Youngquist. I misunderstood you, too.

Mr. Medalie. I see no need for going to the clerk. I think that outside of metropolitan areas this thing would be just as much appreciated as it is in our large cities, where it is easy to go to the clerk's office.

Mr. Crane. May I ask, with reference to that practice, where the clerk does issue the subpoena and you want ten or fifteen, does he have to sign every subpoena?

The Chairman. Yes.

Mr. Youngquist. With us you may write in any number of names in a single subpoena.

The Chairman. But the subpoena is signed by the clerk per a deputy clerk.

Mr. Crane. He signs one subpoena with all the names in.

Mr. Youngquist. He signs one subpoena in blank, and the attorney may write in the names he likes in the original subpoena.

Mr. Crane. When you come to serve it, you serve him with a copy?

Mr. Youngquist. Yes.

Mr. Crane. What is the value of the clerk's signature?

Mr. Youngquist. My understanding was the same as Mr. Waite's, that the subpoena was not to bear the name of the

clerk or court, simply the name of the attorney.

The Chairman. Precisely the same form except that the clerk does not sign his name -- either by the clerk or the deputy -- but his name is signed by the attorney who issues the subpoena. He puts his name on the right and his own name on the left.

Mr. Medalie. Or with the name of the judge.

Mr. Holtzoff. We do not sign the name of the clerk in the state courts.

Mr. Medalie. That is right.

Mr. Holtzoff. Only the attorney's name.

Mr. Medalie. That is right.

Mr. Holtzoff. But we attest the name of the Justices of the Supreme Court.

Mr. Medalie. As a matter of fact, I cannot even tell you now what the form of a subpoena in New York is, because people come when you serve them, and I do not think anybody looks at it except as a direction to come to court, and they would be scared to death not to come.

The Chairman. I know the one in Delaware better than the one in my own State. It says, "Fail not in penalty of fifty pounds."

Mr. Youngquist. I move that 45 (a) be rewritten to conform to that suggestion.

Mr. Seasongood. In our district you always have subpoenas issued by the clerk. Nobody fills them in later. You have a praecipe for the subpoena mentioning for whom you want the subpoena, and the clerk turns it over to the marshal for service.

The only advantage of this other method is that nobody knows who the subpoena is for. You ought to know. If you know the Government has subpoenaed a witness, then you do not have to subpoena him also. I do not see why there should not be disclosure on both sides as to who the witnesses are.

Mr. Medalie. Is that really the purpose?

Mr. Seasongood. I do not know if that is the purpose, but it is the result. You do know who is subpoenaed. There is no use of having double subpoenas.

Mr. Youngquist. The whole purpose of the subpoena, as I see it, is to bring witnesses into court.

Mr. Medalie. I think originally the clerk issued them because it was good business for the Government or the King, or whoever it was, and he collected fees.

There is another thing broken down now. Your office boy, if he is over 18, can serve a subpoena for you. You do not have to depend on the sheriff or the marshal. If someone in your office wants to serve it, he will do it at 2 a.m. The marshal won't.

Mr. Youngquist. The return of the official is prima facie evidence of the service. You get a party who is not official, an office boy or someone like that, and there may be a question as to the validity of the service.

Mr. Medalie. That does arise occasionally, but rarely. I think it is negligible, however.

Mr. Dean. You have the contract of two methods in the Southern District of California, because there in the state courts all processes are served by boys in the office. When I was office boy I stayed up all night waiting to serve people who

were at the theatre. But when you went into the Federal court you could not do that. You had to make out your praecipe, and the marshal served the subpoena, and the clerk issued it.

Mr. Seasongood. The marshal will serve the subpoena.

The Chairman. You must have a good marshal. I hate to think what would happen in some of the districts if you had to wait for the marshal to serve a witness who did not want to be served.

Mr. Seasongood. We have no trouble in getting process

8 served. They are very accommodating and will go at any time of the day or night.

The Chairman. Well, now, there is a motion, gentlemen. Is there any more discussion?

If not, those infavor of the motion made by Mr. Youngquist say "Aye."

(There was a chorus of ayes.)

The Chairman. Opposed, "No." (Silence.)

The motion is carried.

Is there anything further with reference to (b)?

Mr. Dession. I wonder if there ought to be anything governing the procedure that follows bringing this stuff in. I do not think there is any problem where you are not dealing with large volumes of papers, but where you have a large number of papers there is a diversity of rulings.

If a person calling for those cannot see them until the witness is on the stand, it is very time-consuming. Some courts that I know of make orders for inspection before trial. I do not know that there is any uniformity of practice on that, and I am not so sure that there ought not to be some rule.

Mr. Holtzoff. You cannot have inspection before trial in a criminal case.

Mr. Dean. There was one particular case where subpoenas were issued at the instance of the Government, the trial date being fixed. There were three truckloads of documents. The Government then insisted on an inspection of all of these documents. The judge in the meantime had postponed the trial. We fought off the inspection of these documents prior to the trial and then moved also to change the return date of the subpoena.

I think there is something to be said for it in the case of a large number of documents and inspecting them for some reasonable amount of time before you actually put them in.

Mr. Holtzoff. I thought the technical rule is that when you subpoena a document and the document is produced that does not give you the privilege of inspecting it before you put the witness on the stand.

Mr. Dean. This was an inspection two months in advance.

The Chairman. I am curious to know what was the origin of that right to inspect it two months in advance.

Mr. Dean. The subpoena was issued and the trial was to go on May 5th, but it did not. We did not want to give them up. The judge said to give the custody of them to the clerk. We said all right.

The Government said, "We want to look at them."

The judge said, "All right."

The Chairman. Where did the judge get that right?

Mr. Dean. I do not think he had that right, but he ruled against us.

Mr. Holtzoff. I do not think you have a right to look at them until the witness who was subpoenaed comes to the stand with them.

Mr. Dession. That is the decision Judge Caffee followed in the Aluminum case. That is the only decision that deals with the subject. The court dictated an opinion, and it may be published.

Mr. Holtzoff. I think if you had declined to obey the rulings and taken a chance of being cited for contempt you would probably have gotten a reversal.

Mr. Medalie. They were being tried in Lexington, Kentucky, and it was not desirable to create a local fuss which would prejudice the jury prior to its being empaneled, which would put you at a disadvantage.

Mr. Dean. That question may arise where it is not so much in advance, but a few days.

Mr. Dession. In the Aluminum case you have another kind of problem. There the court felt that he had to look at every one of these papers and see what he thought the Government was entitled to see. That is all right if you have a few papers.

I think the rule as laid down in most jurisdictions was based on having only one contract or letter. There is no problem on that. The court can look at that and see whether it should be produced, but if you are dealing with a truckload of documents, you have a problem as to how you are going to work this out.

I think there is a problem here with regard to which there should be some kind of rule. I am not prepared to say what it should be.

Mr. Medalie. I think we can risk something like this, and perhaps it can come back for discussion if we like the idea. Can't we provide that the court can make such provision for inspection by a party calling the witness or any other party prior to the witness' taking the stand as to the court may seem fair?

I think that gives fairly wide discretion to the judge and it is fair to counsel and lets the other side in on it.

The Chairman. If you do not, you will waste an intolerable amount of time in cases where there are large volumes.

Mr. Medalie. I think the average judge will ask you, "Why didn't you look these things over before you put the man on the stand? Don't examine these documents now. Put them in evidence, if you know what you want to put in."

I think it would give the judges power they would like to have.

Mr. Dean. Under that rule could a subpoena be issued for prior to the trial date?

Mr. Medalie. No. It should be issued for the trial date, but while the witness is waiting, you can look at them or have your associates look them over.

Mr. Glueck. Make it a little more specific.

Mr. Medalie. Prior to calling the witness.

Mr. Glueck. I think you had better leave that to the draftsman.

Mr. Medalie. Your idea is correct. I think it ought to go in. As a matter of fact, witnesses are subpoenaed to come to court on a particular day. You do not know whether you are going to call them that day or on the hour of their arrival.

You do not control that.

Mr. Youngquist. Shouldn't you, in the truckload cases, ask for an order to be permitted inspection prior to the day of trial?

Mr. Medalie. It would be very desirable.

Mr. Robinson. Now, in order to do that, it is necessary to call a grand jury. This would avoid that. They found the device in the tobacco case that met that situation.

The Chairman. It might be necessary to be represented by a martyr in some case instead of a mere attorney.

Mr. Medalie. It is not an easy thing to tell the secretary of a corporation that he ought to go to jail in the interest of the principal, in the meantime advertising to the locality that the officer of the corporation is going to jail.

I understand the motion is that a rule carrying the ideas under discussion be presented?

The Chairman. That has been adopted.

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The Chairman. Yes, I agree with that.

Now, that brings us to (d).

Mr. Seasongood. Have we got through with this other?

Mr. Holtzoff. Should not that be revised in connection with the revision of deposition procedure, Mr. Chairman?

The Chairman. No.

Mr. Holtzoff. We took action yesterday to provide for deposition procedure, and this relates to that.

The Chairman. But this would stay here under "subpenas," and this is in fact a subpena.

Mr. Glueck. One type of subpena.

Mr. Medalie. Well, this says, "A subpena commanding the production of documentary evidence on the taking of a deposition." Well, that is all right.

Mr. Seasongood. In (c) you have got here that you have to tender the fees for one day's attendance and the mileage allowed by law. I think, again, that might be pretty onerous for a defendant without much money.

Mr. Holtzoff. That is the present rule.

Mr. Seasongood. For any defendant in the federal courts?

Mr. Holtzoff. Yes.

Mr. Seasongood. It is very unjust, I think, because suppose he is acquitted; he cannot recover costs against the United States.

Mr. Holtzoff. Yes, but suppose the witness is indigent or poor and cannot pay his railroad fare to the place where the court is going to be held.

Mr. Dession. That is a frequent problem.

Mr. Holtzoff. That is a very frequent problem.

o2

Mr. Seasongood. Well, the way it is usually done, by the ordinary statute, or at least our statute in Ohio, is that if he demands it you can.

Mr. Dean. I think that is a good suggestion. If he demands it or requests it. If he is acquitted, in that event he will go down to get his mileage fee.

Mr. Holtzoff. I know, but the poor man may be very dumb and not know his rights.

Mr. Dean. But he is not so dumb that he says, "How do I get there?"

Mr. Holtzoff. What?

Mr. Dean. He is not so dumb that he says, "How do I get there?"

Mr. Holtzoff. There have been cases in Tennessee and Kentucky where some of these mountaineers walk fifty miles to court because they have no money.

Mr. Medalie. And collect mileage; that is the point, is it not?

Mr. Holtzoff. What?

Mr. Medalie. And collect mileage.

The Chairman. In the technical sense.

Mr. Seasongood. It is different in a civil case, I think, because you get your costs from the other person, but if you are in a criminal case you have the constitutional requirement that he may have process for his defense, and here you make him pay the process, pay under all circumstances, and if he is acquitted he cannot get it back.

Mr. Youngquist. That is a burden that every citizen is subject to.

03

Mr. Seasongood. Surely, he is subject to it.

Mr. Waite. I should like some information from somebody. Are we talking now about (c)?

The Chairman. Yes, 45.

Mr. Waite. I want to talk about that. I did not realize. There is not much to it, apparently, about just what I had in mind. The last section, as I understand, provides that if the Government thinks I happen to have seen a bank robber in New York they can subpena me to come to New York at my own expense, in the hope of eventually getting it back; but if I have not got the money and have no way of getting there, is that the present practice? That is what I wanted to ask.

Mr. Medalie. I think you can go to the marshal's office of the district in which you were subpenaed, and he will give you your mileage; is that not it?

Mr. Holtzoff. Actually there is no difficulty over it, because the deputy marshal has money that he will advance to the witness. Technically, the Government witness does not collect or is not entitled to mileage until after he appears; but if he is a person who has no money on which to travel, the marshal will advance him the funds while he is serving the subpena, and there never is any practical difficulty on that point.

Mr. Waite. There are a great many persons who assume that they have got to obey orders of the Federal Government under any and all circumstances. Is there any reason why this rule should not be changed to provide that the fees and traveling expenses should be tendered?

Mr. Holtzoff. You mean in the case of Government witnesses?

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Mr. Waite. Yes, I think particularly in the case of Government witnesses.

Mr. Holtzoff. Well, the only difficulty is the present accounting system of the Government, that you would have to revolutionize the accounting system in order to comply with that kind of direction.

Mr. Medalie. That is true.

Mr. Waite. I think the Government could change its accounting system more easily than many indigent witnesses could find the means of travel.

Mr. Holtzoff. Well, but actually the marshal will advance the money and take it out of the mileage later on.

Mr. Waite. Then, if he can do it actually, I do not see why we should not provide in here that he shall do it actually.

Mr. Seasongood. This actually says he need not do it.

Mr. Holtzoff. He need not.

Mr. Waite. Yes.

Mr. Holtzoff. Of course, what this does is to perpetuate the existing rule.

Mr. Seasongood. Well, we are finding fault with it.

Mr. Waite. I should like to support Mr. Seasongood's motion on that point.

Mr. Dean. What is it? To strike the last sentence?

Mr. Youngquist. Is it not the general practice in the states as well as by the Federal Government that the fee and mileage need not be tendered to a witness subpenaed under that statute?

Mr. Robinson. That is right.

Mr. Youngquist. That is the rule in Minnesota.

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Mr. Holtzoff. That is the general rule, and you pay him the mileage and the fee after he appears and has testified.

Mr. Youngquist. I should not like to see us depart from so well-established a practice. I imagine one of the reasons for requiring that individual parties tender the fees and mileage in advance is to make sure that the witness will get it, and of course if he is subpenaed by the Government he knows that he is going to get it, and the practical aspect of it from the viewpoint of indigence of the witness is taken care of, as Mr. Holtzoff says, by the advancing of the funds by the marshal.

Mr. Waite. Not always, though, Mr. Youngquist. I have known people subpenaed who did not realize that they could get it in advance, who in one case had to borrow money from a personal finance corporation for two or three percent a month interest to get it, in another case borrowed from friends with a great deal of effort and trouble.

Mr. Youngquist. Well, I should suppose those cases would be so rare that we should not make a rule.

Mr. Waite. Well, is it not a good rule anyhow? That is what I am getting at.

Mr. Seasongood. Why do you want an affirmative rule that you do not have to do it? Then maybe the marshal would say, "I will not give you anything."

Also, you have "or agency thereof." Well, what is an agency of the United States is a very elastic question on which there is great diversity of opinions. You have the Federal Reserve Bank, the Reconstruction Finance Corporation, and there are a million agencies of the Government now. Why should they

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get these special benefits?

Mr. Holtzoff. I do not think that is really applicable in criminal cases.

Mr. Youngquist. Neither "officer" or "agency" should be mentioned.

Mr. Holtzoff. No.

Mr. Youngquist. It should be "on behalf of the United States."

The Chairman. By consent those words on line 25, "or an officer or agency thereof," will be eliminated.

Mr. Youngquist. There cannot be a prosecution by anything but the United States.

Mr. Crane. Does not that language, "need not be tendered," give rise, perhaps, to the claim that it need not be paid?

Mr. Seasongood. Yes. There should be a positive rule that you do not have to do it. The marshal says, "Here you have rules, and all inconsistent laws are repealed, and I do not have to give anybody anything."

Mr. Holtzoff. No. It says "need not be tendered." It means need not be tendered in advance.

Mr. Crane. I read it that way, but it might not be so construed by others.

Mr. Holtzoff. The same rule is in the civil rules, and it has not been construed that way. It has been construed as meaning that you do not have to tender it in advance.

Mr. Crane. Then why not add that, that it need not be tendered in advance?

Mr. Holtzoff. I think that would be an improvement, the words "in advance."

o7

Mr. Crane. Yes.

Mr. Youngquist. I do not think it is.

Mr. Crane. Well, that is what I mean by it. Tautology, but all the same it makes it clear.

Mr. Youngquist. You use the word "tendering" four lines above in the context, which makes it plain that it shall be at the time of the service.

The Chairman. "need not be so tendered."

Mr. Holtzoff. Yes.

The Chairman. You want to tie it back to the preceding sentence?

Mr. Holtzoff. Yes.

Mr. Robinson. All right.

The Chairman. Now, is there any further discussion on this section?

Mr. Waite. I think there is a motion, Mr. Chairman. If I understood Mr. Seasongood, he means to move to strike out that last sentence, and I should like to support it and urge it.

The Chairman. It has been moved and seconded that the last sentence of section (c) commencing on line 24 and ending on line 26 be eliminated. All those in favor of the motion will say aye.

(There was a chorus of ayes.)

The Chairman. Opposed, no.

(There were a number of noes.)

The Chairman. I shall call for a show of hands of those in favor of the motion.

(There was a show of hands.)

The Chairman. Nine. Carried.

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Mr. Seasongood. I do not want to keep up a continuous conversation, but I do just want you to have in mind that you are going to change a practice of long standing by this first part of that rule. As I say, it will come as a great surprise to the Ohio practitioners to say that a subpena in a criminal

4 case can be served by anybody now, and not in the way that it has been done since time immemorial.

Mr. Youngquist. Why should there be any difference between a civil and a criminal?

Mr. Seasongood. Well, there is not. They do not serve a subpena. The marshal serves all subpenas in civil cases too.

Mr. Youngquist. Not under the civil rule. That is specific. This is identical with the civil rule.

Mr. Holtzoff. I wonder if I might move to reconsider the vote just taken. This vote is going to cost the Government a lot of money, because you frequently subpena witnesses, and then you find your case is going to be continued, and you notify your witnesses not to come. Now, if in the meantime you have paid your witnesses fees, I think in the course of a year it is going to mean to the taxpayers a whole lot of money, and it will mean a lot to the anti-trust people.

Mr. Seasongood. How about the defendant? Will he subpena his witnesses the same way? He is less able to do it than the Government, which has lots of money to throw around.

Mr. Dean. He is only one.

Mr. Holtzoff. Well, I will not press it.

Mr. Medalie. I think what is going to happen is this: When this draft comes to the court, the Attorney General who

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represents the court says they cannot afford to have that sentence out, and it can go back.

The Chairman. On the front of this building the slogan is, "Equal justice."

Mr. Medalie. All right.

Mr. Crane. This marble palace of justice.

The Chairman. (d). I have a feeling that I have been up to (d) two or three times lately. I may be slipping a little bit here.

Mr. Robinson. I am sure.

The Chairman. I think I am to (d).

Mr. Seasongood. I am sorry.

The Chairman. All right.

Mr. Seasongood. Perhaps I talk too much.

Mr. Robinson. You made a statement, did you not, Mr. Holtzoff, about it a minute ago?

Mr. Holtzoff. What?

Mr. Robinson. Did you not make a statement about (d) a minute ago?

Mr. Holtzoff. The only statement I made was that perhaps you want to take it up with the rest of the ~~members~~ section.

Mr. Robinson. Oh, that is right.

The Chairman. I think we can dispose of it here. It does not bear on the substance of the deposition; just the subpena.

Mr. Glueck. I should like to inquire about the reason for the magical "40 miles" now. Of course nowadays--

Mr. Youngquist. That is probably one day's travel by horseback.

Mr. Glueck. 40 miles a day. You can do that in an hour

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almost.

Mr. Holtzoff. That, of course, is the civil rule.

Mr. Glueck. That does not make it holy.

Mr. Holtzoff. No, it is not ancient. It is recent.

Mr. Glueck. I mean they must have considered it recently, although I do not know whether they did or not.

Mr. Youngquist. The civil rule does not have that. It is 150 miles.

The Chairman. No. A hundred miles.

Mr. Holtzoff. That is for trial, not for deposition. 40 miles is in the civil rules.

Mr. Glueck. That is a horse-and-buggy rule.

5 Mr. Youngquist. "40," at the top of page 2, line 3.

Mr. Holtzoff. Yes, that is in the civil rules. I have seen that in the civil rules.

Mr. Youngquist. It says "100 miles."

Mr. Holtzoff. No. "100" is in the case of a subpena for trial. In the case of a subpena for deposition it is 40.

The Chairman. Yes.

Mr. Youngquist. Oh.

The Chairman. That is where we are in error.

Is there anything under (e)?

Mr. Holtzoff. Under (e)?

Mr. Medalie. Well, you have got the same subpena for a hearing or trial.

Mr. Holtzoff. I think under (e) perhaps there is an inadvertence. A subpena in a civil case--and this one is copied from the civil rules--runs only within the district or within a hundred miles, but a subpena in a criminal case today

o11

runs throughout the country, and we certainly ought to change (e) to correspond, to ~~pitch~~ correspond with the present criminal rule.

Mr. Robinson. That is right.

The Chairman. Then I assume that the same change that will be made with respect to the service in (c) will be made.

Mr. Youngquist. (c)?

The Chairman. Yes.

Mr. Medalie. Will you get the provision here for all issuance of subpenas by courts?

The Chairman. That is what I mean.

Mr. Medalie. Oh, that is what you mean?

The Chairman. The same change.

Mr. Youngquist. Oh, yes.

Mr. Glueck. What are we going to do about this mileage business?

The Chairman. The 40 and 100 miles?

Mr. Glueck. Yes.

The Chairman. I think they are adequate, don't you? They can fix the place of taking depositions almost anywhere. There is no excuse for asking a man to go outside the county.

Mr. Glueck. Then why not 50 instead of 40? That is all I am asking.

Mr. Medalie. It is easy enough on the taking of a deposition; you ought to be as near to the man as you can go.

Mr. Youngquist. But down in Texas you may not find a town within 40 miles from the place of service.

Mr. Medalie. True enough, also, about New Mexico and Arizona.

Mr. Youngquist. There ought to be substituted " a reasonable

o12

distance."

The Chairman. That would be dangerous. Do you know, Mr. Tolman, what dictated "40 miles"?

Mr. Tolman. I am trying to find what it was. I think it came from some statute. Yes, here it is.

The Chairman. Yes; 648 Code:

> "No witness shall be required, under the provisions of either of sections 646 or 647 of this title, to attend at any place out of the county where he resides, nor more than forty miles from the place of his residence, to give his deposition; nor shall any witness"-- and so forth.

Mr. Glueck. What is the age of that statute?

Mr. Medalie. Well, this means that.

Mr. Youngquist. Horseback days.

Mr. Medalie. You can require them to attend.

The Chairman. It was before they had the buggy, even: 1827.

Mr. Medalie. As you have it here, no matter what distance he travels you may require him to attend within the county in which the service was made.

The Chairman. That is right.

Mr. Medalie. If you are taking him out of the county they do not want you to move him more than 40 miles, which is about the width of most small counties.

Mr. Youngquist. I think that is right.

Mr. Longsdorf. Not in California.

6 Mr. Medalie. Then you keep them within the county.

o13

The Chairman. Is there anything further under (e) (1) and (2)?

Mr. Medalie. Yes. Now, what about this 100-mile limit?

Mr. Holtzoff. I understood that that was to be changed. The subpena runs throughout the United States.

Mr. Robinson. Yes, that is changed.

Mr. Medalie. All right.

Mr. Youngquist. Where is that?

The Chairman. It is in line 49.

Mr. Youngquist. Oh, yes.

Mr. Robinson. Any place within the United States.

Mr. Dean. In the second line why is the word "hearing" in there? Should it not simply be "trial"?

Mr. Medalie. You might have a hearing on a motion for the suppression of evidence. You might have a hearing on any motion.

Mr. Dean. That is right.

Mr. Medalie. Whether the court refuses to hear witnesses or not.

Mr. Robinson. That is right.

Mr. Longsdorf. What is it that comes out there, may I ask, in (e)?

The Chairman. Line 48 will read, "hearing or trial may be served at any place within the United States."

Mr. Longsdorf. Within the United States.

The Chairman. And then the following two lines come out.

Mr. Robinson. Since these rules will be applicable to territory outside the United States, I suppose we shall have to make some arrangement about that.

014

Mr. Longsdorf. The process would not have any validity outside the United States.

Mr. Medalie. It operates only if the Attorney General wants them in. The defendant cannot get anybody outside the United States prior to subpena going to the consul. We have that here, have we not?

Mr. Youngquist. Yes.

Mr. Medalie. That is on what page, Rule 45 of the left-hand sheets?

The Chairman. Here it is.

Mr. Robinson. The civil rule.

Mr. Medalie. The Act of July 3, 1926, is what arose out of the oil cases.

Mr. Robinson. Yes, I think that is it.

Mr. Medalie. It looks as if no one but the Government can use that.

Mr. Longsdorf. That is true of passports.

Mr. Medalie. What?

Mr. Longsdorf. That is true of passports.

Mr. Medalie. Yes. The Government.

The Chairman. Was there a question raised on that?

Mr. Medalie. No.

The Chairman. (f).

Mr. Medalie. Now, this says "contempt of the court from which the subpena issued."

Mr. Holtzoff. In the light of the change, that has to be changed. In the light of the change we made a while ago this has to be modified.

Mr. Robinson. "the court for which"?

o15

Mr. Medalie. "contempt of the court"--

Mr. Seasongood. "in the name for which".

Mr. Medalie. "for attendance of which".

Mr. Youngquist. Is there not an error in the citation of section 711, line 57, rule 45, page 3 left?

Mr. Robinson. It should be 712.

Mr. Youngquist. Yes.

Mr. Medalie. 12, 13, 14.

Mr. Robinson. Yes, that is right. Line 57, the last two. 713.

Mr. Medalie. 12, 13, and 14.

Mr. Robinson. You could add 14 to that, yes.

Mr. Longsdorf. Put a dash between 711 and 713, and you will have the same result.

Mr. Robinson. Same result.

Mr. Youngquist. Well, 711 is out?

Mr. Robinson. That is right.

The Chairman. Yes. "712, 713, 714," is the way the end of line 57 will read.

Mr. Medalie. Now, if the language is "contempt of the court for attendance at which the subpena is issued," I think that will cover it.

Mr. Holtzoff. Well, how about subpena duces tecum? The word "attendance" is broad enough, is it?

Mr. Medalie. I think so.

Mr. Robinson. Why not say "for which"?

Mr. Holtzoff. Someone suggested "in the name of which".

Mr. Medalie. Well, that gets down to the form of the subpena.

o16

The Chairman. "attendance at which," I think.

Mr. Longsdorf. How does that read now, Mr. Chairman?

The Chairman. Line 60, "court for attendance at which the subpena was issued."

Mr. Longsdorf. Does this section include contempt for subpena, to appear for deposition, or are we not going to have that? Well, that is hearings for trial; that is all right.

Mr. Seasongood. Is there any trouble with the Nye case in view of what you have done now with these subpenas? I suppose when the subpena was issued by the clerk it was issued by the court. I do not know why; the Nye case is limited to the time.

Mr. Holtzoff. I do not think the Nye case would affect this. The Nye case merely held that the contempt in order to be punishable must be committed in the presence of the court.

Mr. Seasongood. Yes.

Mr. Holtzoff. Well, the contempt here is failure to appear, and I suppose in the presence of the court.

Mr. Dean. Does the contempt statute contain three or four categories?

Mr. Seasongood. Yes, it does.

Mr. Holtzoff. What?

Mr. Dean. Does not the contempt statute contain three or four categories, one of which is contempts in the presence of the court, which is involved in the Nye case, and one of which covers this very situation?

Mr. Holtzoff. Disobedience to process.

Mr. Dean. Disobedience to process.

Mr. Youngquist. Similar punishment was drawn in the Nye

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case.

The Chairman. This subpena here suggested is still the subpena issued by the court. The only difference is, in this case, instead of the clerk signing, another officer of the court, to wit the attorney, signs it, and he signs both the clerk's name and his own name.

Mr. Youngquist. There is one case that we have not covered: that is the subpena for a prisoner without counsel. We have not discussed that.

The Chairman. He has a right to summons, process.

Mr. Holtzoff. The clerk could issue that.

Mr. Medalie. They should both be givenpower to do it. You would have to make it both the clerk and the attorney. That is, either one could do it. Those who prefer a seal on subpenas can go to the clerk.

Mr. Crane. May I ask right there, can you subpena prisoners?

Mr. Robinson. What is that?

Mr. Crane. You spoke of a prisoner.

The Chairman. No. A prisoner without counsel.

Mr. Youngquist. A prisoner without counsel. I am talking about having subpenas signed by the attorney, who is an officer of the court.

Mr. Crane. I see. Yes. I did not understand it.

Mr. Youngquist. I did not make it very clear. I should have said "the accused."

The Chairman. Rule 46.

o18

RULE 46

Mr. Robinson. That rule provides that exceptions shall be unnecessary. The present federal law is that, while the rule has been that generally an exception was necessary to preserve a ruling of the court for review, it is well recognized that appellate courts may notice plain error not assigned without manifest injustice.

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There are two cases on that. In particular that is true on failure to except. Sheridan v. U. S. 112 F. (2d) 503, reversed on February 10, 1941; 61 Supreme Court 619. There the defendants moved for a directed verdict at the close of the entire case but failed to except to its denial. The Circuit Court of Appeals held that for that reason such denial was not assignable as error. On the confession of error the Supreme Court reversed and remanded with directions to consider the sufficiency of the evidence to support its verdict.

Mr. Longsdorf. What was that citation?

Mr. Robinson. The citation was Sheridan v. U. S. 112 F. (2d) 503, the Ninth Circuit, and 61 Supreme Court 619 was the Supreme Court citation. So the status of the present law is as stated. The reason, then, would seem to be now for a change that formal exceptions are somewhat archaic. All that is necessary is that counsel make known to the court what he desires done or his grounds for objecting to the court's action. The proposed rule providing the same procedure as the civil rules seems to me desirable.

Mr. Longsdorf. That was 61, 619?

Mr. Medalie. Now, you have added an additional sentence.

019

Mr. Crane. What does that mean?

Mr. Youngquist. Yes. I do not follow you.

Mr. Crane. Make an objection in a manner which will prejudice the cause? Every objection or demurrer prejudices the cause.

Mr. Robinson. I was just going to say, down at the second circuit conference Judge Carroll C. Hincks raised a point which is stated on the right-hand page in Rule 46, page 2. Judge Hincks said there, as quoted in the proceedings of that conference:

> "Certainly the criminal rules should go as far as the civil rules in making formal exceptions unnecessary."

But he believes that they might go further and state that the time of the court should not be taken by exceptions and that in adopting the civil rule its language should be expanded as follows:

> "It is sufficient that a party . . . make known to the court . . . his objection to the action of the court and, if requested by the judge, his grounds therefor."

Judge Hincks points out the irritating waste of time which in his experience has been caused by obstructive counsel who insist in stating their grounds of objection in extenso, thus sometimes bringing extraneous matter before the jury.

Mr. Medalie. It does not need any rule to stop that.

Mr. Crane. No; the judge can attend to that.

o20

Mr. Medalie. Just say to counsel, "I understand your objection. Now do not argue it any further, and do not make a speech."

Mr. Crane. And if he keeps it up, place him in contempt.

Mr. Seasongood. But the other point is a sound one, in my opinion. On line 7 I would say "take or his objection to the action of the court and, if requested by the court, his grounds therefor."

Frequently you say, "Object," and the court will know what it is and does not want you to make a long palaver of your grounds. If he wants them he should ask for them.

Mr. Medalie. The trouble is on your appeal. No appellate court will pay any attention to an objection where the grounds have not been stated, no matter how the trial court feels about it.

9 Mr. Seasongood. Well, that is your affair.

Mr. Holtzoff. There is another reason, too: I think Government counsel has the right to know the grounds for your objection, because he might concede it in order to prevent the danger of a reversible error being made.

Mr. Medalie. Well, of course that sounds too much like a game. I think it is enough if the court is told why the evidence ought not to go in.

Mr. Crane. Suppose you use the word "exception" under the old practice.

Mr. Medalie. No harm would come.

Mr. Crane. All we have to do is to say, "Exception," and every appellate court has heard it, and we had this up in the Judicial Council trying to follow the federal rule adopted in

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the civil courts. We got it through after it was opposed by every bar association in the state of New York. The city bar association and all the highlights opposed ever taking out the word "exception" simply because it had been used from time immemorial, and it was simply a silly, ridiculous thing.

I prepared a bill and got it to the legislature, and they beat it there, and then they came around the next year, the city bar association, the county bar association, and agreed to it. It takes a long time to get rid of just a word. Now, in other words, if there is error, the appellate courts have likewise to reach it, should reach it, provided it has been called to somebody's attention, and I think in most of the cases they do state the objections, and I do not know as the word "object" need be used, that particular word, if by the record it is shown that there has been some formal statement showing that it is improper and that the lawyer does not want it. In other words, the appellate courts are not to be bound by the use of one particular word. There may be another word in the English language that means as much as "object" does, and certainly "I object" means as much as an exception; not exactly, but enough to call attention to it. They got rid of all these little formal rules which are catch traps for lawyers who do not always stop to think and use the exact word.

Now, we got rid of it, but we had to fight for it, and we adopted in New York--the Judicial Council did, I am speaking of--the federal rule; I do not know exactly which one it was now, but the one, the federal rule adopted, and that was a compromise to get it through the state legislature, and we did.

The Chairman. Was it opposed by the bar, Judge, when it

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came up? Did the bar oppose taking out the word "exception"?

Mr. Crane. Yes.

Mr. Medalie. I do not think the city bar association did.

Mr. Crane. The city bar did.

Mr. Medalie. I know the county lawyers' association did.

Mr. Crane. I can tell you the names of the men. They had a hearing, the Judicial Council.

The Chairman. They like to snap that word "judicial."

Mr. Crane. Yes. And so they had a committee for the city bar, and they opposed it. But to be fair to them let me say that after they got to thinking of it and reasoning and arguing and talking with them, the next year, having beaten the bill the first year, they came around and approved it. But to be fair to them, too, let me state that they modified some part of it, but along the federal rule; and then, being in harmony with the federal practice, it went down a little better, and it was a mighty healthy thing.

Mr. Holtzoff. It seems to me the last sentence of this might perhaps go out.

Mr. Medalie. I move it be stricken.

Mr. Youngquist. I second the motion.

10 Mr. Crane. That is beginning with "and he shall"?

Mr. Glueck. Line 11.

The Chairman. Line 11.

Mr. Crane. Or the whole sentence?

Mr. Glueck. May I inquire as to the meaning of line 9, if he has no opportunity to object?

The Chairman. Well, might we dispose of this other sentence?

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Mr. Glueck. Oh, I am sorry.

The Chairman. Is there any question on it?

Mr. Longsdorf. Mr. Chairman, I want to put in something else before we pass to a vote on this. I think there is a slight fault in the civil rule in this regard: If a party has no opportunity to object to a ruling or order at the time it is made, there may be a time left.

Mr. Crane. I will tell you what that means. It is this. At least one instance of it.

The Chairman. What line is that?

Mr. Crane. You see, Judge, actions made at the end of a case--

Mr. Glueck. I am sorry, Mr. Chairman. Let us vote on this first.

The Chairman. May we dispose of the point number 1, beginning with the sentence on line 11? All those in favor of the motion to strike will say aye.

(There was a chorus of ayes.)

The Chairman. Opposed, no.

(There was no response.)

The Chairman. Carried.

Mr. Crane. Now may I answer that question that was asked by two of them as to what it means? What it means is that when motion is made at the end of the case and the judge says, "I will take it under consideration" or "I will reserve my decision," and the case is closed, as to whether he is going to dismiss the whole thing, and he then makes a ruling, now it is made just in handing down a decision himself, but that is not in court. I know it applies to that one instance in our state,

and there may be others. I do not think it applies to anything where they are in court in the presence of the judge and could speak and make an objection; but there are instances where he might rule and throw the whole case out. But he reserved his decision. Now, if he makes up his mind that he will not throw the whole case out and gives judgment, they have never had a chance to object to his ruling.

Mr. Longsdorf. Well, that may be perfectly correct, to say he had no opportunity whatever in that case.

Mr. Crane. Yes.

Mr. Longsdorf. But suppose there is some occurrence at the trial which may prejudice the jury, might cause a mistrial or might be corrected, and he did not find out right away, but he found out before the case went to the jury: why not give the judge a chance to make a correction if it can be made?

Mr. Crane. He can do that.

Mr. Longsdorf. So he does have opportunity there?

Mr. Crane. Yes. There is no objection to that. He has got to object in some way in trial, call it to the judge's attention.

Mr. Longsdorf. And give the judge a chance.

Mr. Crane. And the other side too.

Mr. Longsdorf. Yes, and the other side. So we have the insertion of the words "at the time it is made or thereafter." That is a ruling or order of the court.

Mr. Crane. I do not think there is any misunderstanding. Is that not taken from the civil rule?

Mr. Youngquist. Yes.

Mr. Longsdorf. Yes, it is taken from the civil rule, but

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he has precautionary words.

Mr. Crane. Well, it works pretty well now.

Mr. Longsdorf. I do not know that it is very important; I am not pressing it.

The Chairman. Is there anything further, gentlemen, on Rule 46?

(There was no response.)

The Chairman. If not, we shall pass to Rule 47.

RULE 47

11 Mr. Robinson. You find a correction in 47 of an error made by the mimeographers, I think only one in about a hundred thousand pages, so it would be well to give them due credit. At the bottom of the page you find, in some pages, that line 19 is omitted. The corrected page was distributed to you on the first day of the meeting, and I suppose some of you do have it. If you have 19 lines on the page, Rule 47, you have the correct copy. If not, we can give you the corrected page.

Mr. Waite. What should line 19 be?

Mr. Robinson. Line 19 reads, "The number shall be the maximum number which is permitted to the defense."

The Chairman. Each member has a copy of the correctly worded page there, underneath the table of contents page, et cetera.

Mr. Robinson. I believe that that states the present rule.

Mr. Crane. Does it?

Mr. Robinson. With possibly some alteration.

Mr. Medalie. In our district we may not ask a juror a question unless the court specifically permits it; it does

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occasionally.

Mr. Robinson. It says "may permit," does it not? Line 2, "The court may permit the defendant or his attorney" to conduct an examination.

Mr. Holtzoff. It says "shall permit."

Mr. Robinson. "May."

The Chairman. "May," it says.

Mr. Holtzoff. Line 5.

Mr. Longsdorf. I might say that Judge St. Sure wishes that the rule might be made mandatory upon the judge to examine the jurors, with the provision that he may allow counsel to present questions to the judge or ask them himself. I am just telling you what Judge St. Sure said. I think "mandatory" is a pretty big word.

Mr. Robinson. What about line 5 there? Does that take care of the point you mention?

Mr. Holtzoff. Line 5 makes it mandatory.

Mr. Robinson. I am just asking him.

Mr. Longsdorf. No, but Judge St. Sure's idea was that it should be made mandatory on the judge to conduct the examination of the jurors and to permit, and so forth, as you have it here.

Mr. Holtzoff. Should not the "shall" in line 5 be changed to "may"?

Mr. Longsdorf. I think not.

Mr. Robinson. It is in the civil rules.

Mr. Holtzoff. Yes.

Mr. Robinson. What is the reason for the change here?

Mr. Holtzoff. Well, in the light of Mr. Medalie's suggestion that in the southern district of New York they do not

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permit counsel to participate in examination.

The Chairman. That is an exception.

Mr. Wechsler. Well, maybe they should. What is the situation on that point? The rules may be changed if there is a reason for it.

Mr. Holtzoff. I wonder if it is not a matter that could be left in the discretion of the court?

Mr. Youngquist. It is here.

Mr. Seasongood. No, it should not be.

Mr. Dean. Suppose the judge says, "You may not ask any questions," and he has not given a decent examination. I think there is a lot to be said for letting counsel go into the qualifications of the jurors.

Mr. Medalie. Of course, this is what you have.

Mr. Robinson. It says, "as it deems proper," line 7. That modifies "shall," does it not?

Mr. Medalie. All this to do about examining jurors arises out of what in some places is a terrible scandal. Now, in our state courts in criminal cases, this last one, the Solomon Mullens case, bribery of public officials, the judge allowed four days for the examination of jurors. Well, that is scandalous.

Some of our best judges in criminal cases in the state courts have allowed a tremendous amount of time for the examination of prospective jurors, and what is done really is not to inquire as to their qualifications or simply simple prejudices but really to harangue them and debate with them and argue with them as to how they would vote under certain conditions.

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Mr. Longsdorf. And insult them.

Mr. Medalie. Supposedly for the purpose of finding out whether they have prejudices. Now, as a matter of fact there never was any original right to examine jurors, and nowhere in any statute, unless in particular states--not in New York, not under the federal--is there any right to examine jurors. The right that is really given is a right to try a challenge actually made for bias or other disqualification. And originally you walked into the courtroom and you saw twelve people in a box; and if you had peremptory challenges allowed you, you would say, "I challenge number 2," and the other fellow
12 would say, "I challenge number 4." Out they go. Others come in. And if you had a challenge for cause you wrote it or, with the permission of the court, stated it. And then you could try the challenge usually by examining the juror on that issue, stating the challenge as for bias or other disqualification.

Now, there has developed out of that a habit of examining jurors in advance, and it has developed, except when restrained by a handful of judges, into this scandal of arguing with jurors and browbeating them and asking them a lot of nonsense.

I think it was Taft who decided to do away with that in the Federal courts if he could, and the rule has been adopted in many districts that the judge shall examine the prospective jurors, and counsel have the opportunity to submit questions to the judge which, if he thinks them proper, he asks the jurors.

Now, on occasion, in important cases, the judge will turn to counsel and say, "You gentlemen are experienced, know the limitations the court has in mind. Will you proceed to examine the jurors?" And with that restriction the examinations are

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brief. After the court is through examining, if counsel have not been accorded the opportunity to examine, additional questions will be suggested orally to the judge, facing the jurors, and to get your answer, but this has cut down very materially the time that it takes to impanel a jury.

The Chairman. Mr. Medalie, I do not think that even exists in any place except New York City.

Mr. Seasongood. I was going to say, it does not take any time with us.

Mr. Medalie. Well, it should not. I think it is outrageous, and it ought to be met either by rule or by the proper exercise of judicial control in those examinations.

Mr. Youngquist. We have that here, Mr. Medalie: "In the latter event, the court may permit the defendant or his attorney to supplement the examination by further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions," and so forth.

Mr. Medalie. I know, but what troubles the bar and those who wish to conform to decent rules and who would not abuse the right to examine jurors is that the court under this rule is not compelled to allow the attorney even the briefest examination of a juror.

Mr. Seasongood. That is not the way it reads.

Mr. Medalie. I think that is how it reads.

Mr. Youngquist. Yes.

Mr. Dean. This first sentence here reads he "may."

Mr. Youngquist. "may" or "shall"?

Mr. Dean. May do one or the other.

Mr. Seasongood. It says may do one or the other. "In the

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latter event, the court shall permit the defendant or his attorney or the attorney for the Government to supplement the examination."

Mr. Dession. By such further inquiries as it deems advisable. That might mean none.

Mr. Medalie. It is only a supplementary examination at most.

Mr. Dean. The court has one of two choices, as I see it: one, to examine the jurors, or, the other, to let the attorneys do it.

Mr. Crane. No, but he may do it himself and then permit some additional questions by the attorney.

Mr. Dean. Suppose the attorney's original decision was urging him to do it himself.

Mr. Crane. Well, then after he gets through he may, I take it--and that is the practice--permit other questions that are suggested by the lawyer and either put those questions himself or permit the lawyer to put them. Over in the southern district I think they do permit other questions. Judge Byers, who was trying that conspiracy case, does it all himself; he will not let anybody. Some of the other judges, when they get through, as you suggest, say, "Would you like to ask some questions?" You ask them or the judge asks them.

Mr. Youngquist. Very little of it.

Mr. Medalie. Very little of it.

Mr. Crane. Very little, but I suppose that is covered here.

Mr. Youngquist. That is exactly what this provides.

Mr. Crane. I think so.

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Mr. Crane. I think so.

Mr. Medalie. Well, of course you have no alternative. "In the latter event,"--that is, after the court itself conducts the examination--"the court shall permit the defendant"--and so
13 forth--"to supplement the examination . . . or shall itself submit to the prospective jurors such additional questions of the parties or their attorneys as it deems proper."

Mr. Youngquist. That is right.

Mr. Medalie. In other words, under the rule as at present drawn, if the court chooses, counsel just does not open his mouth in the impaneling of the jurors except to suggest something to the judge, if we want it that way. I have been able to get along, and I have tried some pretty long cases, and I have been reasonably satisfied with the kind of jury I got under that condition, but I think many lawyers just do not like it.

Mr. Crane. I think it is a pretty good thing as it is.

The Chairman. As a matter of fact, I am told that the district judges follow very largely the practice in the state courts, and if the state court system is working so a jury can be drawn within a half hour, they let counsel go ahead and ask the questions.

Mr. Medalie. Not in the southern district of New York, and materially not in the eastern district of New York.

The Chairman. I know; that is an exceptional situation. I was surprised by the great difference in the extent of the judges' questioning. For example, I was complaining one day to Judge Orie Phillips that in a civil case I had only three challenges, and he quite vehemently said, "That is ample."

I said, "I cannot see that."

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He then developed in a discussion that in the Tenth Circuit when the judge questions a jury he not only asks them general questions such as, "Do you know the plaintiff or the defendant?" but, having a list of witnesses, asks them if they know any of the witnesses who are going to be called. So when he is through there is really very little; and if they answer they do know them he excuses them. So when he is through with that kind of thoroughgoing talking to the whole jury you rarely have a need for more than three challenges; but if the judge in his examination only asks judicial and superficial questions, three challenges may be utterly inadequate.

Now, where there is such a variance I do not see how you can do anything better than set up some general rule like this and trust that the judge will conform himself to the necessity of the practice as he finds it in his district. This rule was made on the civil side to bring New York into line.

Mr. Crane. The abuses there were terrible.

The Chairman. And still are in the state courts, as I understand it.

Mr. Medalie. In criminal cases. They are terrible.

The Chairman. Well, to some extent in civil cases.

Mr. Medalie. Now, that does not mean that you ought to go to the other extreme. The bar is willing to conform to anything within reason, without being pushed to this extreme where nothing may be asked.

Mr. Longsdorf. Mr. Chairman, may I add for your information, I attended the Ninth Circuit Conference, on which one whole day was spent in discussing proposed rules, and we should have had a transcript of that, but for some reason they did not

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get it; it was supposed to have been filed with Mr. Chandler's office, but it does not appear to be there.

Now, there was a considerable amount of discussion on this very subject. All I can do is sum it up. The district judges of the Ninth Circuit were nearly all there, and they were in agreement that the judge should conduct the examination of the jurors and allow counsel to ask questions, the judge approving them. I know that the same practice is followed in the state courts in California, and I know the abuses were terrific before it was passed.

Mr. Seasongood. Mr. Chairman, I move to strike out in lines 7 to 9 the words "or shall itself submit to the prospective jurors such additional questions as it deems proper."

Mr. Dean. I second that motion.

Mr. Seasongood. I feel, Mr. Chairman, that the right to ask a juror questions yourself is a valuable right. I have seen it happen in a number of cases where you ask a general question to all the jurors, "Do you know the defendant?" They do not say a word. On the other hand, if you look them in the eye and say, "Do you know them?" or any other similar question, they sometimes say they do; and in the ordinary cases, certainly where I have practiced, the impaneling of a jury is not a long process, because if a lawyer has any sense he does not ask any more questions than he has to, because he is very apt to get their ill will.

14 I think in the interest of expedition it is very poorly served and used if it prevents your ascertaining--and certainly in a criminal case--if a juror has any particular prejudice, which you can find out by looking at him when he answers you.

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Now, the court can limit that; you may not ask or may not go to extremes, but let the court clear the way as much as possible by asking a few general questions, and then let the counsel have reasonable opportunity to ask questions themselves, and the court can control it, certainly, if that thing is abused.

Mr. Youngquist. I think that would answer the proposed rule entirely.

Mr. Seasongood. Well, it is the practice.

Mr. Youngquist. Because even when the attorneys themselves make the examination the court may limit the inquiry as it deems proper, in the language used in line 7. He has that right now to limit it; and if the motion is carried he may do one of two things: he may permit the attorneys to conduct the whole examination or he may make an examination himself and then turn the attorneys loose. His only control over the attorneys is to limit the inquiry to such questions as he deems proper. Well, he has got that very right, even though he does not impose himself at all. So that if we are to have anything with regard to that I think we must keep the entire provision as it is.

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I spent one solid week in examination of jurors in the state court in Minnesota.

Mr. Crane. Well, when I got a jury in the Thornton Jenkins Hains case I was criticized because we got the jury in a murder in the first degree case, with 60 reporters present and I do not know how many jurors called, in a day and a half, and I did it by sitting late at night until I tired the attorney for the defendant out. They were drastic measures and of course might have been subject to error, but they used to take two and three weeks. The Thaw case was a

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different case, and so are other cases in our state, which ought to make a shame at the trials, and this perhaps goes too far, but it does correct an abuse. That is very very necessary, and as long as the judge has got discretion I should think we ought to permit him to ask the questions. That is all we could expect.

Mr. Seasongood. If he has discretion he may say, "I am not going to let the counsel ask any questions at all."

Mr. Crane. They do it now. I think Judge Byers did that.

Mr. Glueck. Well, then substitute "and" for "or" if that is your fear: I mean, that he may not let counsel do it at all.

Mr. Medalie. Now, you have another situation here. This is a provision for the examination of jurors, and your provision for challenges does not say a word about challenge for cause. Now, I assume a provision can be made for that and for the trial of those challenges. No judge is in a position to try a challenge interposed by counsel on either side and ask the proper questions, and you cannot provide that in advance. Now, in challenges for cause I think a lawyer ought to have a right to try that challenge.

Mr. Holtzoff. Does that often arise?

Mr. Youngquist. Who ought to have the right?

Mr. Medalie. The lawyer who interposes the challenge for cause.

Mr. Dean. He certainly ought to be able to ask the questions.

The Chairman. Well, he is the only one who effectively

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can do it.

Mr. Medalie. Yes. Now, there is no provision here for either challenges for cause and no provision of course, for that reason, for the trial of a challenge by questions by counsel or cross-examination by the other.

Mr. Holtzoff. Well, actually does that frequently arise, that you have challenges for cause?

Mr. Youngquist. For cause, yes.

Mr. Medalie. Now, what really happens is this. The reason why these long examinations take place is for the purpose of finding, if you can, a basis for a challenge for cause. Sometimes it appears that there is a basis for it. Then you inquire further. If it should appear by the questions
15 of a judge or, if he allows it, by the questions of counsel, that there is a basis for a challenge for cause or for further inquiry to determine whether there is any such basis, counsel ought to be permitted to ask those questions and press it.

The Chairman. Is it not a further fact, Mr. Medalie, that one reason that those objections are not pressed in court is that not one lawyer in twenty knows how to conduct such an examination of a juror?

Mr. Medalie. That is true. Most lawyers do not know how to conduct those examinations.

Mr. Crane. There is no question about that--any more than they know how to cross-examine them.

Mr. Youngquist. Well, I was assuming that there would be provision for challenges for cause somewhere.

Mr. Medalie. Now, there is another thing in here, if I can mention that.

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Mr. Robinson. Under the civil rules I suppose it is understood--

Mr. Medalie. (Interposing) Mr. Chairman, there is something else in here. You have changed the law as to the number of peremptory challenges.

Mr. Robinson. That is on the recommendation of a great many lawyers.

Mr. Medalie. Yes. I know it is. It is six for the government and ten for the defendant.

Mr. Robinson. Well, it varies. The challenges now are in treason and capital cases 20 for the defendant, six for the government; any other felony, 10 for the defendant, six for the government.

Mr. Medalie. That is right.

Mr. Robinson. All other cases, three for the defendant and three for the government: any other, equality of challenges.

Mr. Medalie. I mean outside of capital cases it is six and ten.

The Chairman. Now, gentlemen, we have Mr. Seasongood's motion pending on the second clause of the second sentence, beginning at the end of line 7 and running through to the end of the sentence on line 9. Is there any further discussion of that?

Mr. Holtzoff. What is that?

The Chairman. The motion is to strike beginning with the words"or shall itself" at the end of line 7, running through to the end of the sentence. Is there any other discussion? If not, all those in favor of the motion will say aye.

(There was a chorus of ayes.)

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The Chairman. Opposed, no.

(There was a chorus of noes.)

The Chairman. The chair is in doubt. All those in favor of the motion will raise their hands.

(There was a show of hands.)

Mr. Holtzoff. Six.

The Chairman. Opposed.

(There was a show of hands.)

Mr. Holtzoff. Seven.

The Chairman. The motion is lost, six to seven.

Mr. Medalie. I am reminded of a very prominent trial lawyer who challenged for cause. He thought he had cause. He sat down and did not ask any questions of the jury, and the eleventh juror said, "Mr. Ridgeway, you have not asked me whether I know the counsel for the plaintiff."

The lawyer said, "Well, do you?"

And he said, "Yes, sir."

The lawyer asked, "Do you know him very well?"

"Intimately."

And the lawyer sat down. The juror got up to go out, and Mr. Ridgeway said, "Keep your seat. Would to God I could get 12 men who know him."

Mr. Seasongood. Mr. Chairman, is it necessary to have anything in that jurors may be sworn on the voir dire? I just present that for debate.

Mr. Dean. I hate to see this--

Mr. Youngquist. On the voir dire?

The Chairman. I think we should even though it is not

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in the civil rules. I mean I think if it is not here we are going to have a lot of lawyers over in Congress looking for it.

Mr. Dession. I do not see why they should not be. Do you?

Mr. Youngquist. They ought to be.

Mr. Seasongood. I think they ought to be automatically, because if either party requests it he is at a little disadvantage sometimes. Why should they not be sworn automatically on the voir dire?

Mr. Youngquist. Well, was it intended by the civil rules that both should be prohibited?

The Chairman. No.

Mr. Seasongood. Our state practice is that they are only sworn on a voir dire if the person requests that they be sworn. Otherwise they are not.

Mr. Holtzoff. Not everywhere.

Mr. Seasongood. No. I am just mentioning what the Ohio practice is.

Mr. Youngquist. In our state they are sworn as a matter of course. It may be that the practice is so well established that they thought it not necessary to set that forth in the rules.

Mr. Seasongood. No, it is not.

Mr. Youngquist. I think we ought to put it in.

Mr. Robinson. All right.

Mr. Dession. It is done in a great many districts now automatically. I think we ought to do it. We do not want perjury there any more than anywhere else.

Mr. Robinson. Is that in Ohio they are not sworn?

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Mr. Seasongood. They are not sworn unless somebody asks for it. The state statute says that either party may ask that the jurors be sworn touching their qualifications.

Mr. Dession. That brings up another point. I do not think any attorney should have to request such a thing in the presence of the jury.

Mr. Seasongood. Well, that is what I was going to say, that it should be automatic.

Mr. Youngquist. Yes, it should be.

Mr. Seasongood. Rather than having to have them request it. It does not take a minute.

Mr. Youngquist. It may be very important.

Mr. Seasongood. Yes, I think so.

Mr. Dession. Well, one other point on that, Mr. Chairman: When the challenges for cause are taken care of I think we ought to make sure that those challenges do not haveto be made in the presence of the jury. I do not know how often that is done.

Mr. Medalie. They always are.

Mr. Youngquist. Yes.

Mr. Dession. Well, I have been in some courts where they did not have to do it in the presence of the jury.

Mr. Medalie. Really?

Mr. Dession. I think this is a great deal better. There is a stated penalty on making one, if you ~~read~~ for it.

Mr. Medalie. Very rarely is a juror challenged for cause if there are no peremptory challenges left.

The Chairman. Not only because of the effect on the individual juror but the effect on your whole group.

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Mr. Dession. Why should it not always be in chambers or the library?

Mr. Seasongood. Except that you have to send the jury out and bring them back again, and all that.

Mr. Holtzoff. Should not that be left to the discretion of the judge, in local practice?

Mr. Seasongood. Going in and out a number of times.

Mr. Robinson. Parading.

The Chairman. They are often challenged that way, are they?

Mr. Seasongood. Sir?

Mr. Holtzoff. I think challenges for cause are very rare, anyway.

Mr. Medalie. No, it develops that there is something about the juror, his connection with a witness, his connection with some--

Mr. Holtzoff. (Interposing) Yes, but you generally excuse him by consent under those circumstances.

Mr. Dession. Well, there is another advantage of doing it outside the jury's presence, I think. You can go ahead and get a more full and thorough discussion of the juror, if you are awake.

Mr. Medalie. You step up to the bench, and the stenographer comes over and begins recording what you are whispering to the judge.

Mr. Seasongood. I think that is horrible. I think all that kind of stuff creates the worst impression on the ordinary person, to have everybody go up and have that hush, hush, hush around with the judge. They think you are fixing up something

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in the trial. I think that whole business ought to be abolished.

Mr. Youngquist. In our state you interpose the challenge for cause openly in the presence of all the jurors and then go on with the examination to establish the cause.

Mr. Medalie. You mean you challenge them before you have cause?

Mr. Youngquist. No.

Mr. Medalie. But you challenge them for cause?

Mr. Youngquist. We permit the preliminary examination for the purpose of determining whether there might be grounds for the challenge for cause, and then we interpose the challenge for cause and either submit the challenge on the answers that have already been given or ask further questions.

Mr. Medalie. Well, that is the draft rule in New York and other states.

Mr. Youngquist. But we were somewhat puzzled about the absence of provision for challenge for cause in the civil rules,

17 which these follow.

Mr. Holtzoff. Well, maybe you ought to have a separate paragraph.

The Chairman. Well, we have agreed on that.

Mr. Medalie. Yes.

The Chairman. That we are going to cover challenges for cause and examination of the jurors in the voir dire.

Mr. Holtzoff. I should like to ask a question about the sentence beginning on line 9. That is not in the civil rule?

Mr. Robinson. That is right.

Mr. Holtzoff. Now, beginning on line 14 you provide for the removal from the jury at any time if it appears that the

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juror has made a false or misleading answer.

Mr. Robinson. Yes.

Mr. Holtzoff. Now, what puzzles me is, What effect will that have upon a plea of former jeopardy in case you try--

Mr. Medalie. (Interposing) Contempt?

Mr. Holtzoff. No, no. In case you try the defendant again, that would result in a mistrial, would it not?

Mr. Medalie. No. If the defendant asks for a mistrial, there is of course no jeopardy. If during the course of the trial it appears that the juror should not sit, you ask that he be thrown out and consent to go on with 11 jurors, and everything is all right.

Mr. Youngquist. If you do not consent and if the government asks that he be thrown out--

Mr. Medalie. Yes, the defendant must consent.

Mr. Holtzoff. But it does not say that.

Mr. Youngquist. And the defendant does not consent.

Mr. Holtzoff. That is what bothers me. It does not say "with the consent of the parties."

Mr. Youngquist. You are stuck with a juror who has given a false answer.

Mr. Medalie. Yes. Well, to begin with, I do not think that sentence is necessary.

Mr. Crane. Neither do I.

Mr. Medalie. I think that the courts have power to punish anybody who misleads the court.

Mr. Crane. Inherent power.

Mr. Medalie. Now, we had that in the Knapp case. When

that juror gave a false answer we did not find out until the jury disagreed, and found that he was interested in the case.

Mr. Crane. Surely.

Mr. Medalie. And Steve Callahan punished him for contempt.

Mr. Youngquist. And there is no question about that. We do not need it. What bothers me is that in case the juror is subject to removal from the jury it leaves you with 11 jurors.

Mr. Holtzoff. That is what bothers me, too.

Mr. Medalie. All right. Now,--

Mr. Youngquist. (Interposing) I do not think that ought to be done.

Mr. Robinson. That section provides for alternate jurors, you know.

Mr. Medalie. You do not always have alternate jurors.

Mr. Holtzoff. Yes, but that is only in big and long trials.

Mr. Medalie. But now look. Let us get this: The defendant is on trial with a jury of 12 and no alternates, and the trial has been going two or three days or two or three weeks. He discovers that there is a man on the jury who swore to get him and in answer to questions said nothing about it. Now, suppose you do not have a mistrial. You go ahead and get a conviction. That conviction ought not to stand. I think you will agree with that, will you not?

Mr. Holtzoff. Yes. But take the reverse situation.

Mr. Medalie. So what is the harm of kicking him off and getting a mistrial?

b11

Mr. Youngquist. This rule.

Mr. Holtzoff. I am bothered about the reverse situation, Mr. Medalie.

Mr. Youngquist. Yes.

Mr. Holtzoff. Suppose the United States Attorney discovers a juror who gave falseanswers that are prejudicial to the government?

Mr. Seasongood. Yes.

Mr. Holtzoff. Now, under this that juror can be removed.

Mr. Medalie. Yes.

Mr. Holtzoff. Now, I am wondering what effect that would have on a plea of former jeopardy if that is true.

Mr. Medalie. There has been a jeopardy; there is not the slightest doubt about it. The district attorney is stuck. He had better hope for a disagreement so he can try the case over again.

Mr. Holtzoff. Then should not this sentence be modified?

The Chairman. Would not the court have to declare a mistrial?

Mr. Medalie. No; you cannot declare a mistrial without the consent of the defendant.

Mr. Crane. You can never try him again.

Mr. Medalie. I think the solution of the whole business is to leave that sentence out and let the ordinary law take its course.

Mr. Youngquist. I second the motion.

Mr. Robinson. Let me ask about the Minneapolis case in this connection, the Foshay case, you recall.

b12

Mr. Youngquist. Yes, I was thinking of that. There a juror, a woman, was called as a juror. She testified she did not know the defendant, whereas in fact she had worked as a stenographer for him. That was discovered after the trial was over. I think there was an acquittal or a disagreement. She was prosecuted for contempt of court. I do not remember whether theproceeding was pushed to a conclusion, but it was concluded by the very unfortunate circumstance of this wife and her husband and twochildren placing themselves in a closed car, putting a hose on the exhaust pipe, and committing quadruple suicide.

Mr. Holtzoff. That case went to the Supreme Court.

Mr. Youngquist. Did it?

Mr. Holtzoff. And the conviction for contempt was upheld.

Mr. Robinson. Yes, her conviction was upheld, but the case was lost. She held out, you know, not to convict.

Mr. Wechsler. There was a disagreement.

Mr. Crane. C. C. A. reports it as a conviction.

Mr. Wechsler. There was a disagreement, and then there was a second trial and a conviction.

Mr. Crane. Yes.

Mr. Robinson. The second trial you are talking about. The first trial they lost out on; she was the one juror who held out.

Mr. Youngquist. Yes.

Mr. Robinson. Now, then, suppose the counsel for the state or the defendant find out that there is a juror who has made misstatements there. Is there nothing for counsel to do except just wait until the jury disagrees?

b313

Mr. Medalie. No, the defendant has no trouble. The government has a constitutional difficulty.

Mr. Youngquist. That is the point.

Mr. Crane. There is a very nice point coming up in that Solomon case.

Mr. Medalie. Oh, you mean Loft? Loft, a witness, getting sick?

Mr. Crane. Yes.

Mr. Medalie. Well, that is another case.

Mr. Crane. That may be technical.

Mr. Youngquist. Did you make a motion on it?

Mr. Medalie. Yes. I moved to strike that sentence beginning, "In the examination of prospective jurors," lines 9 to 16.

Mr. Youngquist. I second the motion.

The Chairman. Is there any discussion?

(There was no response.)

The Chairman. All those in favor will say aye.

(There was a chorus of ayes.)

The Chairman. Opposed, no.

(There was no response.)

The Chairman. Carried.

Mr. Medalie. Now let us know what we are deciding on number of peremptory challenges. It is proposed that both sides have the same number of peremptory challenges. It is proposed that both sides have the same number of peremptory challenges.

Mr. Robinson. Yes.

Mr. Holtzoff. Why should it they?

Mr. Medalie. I have no objection. I only want you to decide it. I want to know what you are deciding.

b14

Mr. Holtzoff. But I want to make it clear, though, that all the defendants together have the same number of challenges, and I think that sentence should be clarified. I think that is what it is intended to mean.

Mr. Medalie. If you have a dozen defendants, and some of them do not like some of the rest, their challenges are joint or total.

Mr. Robinson. Yes. The suggested amendment there would be in line 17, "to the defendant or defendants."

Mr. Holtzoff. Yes.

19 Mr. Robinson. "or to his or their attorneys."

Mr. Medalie. Well, now, that is one reason why the disparity in challenges ought perhaps to be maintained. Now, if it is a single defendant I am willing to agree that the number of peremptory challenges should be the same on each side; but if you have a number of defendants, particularly where they are represented by different counsel, I think that justice suggests that they have some extra challenges.

Mr. Robinson. Well, now, how many, Mr. Medalie? That is a practical question.

Mr. Medalie. Six to ten has been a workable thing; we have been working under that for years.

Mr. Holtzoff. Well, maybe we could keep that where there is more than one defendant.

Mr. Medalie. Yes, I think that would be fair enough.

Mr. Holtzoff. Provided where there is one defendant the number shall be the same.

Mr. Medalie. Yes. And also provide that challenges are joint and not several where there is more than one defendant.

b15

That is the language of the New York Code: challenges are joint and not several. Where it is a misdemeanor you have only three challenges.

Mr. Youngquist. Mr. Medalie, would not the possible causes of peremptory challenges by the government be multiplied by the number of defendants--friends, acquaintanceship, relationship, and all that?

Mr. Holtzoff. Those challenges would be for cause, would they not?

Mr. Youngquist. No.

Mr. Medalie. That is mathematical rather than real, is it not? The government has just one cause.

Mr. Robinson. I am satisfied that that objection will be raised whenever these rules come up for consideration at bar committee meetings or in Congress or elsewhere. Therefore I think this committee should do something about it.

Mr. Crane. What? Give the government the number of challenges of each defendant?

Mr. Holtzoff. No.

Mr. Robinson. If there are plural defendants.

Mr. Holtzoff. Not under the federal rule.

Mr. Crane. Oh, yes. I agree with Mr. Medalie.

Mr. Holtzoff. In the light of the reporter's remarks, I will bring this matter to a head. I move that this rule be modified so as to provide that in cases where there is one defendant the government and the defendant shall have the same number of challenges.

Mr. Medalie. I would suggest the minimum, not the

b16

maximum: six instead of ten.

Mr. Youngquist. In felony cases?

Mr. Medalie. Yes.

Mr. Youngquist. Misdemeanors?

Mr. Medalie. What?

Mr. Youngquist. Capital?'

Mr. Medalie. I know. Then you could disguise the limit in capital offenses, and you put the limit at 20. That is all right.

Mr. Holtzoff. And that in those cases where there is more than one defendant the number that now prevails shall continue; would that not be all right?

Mr. Medalie. That is six and ten, yes.

Mr. Holtzoff. Yes.

Mr. Robinson. Now, how is that? If more than one--

Mr. Holtzoff. I am not trying to phrase the exact wording.

Mr. Robinson. I know, but--

The Chairman. Six to six for one defendant; six to ten where more than one, and in capital cases--

Mr. Medalie. Capital and treason, 20 to a side.

Mr. Dean. Misdemeanors, three and three.

Mr. Robinson. What?

Mr. Dean. Misdemeanors, three and three.

Mr. Holtzoff. Yes.

Mr. Medalie. Well, that is misdemeanors not in the way in which it is defined in some of our statutes. Some of our misdemeanors carry three- and five-year offenses.

Mr. Holtzoff. Embezzlement from a bank is a misdemeanor.

Mr. Medalie. Is a misdemeanor. That is a five-year

b17

offense. You mean cases where the punishment is not in excess of one year?

Mr. Dean. That is right.

Mr. Medalie. Mr. Robinson?

Mr. Robinson. What is that?

Mr. Medalie. Misdemeanor in the sense that the punishment is not in excess of one year and a fine?

Mr. Robinson. Yes. That is the federal rule.

Mr. Medalie. Is it?

20 Mr. Dean. Now you are going to leave it, in the case of a single defendant in the action, three for the single defendant and three for the government?

The Chairman. Isn't that too little?

Mr. Dean. I think it is.

Mr. Robinson. That is in a misdemeanor case.

The Chairman. Yes. I mean, after all, being sent to jail for a year is not a light thing.

Mr. Robinson. Now we are amending the federal statute, of course, of 1911.

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Mr. Dean. We are doing that also in this draft.

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Mr. Orfield. Do you have challenge for cause?

Mr. Medalie. You do not get many challenges for cause that are ever sustained.

Mr. Youngquist. One reason for the delay in the state courts in examination is that there are quite a number.

Mr. Dean. Not on peremptories.

Mr. Crane. No, they put the juror in the witness box and keep him there for hours. Challenges never cause any trouble.

Mr. Robinson. They do in some states.

Mr. Holtzoff. They cause a great deal of trouble in some state courts.

Mr. Medalie. What about where you have several defendants?

Mr. Holtzoff. Yes.

Mr. Medalie. If you have 15 defendants you have 90 challenges?

Mr. Holtzoff. Yes.

Mr. Medalie. That is terrible.

Mr. Dean. I wonder if there is any way in which we can take care of that difficulty where you have several defendants. It certainly is a mess. I do not think there is any way that we can touch it.

Mr. Medalie. What about misdemeanors?

The Chairman. Six apiece.

Mr. Medalie. Six and six even with plural defendants?

The Chairman. Yes.

Mr. Medalie. There are few such cases ever tried. Most of the misdemeanors are like the food and drugs and migratory bird cases.

b2

The Chairman. Any other point on section (a)?

(There was no response.)

The Chairman. Let us take up (b), alternate jurors.

Mr. Medalie. There has been a change made in the alternate juror statute. The statute provides that alternate jurors stay in until the jury retires to deliberate. You have it here until the jury returns with its verdict.

Mr. Robinson. Yes.

Mr. Medalie. This is your problem: the jury retires and deliberates. Let us say it is out 12 hours. One of them gets sick or dies. Should you call back the alternate juror into these deliberations and start at the end instead of at the beginning?

The Chairman. I think you remember the case in which the Mayor and the Commissioners of Newark were tried and which lasted some time and after the jury retired and was locked up for 15 hours one juror developed an acute appendix. There were alternate jurors available.

Mr. Medalie. Let us see what you would do with the alternate. Twelve jurors have retired and are locked up. That means you sequester the alternate. They stay until the conclusion.

Mr. Holtzoff. Yes.

Mr. Medalie. That is simply boring to the two alternates.

Mr. Youngquist. If one of the jurors in the jury room dies, then you bring in the alternate?

Mr. Dean. The judge can do it, and then the juror takes up the deliberations from that point on, but he has missed the

b3

early discussion.

Mr. Robinson. He is in the custody of the marshal.

Mr. Dean. Would you not have a serious constitutional question there?

Mr. Robinson. The judge would decide it.

Mr. Dean. It seems to me that if you take the alternate into the jury room when you have 12 men then you have more than the 12 because you have a jury of 14 men or 12 men being influenced by the presence of two people who should not be in there. On the other hand, if you sequester them and bring one of them in later because of an accident or something he has then missed the early deliberation.

Mr. Medalie. He has not been present for the whole trial.

Mr. Robinson. Don't you think the decisions on the constitutionality of these alternate juror statutes are sufficient to take care of that?

Mr. Medalie. Do you have any cases which deal with that situation?

Mr. Robinson. Just the broad language.

Mr. Dean. Well, it is a technical objection.

The Chairman. There is one case in Mr. Orfield's state where there was a labor leader on the jury. He convinced them that the jury should organize and get together and elect him chairman. Then they had a secretary and then they agreed that the American principle of majority should rule, and as long as they got seven they were ready for a verdict. Then you would be in trouble.

Mr. Dean. The reason that I say that the cases to which

b4

he refers there are not applicable is because the alternate juror statute is really making for a jury of 14 men rather than a jury of 12 men. The answer of the courts is that there are just 12 people; it is true that you have two people inside the courtroom, but they are not participating in the deliberations and when they go into the jury room for deliberations then you have only 12 men. That is what I understand is the reply of the courts to the attack upon the alternate juror statute.

Here, however, you introduce a different thing.

Mr. Robinson. I would like to go still further into that law, but I might say this as a matter of personal conviction, that I have been thinking about this for many years. I happened to be on the committee appointed by the federal judge in Indianapolis to consider the civil rules, and this was recommended. The reason why it was suggested that the alternate stay when the jury begins deliberations is because that may be a time when they are needed, but I do think that it is a good plan to consider the constitutional question also.

Mr. Dean. Has any case ever decided the validity of the statute involving the constitution where an alternate juror was in?

Mr. Robinson. No, but I think the language of the decisions is sufficient, at least some of the decisions.

Mr. Dean. It may be.

Mr. Medalie. You have this situation in the event that you have two alternate jurors who do not go in. If you start with 12 and they retire to deliberate and one gets sick or dies, you have a mistrial. Now, the worst thing that could

b5

happen if we adopt the procedure that you have suggested is that if this is unconstitutional you would have another trial. I think that it is worth that risk.

Mr. Youngquist. That occurs to me in that connection, that you would go through another trial. If you have an alternate juror and send him into the jury room after one has become sick or died, a verdict will be reached unless the jury disagrees. The only thing that the alternate juror has missed is some discussion. He has heard all the evidence and the argument and all of the charge. He is as well fitted as any of the other jurors to decide the case. It seems to me that the fact that he has not been subjected for a time to the opinions and argument of the other jurors does not work any injustice either to the defendant or to the government.

Mr. Medalie. Are you arguing now for the constitutionality of this procedure?

Mr. Youngquist. I think we should do it, in view of the decisions.

Mr. Medalie. That is what I suggested, and if they hold it unconstitutional then we know that we cannot do it, but if they hold that it is then we have done something that is useful.

The Chairman. We can cite cases which have been carried along, because that has often happened and jurors got sick or died.

Any other discussion on this?

(There was no response.)

The Chairman. If not, we will take up Rule 48.

b6

RULE 48

Mr. Robinson. This refers to the Patton case, I think.

Mr. Glueck. Is there anything in here, Mr. Chairman, as to what kind of materials the jury may have with them in the jury room when they deliberate?

Mr. Medalie. You mean whether they can get the exhibits when they want them?

Mr. Dean. Before we discuss this matter, may I ask a question about the alternate jurors? Don't you change the law with reference to the number of peremptory challenges? My impression was that you had two challenges if you had two alternate jurors.

Mr. Robinson. Line 33, 34, and 35 states it as follows:

"If one or two alternate jurors are called, each party is entitled to one peremptory challenge in addition to those otherwise allowed by law."

Mr. Dean. If you have two alternate jurors shouldn't you have two peremptory challenges?

Mr. Medalie. I think there is no trouble about getting along with one challenge.

Mr. Dean. Is that the law now?

Mr. Medalie. Yes. It works all right now. No one has objected to it.

Mr. Dean. I just wanted to know whether we are changing the present law.

The Chairman. Is there any other question on Rule 48?

Mr. Seasongood. Just the question of phraseology.

Mr. Longsdorf. There is a case where they waived the

b7

twelfth juror because of the incapacity or death of him during the trial. Is that sufficiently included in the language of No. 48?

Mr. Seasongood. That is what I was going to say.

Mr. Robinson. Are you thinking of the Patton case, where a juror died?

Mr. Medalie. This sufficiently covers that.

Mr. Robinson. Yes.

Mr. Seasongood. The only question I have is "They may stipulate that the jury shall consist of * * *." That would be in the future. I think that they "may" stipulate before the trial or during the trial. Why keep the civil rule "shall"?

If it is not improved by it or if that is not the proper thing, leave it out. They may stipulate that the jury shall consist of any number less than twelve.

Mr. Dean. Haven't we covered that in this matter we discussed this morning with respect to what the Patton case provided with reference to waiver?

Mr. Seasongood. Is there any harm in saying "before or at any time during the trial"?

Mr . Medalie. Say before or during the trial.

The Chairman. We are only responsible for our part, but in the one court this may cast a doubt on the civil rules and they may say, "What do you mean in the civil rules?" Unless you have something definite, I do not think it would be wise, do you?

Mr. Medalie. I understand that without this rule that may be stipulated in federal cases.

Mr. Holtzoff. Yes.

b8

Mr. Medalie. So if that stipulation is made, the stipulation has this authority of stating the law and does not reduce in any way the extent of your principle.

Mr. Orfield. Why not go as far as the civil rules and provide for a less than unanimous verdict?

Mr. Burke. There is no Supreme Court case on that.

Mr. Orfield. You could do it.

Mr. Glueck. By stipulation?

Mr. Orfield. Yes.

Mr. Waite. I am in favor of this rule but I would like to voice my objection to the fact that these rules of criminal procedure follow the rules in civil cases.

Mr. Robinson. We do not follow them except where they are good.

Mr. Waite. I mean in their order. If for instance in Rule 39 is the provision about waiver of a jury, then you have a lot of extraneous matter and then Rule 48 in which you have a provision that a single juror may be waived. The logical thing to do would be to put all the rules with respect to the jury together.

Mr. Robinson. I do not know what the reason for this order is.

Mr. Dean. I move we strike out Rule 48 and incorporate whatever is in it in Rule 38.

Mr. Waite. Rule 39?

Mr. Youngquist. No, 38, isn't it?

Mr. Robinson. Yes, Rule 38.

The Chairman. On page 2.

Mr. Holtzoff. I second the motion.

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The Chairman. All those in favor of the motion say aye.

(There was a chorus of ayes.)

The Chairman. Those opposed.

(There was no response.)

The Chairman. It is carried.

Mr. Medalie. Are we going to make a provision for what the jury may take into the jury room with them in the way of exhibits?

Mr. Glueck. What is the present federal law on that?

Mr. Holtzoff. It is in the discretion of the court.

Mr. Youngquist. I think it is safer to leave it there.

The Chairman. Is it customary to take the exhibits in?

Mr. Medalie. If the jurors ask.

Mr. Crane. You have to have consent of the court.

Mr. Medalie. That is the usual thing. Counsel are consulted, but I do not know why they are consulted.

Mr. Holtzoff. I have heard of some cases of some requests being refused.

Mr. Crane. I do not think that the indictment is ever submitted to them.

Mr. Medalie. Yes, it is done in mail fraud cases where there are a number of defendants and the jurors cannot actually carry in their heads the number of defendants, and when that is done they read the indictment.

Mr. Dean. That is one place where there is no uniformity. It is a question whether we want to face the music and fix a rule one way or the other on it. What do you think of the whole idea?

Mr. Crane. I think it is a question for the court to see

b10

that nothing improper is being handed to them. I think it is possible to see and judge what is going to the jury so that nothing improper is slipped in by mistake or intention that really should not go to the jury.

Mr. Glueck. If we have a rule on that I should like to suggest this one whether the jury should be permitted to take notes during the course of the trial.

Mr. Robinson. It would be dangerous.

Mr. Glueck. I do not see why it is dangerous.

Mr. Robinson. That is the common law.

Mr. Dean. If jurors are allowed to take them they will go along and take them for the first few days. That is the government's case. Then they get tired. Then they get in the jury room and all they have with them are a few notes of the government's main witnesses and they bring those out and discuss them.

The Chairman. Isn't that taken care of by the courts? They could take down the pertinent dates and figures as a guide to their recollection and not let the jury do it?

Mr. Dean. I don't know.

Mr. Medalie. I have not seen it.

The Chairman. That is done quite often in our state courts when the trials will last over a week; not any shorter.

Mr. Medalie. A very distinguished prosecutor hit on the device of giving each juror a pad and pencil.

Mr. Waite. In a case in which I sat which lasted five weeks if I did not take any notes I would not know anything about it except perhaps a few bare facts.

b11

Mr. Dean. There is another possibility. I mentioned that other case facetiously, but you get a one-sided picture from these notes. You have a situation where one person who is a good writer will take the notes and the others will ask him, "What do you have on your slip?"

Well, he has got something, and they will take that. I think there is a danger of giving a one-sided picture for what is preserved in the notes.

Mr. Waite. My point wasthat I would have a one-sided picture if I could not take notes.

Mr. Seasongood. The judge can take that into consideration and charge the jury that the notes are evidence and they are not to be given too much weight. In a modern trial you have a great many issues and a great many facts to contend with.

Mr. Youngquist. I think you would get into trouble.

Mr. Holtzoff. I do not think it shouldbe mentioned in the rules.

Mr. Medalie. It is one thing for the juror to take down notes, but he does not get down a fair picture of the evidence. I think we can leave it alone.

The Chairman. I know that in one case one juror spent days taking the judge in various positions and making caricatures of him and distributing them to his fellow jurors.

Mr. Dean. I suggest we leave it out.

Mr. Medalie. I once asked a juror who spent quite some time writing in a little book. This was after the trial, and I asked him what he had taken down about the case, and he said he did not take anything, but every time he thought of something that he wanted to do or to make some telephone call or

b12

something about some business matter that he would write it down in the book. The attorneys were wondering what he was doing.

Mr. Seasongood. There was a very famous case of a judge who wrote quite industriously in a notebook. After the trial it was found out that all he wrote in the notebook was just "Patience, patience, patience."

May I ask with respect to 48 if you have adopted it as it is.

The Chairman. Substantially the same language.

Mr. Seasongood. I think that is the question Mr. Orfield made. That goes to the point I made and that Mr. Orfield made. That is, doesn't that mean they may only stipulate in advance of the trial, or may they stipulate at any time during the trial where one juror dies or is sick that they may go on with less than 12?

The Chairman. Why not cover that in an instruction to the reporter?

Mr. Seasongood. Well, that is in the civil rules.

Mr.Youngquist. It says that the parties may stipulate that the jury will consist of any number less than 12. In the civil rules it states:

> "That a verdict or a finding of a stated majority of the jurors shall be taken as the verdict or finding of the jury."

Mr. Seasongood. I understand that Mr. Orfield raised the question whether you could stipulate with a less number. If you can stipulate by complete waiver, why can't you stipulate

for a less number than 12 and say that the verdict of those shall constitute the verdict? Isn't it obvious that if you can waive a jury entirely you can waive a part of a jury?

The Chairman. Is that possible in a criminal suit, for a defendant to do that?

Mr. Dean. Yes, he did it in the Patton case against the United States.

Mr. Seasongood. That means that a stated majority of the jurors shall be taken as the verdict.

Mr. Robinson. I would assume that if you start with 12 jurors you stipulate that seven will control? I do not think that the Patton case establishes that.

Mr. Holtzoff. That is the only authority for a unanimous verdict of less than 12.

Mr. Dean. According to the Supreme Court a jury must consist of 12 members.

Mr. Seasongood. If you can waive the whole, you can waive a part, or a vote of a part.

Mr. Robinson. Can you say that if a jury of 12 goes into a jury room and then seven out of the 12 can control? Can you say that their votes shall control?

Mr. Holtzoff. Isn't it an academic question, because no defendant would ever stipulate to be bound by less than a unanimous verdict?

Mr. Youngquist. He may get it by the grapevine that it stands 7 to 5. He may want to avoid a long trial again and get it over with and he may be willing to take that majority verdict.

Mr. Seasongood. He may figure that it is better to take

b14

what happens than go through this thing again.

Mr. Orfield. I move we follow the ~~similar~~ civil rule.

The Chairman. To include the last two lines of the rule on the left-hand side of the page.

All those in favor of the motion say aye.

(There was a chorus of ayes.)

The Chairman. And those opposed.

(There was a chorus of noes.)

The Chairman. Let us have a show of hands from the ayes.

(There was a show of hands.)

The Chairman. And from the noes.

(There was a show of hands.)

The Chairman. The motion is lost.

Rule 49.

RULE 49

Mr. Robinson. This is merely a test for your opinions as to whether special verdicts and interrogatories are applicable in criminal cases. That requires an expression of your feelings about the matter.

Mr. Medalie. I move we strike this out.

Mr. Dean. I second it.

The Chairman. Is there any discussion on that?

Mr. Medalie. There is a state experience in New York. We have a special verdict provision in our code of criminal procedure, but that applies to a separate trial of an issue like former jeopardy. The judge makes the verdict. You cannot work it out.

The Chairman. That is your constitutional difficulty.

b15

Mr. Medalie. I think so. It is not necessary, and I think it is much better to get a general verdict than a special verdict. The jury has the responsibility for deciding a man's guilt apart from the mechanical facts.

Mr. Glueck. What kind of verdict can you get other than guilty or not guilty?

Mr. Medalie. You could say whether he had a pistol or not and whether there was a bullet in it and if it struck the defendant in the fourth rib and gangrene set in and that he died and that he knew it and intended it to happen and planned it five weeks. That is a special verdict.

The Chairman. Those in favor of the motion to strike it out say aye.

(There was a chorus of ayes.)

The Chairman. Those opposed.

(There were a number of noes.)

The Chairman. Two noes. Let us hear argument.

Mr. Waite. I would like to say that I think this procedure for special verdicts is very desirable under certain conditions, but not as a common thing, but only in certain circumstances.

Beginning with line 13, this particular provision seems to have cured a great defect in the pre-existing special verdict procedures by taking care of situations where some pre-issue of fact has not been submitted to the jury. That was the difficulty with the special verdict procedure. Now that is covered by this feature so there cannot be any defect in it, and I think that is a good procedure.

Mr. Holtzoff. Why doesn't this special verdict deprive a defendant of his right to a jury trial? He is entitled to have

the jury say whether he is guilty or not and not merely make a detailed finding of facts.

Mr. Wechsler. This procedure all comes back to the English law and practice in having the jury return special verdicts. It was the major way of reviewing questions of law in criminal cases. It seems to me to be a useful practice in cases where the law is complex and where the general verdict is not nearly as helpful as a recitation of the facts and the rest of the issues in the trial.

I do not think that anybody would want its use to be frequent, and I do not say that in its present form I would approve of it entirely, but I do think that some notion of reserving questions of law for appeal on review other than by the general verdict is desirable.

Mr. Holtzoff. Don't you do that by a motion for a directed verdict in Rule 50?

Mr. Wechsler. No, you do not, because you do not get the jury to resolve those issues. It may make all the difference in the world if you put those issues to the jury discreetly and direct their attention to them. If you ask for a general verdict you see what happens.

Mr. Medalie. The court alone can without the consent of counsel do that.

Mr. Robinson. I would like to get Professor Orfield's view on that.

Mr. Orfield. As I see it it developed historically in taking the power from the jury. The jury had too much power. That was one of the purposes in giving the power to the court.

b17

Mr. Wechsler. That is only one statement of the function. Didn't it also serve to facilitate appeal to a large number of judges at a time when there was no way to get that review?

The Chairman. Aren't you speaking of a time when there was no other way to get it?

Mr. Wechsler. I made the English point only to illustrate this idea. I do not think the reason for its development in England, or the major reason for its development, is applicable to us, but in reading these English cases I have been impressed by the way in which they proceeded to sharpen legal questions for the consideration of the Court ~~in~~ for crown cases, reserved.

Mr. Medalie. What was the form of special verdict?

Mr. Wechsler. It is a recitation of facts.

Mr. Medalie. A recitation of facts?

Mr. Longsdorf. Each and every fact in a crime?

Mr. Wechsler. Yes.

Mr. Medalie. Today we have perfected methods for raising any sound legal question in any criminal case.

Apart from the question you raised with respect to indictment, any competent counsel with a handful of prepared requests for instructions can sharply raise any issue relating to any criminal case. I am not talking about frivolous requests for instructions. I am talking about the essential points of the case.

You cannot cite a single exception where a flat question of law in any important phase of the case cannot be raised that way.

Mr. Wechsler. You raise a lot of legal questions today

b18

by questioning the sufficiency of the evidence to support a perfectly legal conclusion.

Mr. Medalie. But you have a verdict.

Mr. Wechsler. You have a general verdict.

Mr. Medalie. Then you have set forth every fact in the case.

Mr. Wechsler. Therefore what you have to do and what the courts must do is to cull the record to find if there is any substantial evidence to sustain your point.

Mr. Medalie. You must do that in any event for the purpose of determining whether the evidence sustains the verdict or whether or not the judge should submit the case to the jury.

Mr. Wechsler. But if the issue were discreetly submitted to the jury, the jury may find on that particular issue the other way, but the taking of the general verdict is to limit it and then you get this retrospective combing of the record.

Mr. Medalie. They can make a request for a special instruction.

Mr. Wechsler. You said yesterday that you had criminal cases adjudicated on an agreed statement of facts.

Mr. Medalie. No, I did not say that.

Mr. Youngquist. On a stipulation.

Mr. Medalie. I never give my facts away as easily as that. There would be no use in trying cases. There are certain facts that are stipulated; that is, that a particular document was signed by X or that B was to pay a certain amount of money on a certain day to C; or that the books of the corporation disclosed such and such an amount, and things of that sort; or that

b19

a company was incorporated on a certain date and that certain persons were directors of the corporation. They are usually things that the government would probably take two or three tedious days to prove.

Mr. Waite. I think that you are not exactly correct in saying that under that procedure questions of law can be raised under our line of procedure. I have in mind that a special verdict is sometimes markedly more accurate than a general verdict. In a case where the issue was complicated and where the emotional situation is extreme, a special verdict may definitely protect a defendant against an emotional general verdict on the part of the jury.

Mr. Medalie. Well, I think if the jury is so influenced by emotion then the form of the verdict may not make much difference.

Mr. Waite. That is not true. They may often find a general verdict of guilty, but when they are asked to find a special thing and state particular facts they won't find facts contrary to the evidence.

Mr. Medalie. This really does not help that situation at all.

Mr. Waite. We should give the judge the power to require it in situations where it is desirable. I would like to see the defendant or the prosecutor have a special verdict in cases where they want them. I think it should be left to the discretion of the judge. I assume that it would be very rarely used.

Mr. Medalie. Let us see what may happen in the course of the next two or three years. Suppose we get into this war.

b20

Suppose the sentiment begins to run high against the Vallandighams?

Mr. Waite. Against whom?

Mr. Medalie. Against the Vallandighams, against the dissenters, people who make speeches.

That is all they need do to make sure these men are taken care of, namely to submit questions for special verdicts. I may dislike Vallandighams, and they won't like them when that is a good reason for protecting them.

Mr. Waite. That is my point, that if you leave it to the jury on a general verdict that is what you will get, but if you require findings of fact specifically, the jury will be called upon to decide those facts more specifically so that you will get a more proper verdict than guilty just on emotion.

Mr. Crane. May I say a word here? This bears upon the whole jury system. It is an outlet for the expression and feelings of the American people which prevents us from breaking out or breaking up. Suppose juries are not always logical and their verdicts may be contrary to the evidence, yet we like the jury system. You may go before a judge, and judges are just, but the jury system is an outlet and that is the reason why we have the jury system instead of the judge. The judge is fair; he is just; he is trained to look at the facts and make logical conclusions and to weigh the evidence. Juries may not do that, but the jury system is a great outlet in America. We may find fault with it, and the prosecutor may find fault with it, and we get absolutely disgusted sometimes with the stupidity of juries. The jury system is good even with its faults and because of its faults.

b21

Just to give an illustration, when I was prosecutor in Kings County we had to enforce a liquor law, not the prohibition law, but a law closing stores on Sunday and they had to close at 12 o'clock. One Sunday a person went to a place where there was a saloon and asked the man to open it up. It was closed and he called to the owner to come down and open the place and get hima bottle of brandy because his child had heart trouble, and the doctor said he had to take it. Well, the good-hearted Irishman went down and opened the saloon and gave him the bottle of brandy, and he paid for it and went away.

The officer arrested him and we had an assistant prosecutor try the case, and the jury came back and brought in a verdict finding the officer guilty. (Laughter.)

Now then, they had to say something; they just could not stand there and not say anything. That just illustrates that the juries sometimes do things that are not logical and are not perhaps right, but these things arise, nevertheless.

Of course, we have to prosecute and we have to carry out these statutes. We do the best we can and then leave it to the jury. That is the reason why we have juries, and I think it is the jury which has been the bulwark of liberty sometimes in spite of government.

I think that for that reason a verdict of guilty or not guilty as the jury thinks best is about the best we can do. The juries are taken from the people, and in most cases they know the people.

The Chairman. Do we adjourn now?

Mr. Crane. I was just warming up.

Mr. Medalie. Are we going on tomorrow?

b22

The Chairman. Yes.

Mr. Seasongood. How about Thursday?

The Chairman. I think we can tell tonight whether we will finish tomorrow.

(Thereupon, at 4:35 o'clock p. m., a recess was taken until 8 o'clock p. m. of the same day.)

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NJC

NIGHT SESSION

The proceedings were resumed at 8 o'clock p.m., at the expiration of the recess.

RULE 50

The Chairman. All right, gentlemen. Rule 50.

Mr. Seasongood. Mr. Chairman, before we leave the question of the jury, ought there be anything in the rules regarding polling the jury?

The Chairman. Should there be anything regarding polling the jury?

Mr. Medalie. I suppose there could be. It is the most futile thing I ever saw.

The Chairman. The only time I saw it do anything was once when juror No. 5 said, "Yes, we find him guilty because he is a so-and-so." That is the only time I have ever heard any variation, because he could not restrain himself.

But do you think it is worth anything?

Mr. Seasongood. It is a right that is secured in our state practice to any party.

The Chairman. I suppose it is a thing that every judge would do on request, without a doubt.

Mr. Youngquist. I think we could safely leave it to them.

Mr. Robinson. It is a well-established common law procedure.

Mr. Longsdorf. How did it originate in the first place?

Mr. Youngquist. Some suspicious defendant, I suppose.

The Chairman. Wasn't it the object on the part of the Crown to lay the basis of an action against a juror for having reached an improper verdict?

Mr. Longsdorf. I have a faint recollection it was some

such occult as that.

The Chairman. If it is worth anything I think we should put it in.

Mr. Medalie. I was just looking through this very elaborate New York Code of Criminal Procedure. I do not find any provision in here for polling juries.

Mr. Youngquist. I am quite sure we have no such provision in the Minnesota statutes, but it is common practice.

Mr. Crane. I suppose it means that a judge can ask each juror if that is his verdict, so as to be sure they understand what they have done.

Mr. Seasongood. Yes. Any party can ask if that is what they say.

Mr. Crane. Yes. They ask if "That is your verdict," and they take their answer to it, just to make sure it is unanimous; but I should think it was in the power of the court to find out if that was the verdict of all the jurors anyway.

The Chairman. I see no objection to it if anybody thinks it will be of any assistance.

Mr. Youngquist. Well, I should not suppose there would be any need of it, because if anyone wants a poll the judge certain would poll the jury.

The Chairman. The question which is up, gentlemen, is, Shall we have a provision concerning polling the jury?

Mr. Seasongood. Well, let the reporter consider it and see if he thinks of any reason why it should be and if it is contained in any of the state codes.

The Chairman. We will make a note for the reporter to see if it is a common procedure in the code.

Mr. Orfield. It is covered by Section 336 in the American Institute of Law Code:

"If any juror announces that the verdict as declared by the foreman is not the verdict agreed on or that it was not concurred in by the required number of jurors or that he no longer concurs in it, the court shall cause the jurors to be asked severally if it is their verdict. If the required number answer in the affirmative, the verdict shall then be entered of record and the jury retired from cause. If the required number do not answer in the affirmative, the court may direct them to reconsider their verdict. In any case the court may, on its own motion and on motion of either party, poll the jury."

According to the commentary, something like ten States have that in their statutes.

Mr. Holtzoff. Isn't that inherent?

Mr. Daan. Why do we need a rule to poll a jury?

The Chairman. That is the question which has been raised.

Mr. Seasongood. There is apparently no Federal statute containing that, and they seem to have statutes in a number of States. I do not know whether it is necessary.

The Chairman. Suppose we have a further check made on that by the reporter.

Mr. Longsdorf. Mr. Chairman, I did not understand, when we left here at the last session, whether Rule 49 on special verdicts was retained or discarded.

The Chairman. It was voted down, and then the chair

asked Mr. Orfield and Mr. Wechsler to elaborate their views for information.

You did not discuss that, did you, Mr. Waite?

Mr. Waite. I said a word. I do not know whether you would call it discussing it.

The Chairman. I did not think you were in the negative on that point.

Mr. Waite. Yes.

The Chairman. All right, then, Mr. Waite. Pardon me for overlooking you.

Rule 50.

Mr. Robinson. The present Federal law has been changed by a Supreme Court decision as recently as 1940. Mr. Strine supplied me with this memorandum:

"The rules have been repeatedly stated that a defendant waives a motion for a directed verdict made at the close of the Government's case by introducing evidence in his behalf and failing to renew the motion at the close of the entire case; that where no motion is made for a directed verdict at the close of the whole case defendant may not raise the sufficiency of the evidence after verdict; and that in the absence of an exception the denial of a motion for a directed verdict at close of whole case may not be ~~renewed~~ reviewed on appeal. The Circuit Court of Appeals for the Ninth Circuit announced and followed these rules in Hemphill v. United States, 112 Fed. (2d) 505, and Sheridan v. United States, 112 Fed. (2d) 503,(1940). But both of these cases were reversed by the Supreme Court and remanded (per curiam) with

directions to consider the sufficiency of the evidence to

2 support the verdict."

That was Hemphill, 61 Supreme Court 729, and Sheridan, 61 Supreme Court 619.

In the Sheridan case the Solicitor General confessed error.

It seems, then, that if the defendant moves for a directed verdict at the close of the evidence by the Government and then goes ahead, when the motion is overruled, offers his evidence, and then fails to move for a directed verdict at the close, he is not thereby cut off from the advantage that he otherwise would get if he were to renew it.

Now, that is the rule. I do not know what you consider to be its relation to the new decision. I do not think it makes the rule unnecessary. I notice it follows exactly the civil rule on the subject.

Mr. Wechsler. Well, has the problem that arose in the civil procedure and to which this rule was addressed originally in criminal cases, to wit, the problem of the motion for direction constituting a waiver of jury disposition, which is really what it amounted to, come up? The old procedure was that when the plaintiff and defendant both moved for direction there might be lost the opportunity to offer a defense. Now the Government cannot move for a direction, and therefore I question whether this provision has any point in criminal procedure.

Mr. Robinson. I think that is probably true.

Mr. Crane. That is my idea. I do not see any necessity for it.

Mr. Holtzoff. Doesn't it have an office, because it goes to a different point, Mr. Wechsler? Namely, whether by moving for a directed verdict at the end of the prosecution's case the defendant waives the right to offer evidence on his behalf.

Mr. Wechsler. Has it ever been suggested that he does?

The Chairman. That is the law in New Jersey.

Mr. Dean. In a criminal case?

The Chairman. Yes.

Mr. Medalie. And applied by Federal judges in New Jersey to criminal cases there.

Mr. Crane. If he moves for a directed verdict at the end of the People's case, he cannot offer evidence.

The Chairman. He cannot offer evidence unless the court grants permission, and it is within the sole discretion of the court.

Mr. Medalie. Did they ever get away with that in a Federal case?

The Chairman. Certainly. Judge ~~Ralstead~~ Kellstab did it.

Mr. Medalie. I had an experience with him in 1920. He said, "Of course, I deny your motion, but you may offer evidence for the defense."

The Chairman. If he thought that the man was guilty and it was just a waste of the defendant's time, he would deny the motion.

Mr. Medalie. Did the Circuit Court of Appeals ever sustain that?

The Chairman. I do not know that it went up to it.

Mr. Dean. I noticed an approved form in one of the Circuit Court of Appeals in which it appeared that the defendant prayed

for leave to put on his case after making the motion. First he asked for that leave and then asked the court to direct the verdict.

The Chairman. I believe that is the law in Delaware as well.

Mr. Crane. If that is so, you had better have it in there.

Mr. Wechsler. Should there be an additional provision which incorporates the rule of the Hemphill case that the motion need not be renewed at the end of the whole case, having been made at the end of the prosecution's case?

Mr. Dean. Why should the motion be renewed?

Mr. Youngquist. You may have quite a different case at the end of the defense. You may have a stronger case because of the cross-examination of the Government.

Mr. Wechsler. I take it that the point of this provision comes to this. At the end of the whole case, whether the defendant makes a motion or not, the court is obliged to determine that the evidence is sufficient to go to the jury.

Mr. Youngquist. But there is no motion.

Mr. Wechsler. Even in the absence of a motion. That is the effect of these decisions.

Mr. Crane. I think so. I think it is entirely different from a civilcase. If on the evidence there is no crime that has been committed, why should the court say the lawyer waived anything because he failed to make a motion?

In a civil case they both move for a directed verdict, the judge pronounces what he would do, and he decides the case.

Again, in a close case they use it in the courts and say

that the defendants admitted that there was an issue of fact for the jury. It does not make any difference in a civil case, but I do not think you should send a man to jail when the entire record fails to show the commission of a crime in the estimation of the appellate court. If that is so, it seems it was not to be so, because you are going to take the failure of the defendant's lawyer as a substitute for evidence.

Mr. Wechsler. These rules all have their meaning in the exceptional cases where the defendant is represented by exceptionally inept counsel, and the question is to what extent should he be penalized for that, particularly when he may not have chosen his lawyer but had him assigned by the court.

I think it would be a feasible thing to incorporate two principles into Federal criminal procedure; first, that at the end of the prosecution's case the judge as a matter of judicial duty should consider whether the evidence makes a prima facie case and should throw it out if it does not. Most judges would do that, anyway. Second, that at the end of the whole case he
3 should consider whether there is a case for the jury, and should throw it out if there is not, and that regardless of whether the motions were made.

Such a provision would be carrying the view that is taken with reference to exceptions one step further, but I think it would be sound and would eliminate a little bit of motion that is mere technicality.

Mr. Medalie. I think it ought to be possible to review, without any hocus-pocus or gibberish, the sufficiency of evidence so long as there is a judgment declaring a man guilty after a trial.

Mr. Wechsler. I agree.

Mr. Medalie. Whether or not a motion was made at the close of the Government's case or noted at the end of the entire case or whether anything was mumbled. If there is a judgment saying the man is guilty after a trial, he shall have the right to review that.

Mr. Crane. It is not much different than the sufficiency of the indictment, and that can always be raised, even after verdict.

The Chairman. I really do not see why it is asking too much for defendant's counsel to get up and say, "We move for a directed verdict on the record," and give the court -- he is certainly entitled to be aided by counsel -- the benefit of his view.

If the defendant's counsel has not enough confidence in the fact that the prosecution has not made out a case to make that formal motion, I do not see why we should put the judge right out on the spot and put him in the position where some appellate court, with perhaps a slightly different philosophy as to this particular crime, may reverse him because they do not like his social value.

Mr. Crane. Your associations have been such that, of course, they have not brought you in contact with a lot of counsel who, according to our rules, may be assigned because the poor fellow has not got the money to get counsel. You would not wonder why they had forgotten anything, and many of them are very nice young men, but they are not quite familiar with the procedure and they go into these cases for the first time, at the beginning of their career, and they get rattled.

The Chairman. I do not see how they could forget to do that any more than forget to put their neckties on.

Mr. Crane. Some of them do not have neckties.

Mr. Medalie. In some cases the judges see to it that no case goes to the jury if the evidence is insufficient. That is the determination he is bound to make in a criminal case, regardless of whether formalities are mentioned with regard to calling his attention to anything. The only formula you need is, "I move for a directed verdict on the ground that the Government has failed to prove the case charged in the indictment." That is all you need.

The Chairman. True enough, but if you really want to win your motion, you go on to tell the judge wherein the Government failed to prove its case. If you just say that the average judge says, "He is going through that as a formula," just like some people go to church every Sunday, but if a man puts up an impassioned plea and explains where the vital link in the chain is missing,the judge is likely to pay attention to him.

Mr. Medalie. Very often he says, "I do not want to hear any argument. Let it go to the jury." Judges have said it to the best of counsel.

I do not think it is necessary to call the judge's attention to the insufficiency of evidence in a criminal case. Everybody should assume that a judge hearing a criminal case is following the evidence and that he knows whether every essential element of the crime has been established.

Mr. Youngquist. Isn't this decision of 1940 to the effect that the question of the sufficiency of evidence may be raised on appeal, even without motion?

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Mr. Robinson. At the end of the case. If there was one at the end of the State's case, that is sufficient.

The Chairman. There has to be one somewhere.

Mr. Robinson. Yes.

Mr. Youngquist. All we are providing here is that if he makes one at the end of the State's case he may go on and introduce evidence.

Mr. Robinson. That is right.

Mr. Youngquist. Then by (b) he is not required to make a motion at the end of the case, but it simply provides that if he does make a motion,and if it is denied or if for any reason it is not granted, he may bring it up again within ten days, and then get an order of the court.

It does not touch the question of review at all, nor is there anything in it that either requires or makes unnecessary a motion at the close of all the evidence.

Mr. Robinson. Our point then would be whether or not to incorporate this latest Supreme Court ~~position~~ decision in the matter.

Mr. Youngquist. But that deals only with renewal on appeal, and is that withinour jurisdiction?

Mr. Wechsler. But I venture to say, Mr. Chairman, that

4 the principle of that Supreme Court decision, which is that it is judicial duty to notice plain error, whether or not assigned, would be applied in a case where no motion had been made at the end of the prosecution's case if the evidence was insufficient; and therefore we would be drafting with reference to facts rather than to the principle of that decision, if you follow Mr. Youngquist's suggestion.

Mr. Youngquist. Even (a) says nothing about requiring a

motion for a directed verdict.

Mr. Wechsler. That is true.

Mr. Youngquist. It simply saves his right -- he who makes such a motion -- to proceed with his case and proceed with his evidence, and that is all, and I do not think that we should, in these rules, tell the court that it is his duty to direct a verdict if the evidence does not appear to be sufficient, even though counsel makes no motion. That we must assume he would do of his own motion.

Mr. Holtzoff. I do not think the error of insufficiency is always a plain error, such as was contemplated in that case. I have in mind a case tried by the Government recently here in the District which took several weeks to try. At the end of the entire case it appeared that there was some purely technical link in the chain of evidence that the United States Attorney or the special assistant trying the case had failed to put in -- a purely technical omission.

Now, a motion for a directed verdict was made based on that omission. The case was immediately reopened and the missing link was supplied.

Now, suppose no motion had been made and the case had gone to the jury and there was a conviction, as there was, and on appeal it was sought to raise the point of insufficiency. Now, that would have been a gross injustice, because here was an error which could easily have been cured if attention had been called to it, and yet the evidence was not sufficient to make out a case.

Mr. Youngquist. That would put on the defendant the burden of calling attention to omissions in the Government's

case.

Mr. Holtzoff. Yes.

Mr. Wechsler. I think the answer is as it was given by Mr. Medalie a while ago, that it would be sufficient under the most technical practice if counsel for the defendant moved to dismiss on the ground that the evidence was insufficient.

The Chairman. Not in my State.

Mr. Wechsler. The record would not then show that he pointed to this particular link in the prosecution's evidence.

Mr. Holtzoff. I do not claim that he would have to call attention to this missing link.

Mr. Wechsler. If you do not claim that counsel would have to call attention to that particular missing link, then I do not see the point of your objection, because if we regularize the practice in this way, that at the end of the prosecution's case the judge knew that it was his duty to consider the sufficiency of the evidence, then a friendly judge would turn to defendant's counsel and say, "Do you wish to address yourself to the sufficiency of the evidence?"

I think that is what Judge Crane would do under the present practice if I were counsel and failed to make the motion. Then, if defense counsel does not know what to say -- that is a common difficulty that arises when a defendant is poorly represented, but it would be the judge's --

The Chairman. Take the case that Mr. Holtzoff put. If counsel gets up and says,"I object to it on the ground that the evidence is incompetent, irrelevant, and immaterial," or whatever the sacred formula is in New York --

Mr. Medalie. It is not sacred in New York.

The Chairman. It does not make any difference what it is. You have to state wherein the question is improper, and we are supposed to do it in one sentence instead of making a speech.

Similarly, in a motion for a directed verdict we are supposed, to have that motion carry any weight, to state the reason or reasons for our motion. In a lawsuit it would be a motion for a nonsuit, and we state our grounds for the motion are one, two, three, four, and five, and having stated our propositions of law, we argue it.

Similarly, in a criminal case we must state that we move for a directed verdict on the following grounds, and state the reasons.

The court is entitled to know what is in counsel's mind.

Mr. Wechsler. Then, the practice that you refer to is more technical than I had supposed it to be, but I still think this principle is a desirable principle, even though it would be a reform in your State.

The Chairman. The point I want to make is that I donot think it is technical. I think it is doing the fair thing to the court. We can get so interested in the Government or the defendant that we fail to remember that the tryer of facts has a few rights.

Mr. Wechsler. Is it unfair to ask the court to follow the evidence sufficiently to be satisfied that a prima facie case has been made or, subsequently, that there is a case for the jury?

The Chairman. Well, it is not an easy thing in some types of cases. I am speaking more on the civil side rather than criminal cases, because I do not know much about criminal law,

if anything. It is a very hard thing in some types of cases for a judge to know if a case has been made out. Suppose a case goes on a week, two weeks, or three weeks, and it involves technical proof. He is entitled to the benefit of what is in counsel's mind.

Mr. Medalie. You are not talking about the defendant being treated fairly. You are talking about the judge being treated fairly.

The Chairman. Absolutely.

Mr. Youngquist. That is what he said.

Mr. Medalie. I do not think we ought to do that kind of thing.

The Chairman. I do not think he is a goat. I think he is the representative of justice.

Mr. Medalie. The judge makes an erroneous decision in the best of good faith, and he might have been saved that if counsel had done certain things. Nevertheless, if he made an erroneous decision, it is not a question of being just to the judge. Nothing happens to the judge. Something happens to the judgment, but, worse than that, something happens to the defendant that should not have happened to him. That is all we are concerned with.

Mr. Seasongood. That is not true. I had the same thought
5 Mr. Holtzoff had. The defendant would be found guilty, but if there is some technical or slight thing that was not proved, it could be proved in two minutes if it had been proved, surely that defendant would not be acquitted.

Mr. Medalie. You do not get a reversal in something like that. In New York there was a case once in which there was only

a question of proving that Canal Street or some such thing was in the County of New York, and it was not proved.

Mr. Wechsler. I think the way to cure that is to provide a rule for trivial defects in evidence, but in order to save that situation, if we eliminate any action on this point we are defeating the defendant's claim in a case where there is substantial deficiency in it.

The Chairman. May we check this sentence by sentence and see where it gets us?

Is there any objection to the first sentence?

"A defendant who moves for a directed verdict at the close of the evidence offered by the Government may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made."

That changes the rule of common law. It seems to me it is a sound change.

Is there any objection to that? (Silence.)

Now, the next sentence seems to me not so properly in criminal rule. I may be wrong.

"A motion for a directed verdict which is not granted is not a waiver of trial by jury."

Does that not more relate to the civil rule, where there are cross motions for a directed verdict? Some States hold that it resolves the case and there is no question of law for the court?

Mr. Longsdorf. That is correct.

The Chairman. If that is so, it does not belong here.

Mr. Medalie. It is not applicable to criminal cases.

Mr. Seasongood. I thought you said that if in your State you make such a motion you may not offer evidence?

The Chairman. That is right. This changes that and gives him the right to offer evidence, which I think he should have.

Mr. Seasongood. Surely.

The Chairman. By common consent, the second sentence, starting on line 6, will come out.

"A motion for a directed verdict shall state the specific grounds therefor."

That I think is only fair to the trial court.

Mr. Wechsler. That is the sentence that really gets into the problem that we were largely discussing.

Mr. Crane. That brings it up because it is implied in this, but we have not said that the judge should indicate that a motion for a directed verdict should be made. Of course, that comes up largely on the question of appeal, Mr. Chairman, and not so much here. It is a question of what the appellate court reviews.

Are we going to deal with the question of appeals here, do you think?

The Chairman. That, of course, is going to be one question on which we will have to have instructions from the court.

Mr. Crane. I do not want to digress, but in connection with this -- this, of course, would be a question of what the court will review on appeal -- there must be a motion for a directed verdict if they are going to review sufficiency of evidence.

The Chairman. I think it is proper here, because in my State if a man said, "I move for a directed verdict," and sat

down, the court would treat him as if he had been sitting down all the time.

Mr. Crane. The first part, yes.

The Chairman. No; the last sentence. In other words, for a motion to mean anything, he must state the specific reasons.

Mr. Crane. It would seem to imply that a motion for a directed verdict should be made. I was thinking, when it comes to a question of appeal, and we deal with appeals, then we will have to reform our practice so that the court will review it. The reason I am quite interested in that is that our State of New York has gone wrong if they come to the question of appeal, and I do not want it to happen here, and that is that on a demurrer to an indictment the sufficiency of it, of course, is raised and can be decided as a question of law. I am simply saying that as we go along here we must bear in mind what the procedure must be.

Mr. Youngquist. Is this matter dealt with in the rules on appeals?

Mr. Crane. No.

The Chairman. This is probably part of the trial procedure.

Mr. Orfield. It was suggested by the Solicitor General in his ruling that it was not.

Mr. Youngquist. But we do have the Supreme Court ruling of last year that defines the scope with reference to the motion for a directed verdict.

Mr. Wechsler. That decision is not under the rules, though.

The Chairman. Is there any objection to the last sentence in paragraph (a)?

19

Mr. Wechsler. I think the last sentence, though desirable practice, is probably incompatible with the provision I should like to see incorporated; and perhaps to bring the matter to a head and to avoid the error I am trying to safeguard defendants from, I ought to move that there be a rule drafted which would embody the following principle: that at the end of the prosecution's case, and again at the end of the whole case, it would be the affirmative duty of the court to consider and determine the sufficiency of the evidence. I do not suggest that as the artistic language.

The Chairman. Without motion.

Mr. Youngquist. That is so obviously the duty of the court, anyway, that we should not put it in the rules.

6 Mr. Wechsler. If it is the duty of the court anyway, then I do not see the point of a sentence that says an omission for a direction.

Mr. Medalie. It has a value, and that is such a thing as calling the court's attention to failing to prove that a company was incorporated, that a particular street was in a particular town, and so on.

Mr. Robinson. What about venue?

Mr. Medalie. That applies to venue. That was a case where venue was overlooked by both sides.

The Chairman. Our courts, with their very technical rules, Mr. Wechsler, do exactly what you want.

Mr. Wechsler. Most courts do.

The Chairman. Because I have heard the judge say to counsel, before he could get onhis feet, "Your motion for a directed verdict is granted."

Mr. Wechsler. As a matter of fact, Mr. Chairman, I think if we adopted the proposal that I make, when you take that in conjunction with another rule that we have already adopted, we get the result that I would like to see. We have adopted a rule that there need not be an exception to an objection --

Mr. Robinson. Isn't that a common confusion between the exception and the objection? What we are doing is to remove the necessity of exceptions, but not the necessity for an objection.

Mr. Wechsler. That is precisely my point. We said there must be an objection. The effect of my suggested rule must be that the court, of its own motion, should stop it and say, "Is the evidence sufficient?"

If at that point he turns to defense counsel and says, "Have you any objection to the sufficiency of evidence?" and the defendant's counsel says, "No, I have none," then it seems to me that by virtue of this rule, and the earlier rule on the objection, you would probably reach a situation where the technical defect on the evidence would not be sufficient to reverse; but, on the other hand, the rule puts the court on notice that he should think of the necessity.

The Chairman. You are going so far to protect poor defense counsel that youare, I think, ignoring the fact that with a particularly long and technical case the judge may even more need protection and advice of counsel as to what is going on, by way of summary of the evidence.

Mr. Wechsler. Let him ask for it, then.

Mr. Waite. I am not clear in my own mind what the objection to this is yet. Why shouldn't he be required to state the

ground of his objection?

Mr. Medalie. We are dealing with the consequences if it has not been done.

Mr. Dean. We are looking at it with the view of the appellate court.

Mr. Seasongood. We are looking at it for a substantial matter. You do not know what may be regarded in the appellate court as material or not material. There may be something else other than the examples you have given. There may be something which is a failure of proof, and there would have been no trouble about proving it at all, but it is a material part of the case. There is no reason why they should not make a motion for a directed verdict and state the specific ground. He owes that to the court.

Mr. Medalie. The appellate court won't reverse for trifles.

Mr. Seasongood. No, but what is a trifle is a matter of opinion.

Mr. Medalie. Let us take a case which was a proceeding on misrepresentation. If there was no proof that misrepresentation was made or intended, that case ought to be reversed.

Mr. Wechsler. If it is to be reversed the way to do that is to lay a foundation for it by articulating the proposition that the judge at the trial should determine the issue then, even though the motion is not made.

Mr. Youngquist. Must not we assume that in such a case, where the very gist of the offense was not proved, the judge would, of his own motion, dismiss?

Mr. Medalie. He should, and if he did not there ought to

be a reversal, regardless of these formulas.

Mr. Youngquist. Well, we are not talking about the appellate procedure, as I understand it. What we are talking about now, as I understand it, on the basis of Mr. Wechsler's suggestion, is to state in these rules that it shall be the duty of the court, on its own motion, to direct a verdict at the close of the Government's case or at the close of the State's case, without a motion on the part of the defendant.

It seems to me that is wholly superfluous. I do agree that if a motion is made it ought to be made on some ground, and if there is a ground the ground ought to be specified.

There is this one question present which deals with the scope of the appeal. If specific grounds are stated in the motion for a directed verdict, is the defendant limited to a consideration by the appellate court of those grounds only? That may present a problem.

Mr. Medalie. There is something that can cover it with respect to the appellate court's right to review and its right to take action -- that is a provision -- and it may exist; I do not know; I know in our circuit they do that sort of thing in a very clear case -- notwithstanding the raising of the question by proper formula or procedure below, notwithstanding even the omission of an assignment of error where there is a very clear error which goes to the very gist or rule of the case, they will reverse.

Mr. Longsdorf. Yes, but what is a clear error?

Mr. Medalie. Well, I will give it to you again. In a mail fraud case there was no evidence that the parties ever intended to set forth the matters alleged in the indictment.

Mr. Burke. It was my impression that in the original discussion we started to consider the effect not of the failure to make a motion to direct a verdict but the failure to renew a motion, assuming that the motion had been made at the end of the People's case, at the close of the presentation of the testimony on the part of the defendant.

The Chairman. Well, I think that would be the next thing we would have to cover from here.

7 If we are tentatively agreed thus far -- and I say that word "tentatively" very hesitatingly, in view of Mr. Wechsler's objection -- I think we might go on and have a motion to instruct the reporter to prepare a further sentence in this rule which would carry out the effect of this recent case.

Mr. Burke. The thought I had in mind in that connection was that, assuming that the district attorney failed to make a prima facie case and the court failed to observe the lack of the prima facie case, it certainly would not be a great fault on the part of inept counsel for the defendant in also omitting something that in a similar case, in the hands of competent counsel, might free the defendant in a like situation in another court.

The Chairman. Now, we are presuming there an inept counsel and an inept court and a very shrewd prosecutor. Can we frame our rules to meet such unusual cases?

Mr. Wechsler. In most cases, Mr. Chairman, the motion is made, and therefore the issue to which my proposition is directed does not arise. By hypothesis, we are dealing with a case which is badly represented, or with a case which is, for some other reason, exceptional in that respect. That is the case that I want to deal with, and I may say again, in answer to what Mr. Burke

said, that I believe the principle of that Supreme Court decision not to rest upon the ground that the motion was made at the end of the People's case, but, rather to rest upon the ground of an affirmative duty on the court to protect the defendant with respect to the sufficiency of the evidence.

Now, the strength with which the courts use that issue may be indicated by the fact that while the Solicitor General confessed error in one of those cases, another one of them was opposed, and a colleague of mine in the Department had the burden of maintaining the Government's position with respect to the case, in which we felt that the evidence was so strong that we ought not consent to a reversal.

I can only say that the Chief Justice, on the argument of that case, administered one of the most vigorous findings to the gentleman who represented the Government that I have ever heard administered in open court. The entire argument lasted, in substance, three and a half minutes.

The Chief asked only why the trial judge should not have considered the sufficiency of the evidence, and we were only able to say, "Well, the evidence is very sufficient." The Chief said, "Nevertheless, it should have been considered."

The case was reversed.

I think we would be giving effect to the underlying principle of that decision, which is that there is or should be an affirmative duty on the court in this type of situation.

Mr. Holtzoff. Isn't the underlying principle of that decision that a patent and plain error will be considered by the appellate court even if the question was not properly saved for review, rather than that it is the duty of the court,

on his own motion, ~~because of~~ to consider the sufficiency or insufficiency of the evidence?

Mr. Wechsler. I say, if the trial judge knows that he will be reversed if he overlooks a plain error, I suppose he infers that it is his duty to look for a plain error.

I would be in accord with some draft of a rule that qualified this duty in terms of some adjective, such as "plain" or some other adjective designed to indicate that.

If it was a trivial error, the judge is not supposed to marshal the evidence himself, but I am interested in the principle of the duty which I think is embodied in what I regard as a progressive decision by the court.

Mr. Crane. I think you will find in the codes that this is a matter dealt with from the following viewpoints. The appellate courts have required these things because they refused to review.

You take our intermediate court. It can review the evidence and grant a new trial, in its discretion, but you come to the Court of Appeals, and there it was that it had to be a question of law, and that was raised by an exception or by some motion.

I should think that we ought to come back here, in fairness to the bar, at the beginning, and tell them what they must do. Has he got to move? If he has moved, is it something he does because he wants to do it? Do we require it because it must be done to preserve his rights on appeal, that he make a motionto direct a verdict or should make a motion to direct a verdict?

I did not understand that it is necessary in a criminal case for a court that reviews facts. I did not know it was

necessary to make a motion to dismiss an indictment, as it is called in some instances, or to direct a verdict as it is called in others, in States that have intermediate courts, and the court that reviewed the facts would review them without the necessity of that motion or an exception to that denial.

It is a different thing when you come to courts that can only review questions of law, as the Court of Appeals in my State does.

I take it that the Circuit Court of Appeals reviews facts, does it not?

Mr. Holtzoff. No. Facts are not reviewed in the Federal courts in criminal cases.

Mr. Crane. Don't they review them at all?

Mr. Holtzoff. No.

Mr. Crane. Then you have to have a question on law presented by a motion. Of course, sufficiency of evidence is always a question of law.

Mr. Wechsler. The jurisdiction of the Circuit Court of Appeals is the same as --

Mr. Crane. They do review the facts as to sufficiency of evidence, because that is always a question of law. What I meant was that we did not used to consider the question of law unless there was a motion made and an exception taken.

The Chairman. May we refer this section back to the reporter to redraft it and incorporate in it the decision of this recent Supreme Court case?

Mr. Longsdorf. I am very glad to have it referred back, but I am not clear in my mind about certain things, and I would like to be straightened up. Am I in order?

The Chairman. All right.

8 Mr. Longsdorf. I do not understand that this Sheridan case and the Hemphill case -- I cannot make up my mind without looking at those cases -- have dispensed with the necessity of claiming formal exceptions. I think they should be dispensed with, but I do not know whether those decisions did make that unnecessary.

Now, we have a civil rule that made it unnecessary. Don't we want the same kind of rule here?

Then, following that, may I be informed whether or not Rule 46 stood or, as I understood, was dropped because it was no longer necessary?

Mr. Robinson. Just the last give lines of Rule 46 was dropped.

Mr. Longsdorf. That is all right, then. The rest of it stands?

Mr. Robinson. Yes.

Mr. Longsdorf. Very well, then.

Mr. Dean. If this is to be recast, may I make one suggestion, and that is that in that first sentence there should be somewhere contained a statement of the duty of the trial court when a motion is made. Now it is completely omitted, and I suggest that if we should come to the conclusion that a motion should be made,either at the end of the Government's case or at the end of the entire case, we should also add at the end of the first sentence, "And it shall be the duty of the trial court to direct a verdict if there is no substantial evidence of guilt."

We say he makes the motion, but we do not give any test to

the court affirmatively.

Mr. Medalie. Section 410 of the New York Code deals with this very sensibly and I think meets all the situations:

"If at any time after the evidence on either side is closed the court deems it insufficient to warrant conviction * * * it may advise the jury to acquit the defendant thereof, and they must follow the advice."

Mr. Holtzoff. If you do not make a motion, in spite of that provision you lose the right to review the point in the Court of Appeals, do you not?

Mr. Medalie. Can't this be written without the use of the word "may" and say "shall"?

Mr. Orfield. Section 321 of the American Law Institute Code of Criminal Procedure reads:

"If, at the close of the evidence for the State or at the close of all the evidence in the cause, the court is of the opinion that the evidence is insufficient to warrant a conviction, it may, and on the motion of the defendant shall, direct the jury to acquit the defendant."

Mr. Longsdorf. That is quite a different thing.

Mr. Medalie. Then it can be done at either time and does not involve these questions of waiver.

Mr. Crane. It simply expresses what is the duty of the judge.

Mr. Dean. I think we still ought to emphasize the duty of the trial court to do it at the end of the Government's case, for this reason. The defendant has the alternative of appealing directly from the error growing out of the judge's failure to sustain his motion, or he can put on his case. Now, if he puts on

his case after the judge has made an error in refusing to sustain his motion, on cross-examination the Government brings out a lot of things from the defense witness. That fact should not deprive a defendant from going back to that original motion at the end of the Government's case and raising that point.

Mr. Crane. I do not think that has ever been done.

Mr. Medalie. If the defendant supplies the missing link, there is a case.

Mr. Dean. How can you say that cures the error?

Mr. Medalie. It does not. The error no longer counts.

Mr. Dean. What you are saying is that by putting on his case the defendant waives his right to take advantage of the error.

Mr. Medalie. No. All we say is that an error has been committed. At the time the defendant made the motion at the close of the prosecution's case, there was no case. Had he offered no evidence, there still would have been no case.

Now, from the viewpoint of the administration of justice, at the close of the entire case on both sides there now is enough evidence.

Mr. Burke. But the question we were considering was in the event that at the conclusion of the defendant's case there still was not enough evidence.

Mr. Medalie. You have a new point there. At the end of the defendant's case there was no evidence to establish his guilt.

Mr. Burke. Failure of counsel to renew his motion again is not much of a solution to a defendant committed to a penal institution.

Mr. Medalie. His conviction ought not to be sustained if there is not sufficient evidence.

Mr. Dean. I still cannot understand why, if the judge has made an obvious error in overruling the motion for a directed verdict at the end of the Government's case, you cannot preserve that point.

The Chairman. This is not a game. At the end of the defendant's case all proof of guilt is in. The man is guilty.

Mr. Dean. All right. Now, the judge says, when you make your motion for a directed verdict, "I know you are going to put in a case anyway. I am going to overrule you. I know you are right, but the trial has gone on too long. The newspapers are full of it. I have got to go on with it. I cannot take the responsibility for it."

You are saying that the judge at that point has no obligation as a matter of law to dismiss that case.

Mr. Holtzoff. Do you claim that if he fails erroneously to dismiss the case and yet if additional evidence is produced by the defendant which makes the prosecution's case a conviction should be reversed?

Mr. Dean. I am taking them one at a time. First of all, you have the case. When you get to this stage of the proceedings why shouldn't you preserve that error?

The Chairman. You can.

Mr. Dean. I do not see it.

The Chairman. You make yourmotion for a directed verdict and state your grounds, and the court overrules you.

9 The Chairman. And then you appeal. If you know that your witnesses are going on and are going to prove the Government's

case, it is your duty as counsel to stop them.

Mr. Burke. If the defendant elects to go ahead and present testimony that aids the Government in making a prima facie case, then the facts and the law and justice are sustained; but if at the end of his defense the situation is the same, so far as the legal aspect of the case is concerned, as it was at the close of the case of the prosecution, then the failure of inept counsel, by reason of his lack of ability to renew the motion--

Mr. Dean. That is a different ~~motion~~ matter, and I agree with Mr. Burke on that.

The Chairman. But he does not agree with you.

Mr. Dean. That is all right.

Mr. Medalie. This is a common situation that arises in cases in New York. We have a rule that requires that an accomplice be corroborated, and without such corroboration the accomplice's testimony is insufficient. The defendant takes the stand and, almost invariably, either on direct examination or cross-examination or both, he supplies the necessary corroboration. There is a case.

Mr. Dean. Particularly on cross-examination.

Mr. Medalie. And justice requires that that case go to the jury.

Mr. Seasongood. I would like to add that this motion be made in the absence of the jury.

The Chairman. Is there any objection to that being considered in the redraft of the rule?

Mr. Medalie. Isn't it the law that the motion may be made in the absence of the jury if the court permits it?

Mr. Seasongood. Yes, but he does not permit it.

Mr. Medalie. You want it as a matter of right that the jury must walk out when counsel says, "I want to make a motion."

Mr. Holtzoff. In the District here they make it out of the hearing of the jury. They step up to the bench.

Mr. Crane. Is the defendant present?

Mr. Seasongood. The defendant is present, but the jury is not present. They send the jury out. We have it all the time in our State. If you make a motion in a Federal court in our State it is a very good thing. If the jury hears the motion and the court says, "It is overruled," then the jury says, "He is guilty."

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The Chairman. That sneer is futile.

Mr. Crane. He argues with you and shows you your error.

The Chairman. No; he can do it in just three words; he can say, "You are overruled" in such a way as to impress the jury with the belief that you are just a nitwit. That one word "overruled" is deadly, in the way it is uttered. And in civil cases it is just as bad.

All right; we have covered the general thought we want incorporated in this redraft.

Mr. Wechsler. Before you pass this, may I say one word? Professor Waite has suggested a formula which I think might incorporate the thought I had in mind and also the views of the other side. It would be in these terms: That a motion for directed verdict shall state the specific grounds thereof, but failure of the attorney for the defense to make such a motion shall not relieve the trial judge of the obligation to dismiss on his own motion if the evidence is plainly insufficient.

That would incorporate the plain error conception.

Mr. Medalie. If you will add "as to the substantial elements of the defense", indicating that it does not cover technical oversights.

Mr. Seasongood. I think it is very unfair to the court. The ordinary way is that the counsel says, "The plaintiff rests", or the defendant starts in. So the court thinks there is enough evidence to go to the jury, and does not give the matter much thought. He is entitled to have it presented to him in an orderly way, with all the assistance counsel can give to him.

The Chairman. And especially if he has spent all his time

during the preceding four weeks in writing longhand letters, and if he has not followed the matter carefully!

Mr. Seth. I do not see any reason for putting part (b) in if you are going to put on the judge the duty of deciding pronto at the end of the plaintiff's case whether the case should go to thejury.

Mr. Crane. He can reserve.

Mr. Medalie. Even if he does reserve you have your motion for new trial.

Mr. Holtzoff. But the motion for new trial is discretionary.

Mr. Medalie. If the evidence is insufficient. I know that the court can or cannot grant it, but you preserve the right.

Mr. Waite. On (a) --

The Chairman. Pardon me, gentlemen; we are back on (a) again.

Mr. Waite. I did not quite get Mr. Seasongood's proposition. As I understood it, it was that the motion for directed verdict must be made in the absence of the jury. If I may inject a little bit of experience of my own, I do not think that such a position is always wise. I was defending a man in a case in which the prosecuting attorney was a man named Wagenheimer, a prosecutor notoriously able to play on the feelings of the jury. In the defense we had to rely on the State's evidence. At the conclusion of the State's evidence I made a motion to dismiss for lack of evidence, and I argued it as fluently and as specifically as I was capable of doing. The motion was not granted.

The prosecutor made his opening speech very, very brief, saving his flamboyant oratory for his reply to me. I, having already made my speech to the jury, although ostensibly to the judge, did not make any speech at all; and the prosecutor did not have anything to reply to. And I must confess that no one was more surprised than I when the jury disagreed.

But there is certainly an advantage in being able to make the motion in the presence of the jury, and I should hate to see that taken away.

Mr. Seasongood. I believe I stated that it may be made.

Mr. Holtzoff. From the point of view of the jury there is a difference between a motion for new trial and the right to move for a directed verdict before the jury.

Mr. Medalie. And to move it on the ground that the court committed error in the admission of evidence.

The Chairman. Do you not want to protect the right of the defendant to get a directed verdict?

Mr. Medalie. I am practicing in the courts, and I assume when I represent a defendant that I am going to get adverse rulings.

From that point of view I thought we should figure what we should do here: "Note for the jury and the judge"!

Mr. Youngquist. As I read this, its only purpose is to give the court an opportunity, even after the evidence is in and the case is submitted, to grant the motion for directed verdict and end it right there.

Mr. Crane. Yes; but the defendant does not have to make another motion. If the judge has reserved the decision he has got to make the motion; he has to decide it; he has got to move.

Mr. Holtzoff. What this really is, is if a judgment is non obstante veredicto.

Mr. Medalie. In New York there has been adopted a practice in civil cases that the defendant moves for a directed verdict or the defendant moves the court to direct a verdict, and the court says, "I will reserve decision on that motion, but I will submit the case to the jury."

There is a reason for that, which is that if the judge should be wrong in his decision to take the case away from the jury the appellate court can correct his error even when he sets the verdict aside later and grants the motion, decision of which he reserved, to take the case away from the jury, and can reinstate the verdict.

You know the practice. It is a very practical thing, when the judge is in doubt about it.

Mr. Crane. In civil cases, but not in criminal cases.

Mr. Medalie. No; not in a criminal case, because you cannot reinstate the verdict in a criminal case.

Mr. Seth. Did you ever hear of the Slocum case, the steamer that burned? Here it is.

Mr. Seasongood. Let us take a vote.

The Chairman. It has already been acted upon.

Mr. Seasongood. There is only one thing about (b). This practice obtains in the civil rules. I am under the strong impression, and am practically certain, that there was a question whether that might be done in criminal cases. In some oil prosecution case the court had a long trial of four weeks or four months, and the defendants made a motion for an acquittal. The court said, "I want to have all of this written out

and I want to go over the evidence and see whether there is any evidence to go to the jury. So I am going to let it go to the jury, reserving the right to grant the motion if there should be a finding of guilty."

There was a finding of guilty by the jury; but nevertheless the judge entered a judgment of acquittal.

The case was taken by the Government to the Supreme Court; and, as I remember, they divided four and four on the question. You are familiar with the case, no doubt.

Mr. Robinson. The Socony-Vacuum case, at Madison, Wisconsin.

Mr. Seasongood. Yes; that was the case. I am just calling attention to whether it should be done.

The Chairman. Do you think it desirable if it can be done?

Mr. Seasongood. Yes; very desirable.

Mr. Robinson. The Attorney General in his report in 1938 condemned that very bitterly.

Mr. Seasongood. What is his ground?

Mr. Robinson. On the position that it permits the court to usurp the powers of the jury.

Mr. Holtzoff. I do not think that was the Attorney General.

Mr. Robinson. Well, Mr. Thurman Arnold.

Mr. Seasongood. If the judge acquits after there has been a four months' trial, why, that is the end of it. The defendants are all out. He may say, "I should like to think about this thing more, and let it go to the jury and see what they do, and I will have all of it written out and I will pass on it" -- and enter a judgment of acquittal notwithstanding the

verdict.

Mr. Crane. Has that been done?

Mr. Seasongood. As I say, that was done in the oil case in Wisconsin.

Mr. Crane. What was wrong about it?

Mr. Seasongood. The Supreme Court divided four and four as to whether it may be done.

Mr. Orfield. Did the court pass upon that question in the Supreme Court?

Mr. Seasongood. I do not think they wrote an opinion; did they?

Mr. Holtzoff. No; they do not write opinions. when they divide evenly.

Mr. Robinson. This is the case of ex parte United States, that being the case in the Supreme Court. The Circuit Court of Appeals held that the district judge has inherent power to reserve his ruling on a motion for directed verdict and, after the jury returns a verdict of guilty, to enter a judgment dismissing the indictment for insufficiency of the evidence.

The case was affirmed by an equally divided court -- United States vs. Stone, 308 U. S. 519.

Mr. Holtzoff. It is better to perpetuate that in the rules.

The Chairman. Is there any doubt as to preserving (b) in this rule?

Mr. Crane. Yes; I do not like (b).

The Chairman. Then let us put it to a vote.

Mr. Crane. I meant the phraseology of it: "within ten days after the reception of a verdict, a defendant who has moved for a directed verdict may move to have the verdict and any

judgment entered thereon set aside * * *."

In other words, would you have to move again? If the judge has reserve his decision he has got to decide it. The defendant does not have again to move.

The Chairman. He does not reserve it.

Mr. Crane. "Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion."

The Chairman. In other words, as a matter of law he reserves it. Now to bring it officially to his attention so that he will do something about it, you have to make a motion.

Mr.Crane. You have to move again?

The Chairman. Yes.

Mr. Crane. When a judge reserves a decision until the end of the case and says, "You have made your motion and I am going to decide it; I will reserve this decision, and in the meantime we shall let the defendant go ahead," does the defendant have to move again in order to get it done?

The Chairman. Yes; for the reason that if you do not require him to make a motion he would be regarded as considering such a motion in every case in which a verdict had been entered.

Mr.Crane. No; when he reserves it --

The Chairman. He does not reserve it. The law says he reserves it automatically. He is deemed to have reserved it.

Mr. Crane. You have the thing all wrong. When a judge

takes a motion to dismiss, and directs a verdict, the judge decides it then and there; or if he does not he says, "I will reserve it, and I am not deciding it now."

He does not sit there like a mummy. He says, "I will reserve the decision on that question."

The Chairman. That is not our case. The judge denies the motion, and the jury brings in a verdict.

Mr. Medalie. Judge Crane wants to go further.

Mr. Crane. No.

The Chairman. In spite of all of that having happened and the judge having ruled adversely on the motion to direct a verdict, he is deemed in law to have the power, if application is made in ten days, to take it up.

Mr. Crane. That is not what is said here:

"Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted" -- he does not do anything, he does not deny it, he does not grant it -- "the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion."

If he has the power if it has been denied, why do you not say that after the verdict they can always raise the question again?

The Chairman. If motion is made within ten days. That is what this rule tries to say. Perhaps it does not say it well.

Mr. Crane. I say with all due respect that this is too confused a way. You have a lawyer trying a case before a judge; and he makes a motion, and the judge is bound to rule on it, the

same as he rules when exceptions or objections are taken. If he denies it, that is a denial. We understand that.

But suppose he does not do anything? Why, then he has got to decide it some time. He cannot sleep on it, and his duty is to decide it, and not to have the lawyer move again to wake him up, and say, "You have not decided that motion of mine."

That is the part I am speaking of. Why should he make another motion?

The other part is this: Suppose you make a motion for directed verdict, as you do at the end of the case, and the judge says, "I deny it", and an exception is taken in all due and proper form. You go through and get a verdict of the jury. Now that case is closed.

When we come to motions that may be made after the verdict, that is the time to say that you can then move for various grounds, and one of them is that the evidence was not sufficient to go to the jury.

Why should we put all of it on this complicated form here?

Mr. Youngquist. That is just what this does in case the motion is denied.

Mr. Medalie. No; this goes farther.

Mr. Youngquist. If the motion is denied the defendant may at any time within ten days after the reception of a verdict move for a directed verdict.

Mr. Crane. Why does he move for a directed verdict?

Mr. Youngquist. Just a short-cut.

Mr. Crane. What he does is to move to set it aside because there is no evidence to sustain it.

Mr. Youngquist. There is more than that.

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Mr. Medalie. There is something else. There has been a disagreement, and the court can still grant the motion for directed verdict. That is what this says.

The Chairman. Is that the language?

Mr. Crane. That is the language; but let us not get this so mixed up that we cannot understand it. The criminal law should be simple. Let us not complicate it with all the intricacies of the civil practice. The criminal law is simple. The cases are complicated, as you get them in the Federal courts, but the practice is the simplest thing in the world.

The Chairman. By common consent, then, we will refer this back to the Reporter.

Mr. Seasongood. This says "in every case". I think that is a bad way to do it, because the judge will overrule the motion every time. It seems to me that the judge ought to have the privilege of leaving it to the jury, reserving the right to enter judgment.

Mr. Medalie. Your idea is that if he wants to he may reserve decision on the motion?

Mr. Seasongood. Yes.

Mr. Medalie. And then take action either after verdict or after disagreement, and take his own sweet time about it, so that you do not tell him that he has to decide within ten days a case that took him two months to study.

Mr. Youngquist. He does not have to decide within ten days.

Mr. Crane. Why should you have to move him again?

Mr. Holtzoff. That is an automatic reservation. Suppose he has denied the motion, and the case goes to the jury: There

is a fiction of reservation so he can raise it later.

Mr. Medalie. Mr. Seasongood says there is one thing worth doing, and that is when the judge says, "I reserve the right to decide later" we should reserve the right to enter this on disagreement.

The other question is whether we should make the provision that is in the civil practice rules, that the court is deemed to make reservation even if he did not.

Mr. Crane. May I ask a question? Because really I cannot see this at all. Here you are doing the same thing, and every judge who has had any criminal practice has been doing the same thing that you are trying to express here as something new. A judge tries a case, and the defendant is found guilty. All the motions you can think of have been made and denied. Every code and proceeding has a motion in arrest of judgment, and a motion on the insufficiency of the indictment can always be made after a verdict. Why do you have to talk about a reservation or a supposed reservation? You can always make a motion, even after verdict, that the indictment or the evidence was not sufficient.

Mr. Seasongood. You run into some trouble with the Constitution, do you not? There is that old case to the effect that you cannot later enter judgment -- the right of trial by jury.

Mr. Crane. Can you assume that the judge has reserved the question when he has not? Can you get around the Constitution in that way?

Mr. Seasongood. No; that is what I say.

Mr. Holtzoff. But when this is for the defendant's benefit there is no constitutional question involved. This

reservation is for the benefit of the defendant.

Mr. Dean. In the redraft of this thing cannot we later consider the wording of this phrase, if we are not going to require a motion?

Mr. Burke. Is not that what Judge Stone sought to do?

Mr. Crane. His act is a reservation, except he does not require the defendant to move again.

But I say that when the judge has decided it, then to stick in something by which he is supposed to reserve the question, when he has not, in order that he may move thereafter for some reason, why not come out and say that the defendant may always enter a motion within 30 or 40 days for relief?

Mr. Dean. I see your point; because this language says that it is reserved. And then you say that it is not reserved at all but that you have to make a motion.

Mr. Crane. That is the point.

Mr. Medalie. I move that it is the concensus of opinion of this committee that the judge shall have the power expressly to reserve decision on a motion for directed verdict and to grant the motion either after there is a verdict of guilty or after the jury has reported its disagreement.

Mr. Seasongood. I second the motion.

Mr. Seth. That is all right.

Mr. Medalie. Then we can take up the rest of it afterwards.

Mr. Holtzoff. I should like to amend that so that the judge shall have a similar power even after he has denied the motion.

Mr. Medalie. Let us take that up separately.

Mr. Burke. Mr. Chairman, does not that in some juris-

dictions give an opportunity, assuming there is some merit to the motion made, simply to pass the burden, shall we say, for the time being on the possibility that there may be an acquittal which will solve the whole thing? On the other hand, if there is a verdict of guilty the defendant has suffered all the humiliation and additional embarrassment that comes from something that might possibly have been decided as a matter of law.

The Chairman. There is no doubt about that. But on the other hand, if you have a judge who will not make up his mind, is not the defendant better off if he has a chance to get after that judge again on a subsequent motion?

Of course I am going beyond your motion now.

Mr. Medalie. Yes; you are way beyond it.

The Chairman. Are you ready to vote on Mr. Medalie's motion, which is that the trial judge shall have the right to reserve decision on motion for directed verdict, and in the meantime let the case go to the jury and a verdict of guilty come in or a disagreement?

Mr. Mdealie. That is right.

The Chairman. Are you ready to vote on the motion?

Mr. Crane. And decide the motion after that.

The Chairman. After the verdict or disagreement.

Mr. Crane. Yes.

The Chairman. Are you ready for a vote on that motion? That does not preclude us from voting further.

Are you ready for a vote on that?

(The motion was agreed to.)

The Chairman. Who voted "no"? Two? Very well.

Mr. Holtzoff. I should like to move that we go one step

further and provide in the rule that even if a motion for directed verdict is denied, after the verdict comes in or if there is a disagreement, the judge shall have jurisdiction or authority to entertain a motion or a renewal motion for directed verdict, and pass upon it and grant the motion as though he were doing it before the jury went out.

Mr. Crane. I have no objection to that; that states what you mean.

The Chairman. Is the motion seconded?

Mr. Seasongood. I second the motion.

The Chairman. Are you ready to vote on the motion?

(The motion was agreed to.)

Mr. Crane. I think what you mean now is very clear. My objection is not based on that.

The Chairman. All right. May the Reporter begin to do some drafting on the basis of that?

Now, Rule 51.

Mr. Robinson. Rule 51 provides for instructions to the jury and provides when objections are to be noted.

Mr. Medalie. Before we start to consider that may I correct an error of mine? I misadvised the committee. It may not have been noticed. But there is a provision in the New York Code for the polling of the jury.

The Chairman. Very good.

Mr. Seasongood. That is the reason I brought it up. I know there are provisions in some States.

The Chairman. We will clear up all of them.

Mr. Medalie. That is section 450.

The Chairman. Very well; now we are on Rule 51.

Mr. Seth. I think we voted on that.

Mr. Robinson. The four points are, first, that the party requesting the instructions may file his written request for them; second, the judge shall inform counsel of his proposed action with regard to such requests prior to the arguments of counsel to the jury; third, the party must object before the jury retires if he wishes to save any question with regard to an instruction given or refused; and, fourth and finally, opportunity must be given him to make his objections outside of the hearing of the jury.

Mr. Medalie. May I make some comments on this?

The Chairman. Yes.

Mr. Medalie. In the southern district of New York we have a rule which provides that you may [redacted] spring requests for instructions on the trial judge after you finish your summation. You must not have them in, in writing, before summations begin -- that is, at the close of the evidence.

Here you provide, "At the close of the evidence or at such earlier time during the trial." In that event Government counsel would be at a distinct disadvantage in being required to submit requests for instructions too early in the case. The night of the day the trial is closing is about as early a time as you can finally make up your mind on what ought to be submitted to the court; because then you can come fairly near knowing the state of the record. If you are required to do it a week earlier or at the close of the Government's case you are not really being given a fair chance, when you are precluded from submitting these requests thereafter.

For that reason I move that the words "or at such earlier

time during the trial as the court reasonably directs" be stricken from the draft of this rule.

Mr.Dean. I second the motion.

Mr.Robinson. Would that restrict them to waiting until after the evidence is closed before they can submit motions?

Mr. Medalie. No. The court directs, "I wish to have requests for prayers in before the summations."

In the southern district of New York you do not submit anything. You catch the judge all unawares by standing up and saying, "I except to your Honor's instructions so and so, and I ask your Honor to charge as follows." Or without an exception you just go ahead and run off a few on him. It is argued that he does not have time to reflect, and that obviously that is unfair and does not result in a fair trial.

The rule in the southern district is a very practical way. It is a rule under which cases have been tried by skilled counsel; and it works no hardship, although at times it is an inconvenience.

The Chairman. Is it not the custom for the attorney to say, if it is a long case and if he has a lot of requests, "These are not complete, but these are what I have in mind to hand to the court"?

Mr. Medalie. Yes. A device I tried is that in a long case, about a week before the trial is finished and the evidence is in I have it appear in the record, "Your Honor, may I hand in my requests to charge, which are substantially complete, with the privilege of putting in three or four more prior to summation?"

In other words, I make a record of it to show the

appellate court that I did not catch the judge unawares and that I gave him plenty of time to study them.

The Chairman. And so that he cannot state, "I have just been confronted with voluminous requests."

Mr. Medalie. I might say there is also another thing in connection with a request to review ~~the~~ a requested charge. The appellate court will not review requested instructions for error if, even timely, you have requested 120 instructions. The judge just cannot meet that burden. Sensible counsel will limit them to 25 or so at the most.

You cannot do that here. You leave it to the court.

Mr. Crane. Would it help the court to write out the charge for him?

Mr. Medalie. No; that would leave out the oratory and harangue.

Mr. Crane. I do not see any reason why it could not be given to the court as a request. But it is not my business.

Mr. Dean. May I suggest that instead of striking out the words "or at such earlier time during the trial as the court reasonably directs" you simply strike out the words "at such earlier time during the trial", and have it read "or as the court reasonably directs"?

Mr. Robinson. That is what I was speaking of a moment ago.

The Chairman. You should do so before the summation starts. If he takes it after that he is not being fair.

Mr. Youngquist. You are undertaking to say "Not later than at the close of the evidence."

Mr. Medalie. I really intended it to be before the addresses to the jury. That is important; because in a long

case the evidence may close on Friday. You come back on Monday morning to sum up. That gives you time to prepare. Or the evidence may close at half-past eleven on Tuesday and the court may say, "Well, we have had a long time of it, and counsel want to have a chance to prepare summations. The jury will come back tomorrow morning at 10 o'clock."

Ten o'clock the next morning is the right time to give the instructions.

The Chairman. Is that fair to the court?

Mr. Medalie. Yes.

The Chairman. I do not think so. If you need the week-end to prepare the requests, he needs the week-end to sift them out.

Mr. Medalie. No; I am assuming that the judge is a moderately competent person, that he has some notion of what the case is about and what legal propositions are involved. A court has ample time during the hour or the few days in which counsel sum up to examine those instructions; and no matter what we think of our own persuasive speeches we know that frequently the judges are either reading the instructions or writing their intended instructions or attending to their personal correspondence. It is perfectly fair to the court.

The Chairman. Do you mean you let the arguments go on without any interruption ~~because~~ irrespective of what opposing counsel says?

Mr. Medalie. I do not interr pt opposing counsel.

The Chairman. Never?

Mr. Medalie. No.

The Chairman. Well, you are in a well-behaved jurisdiction!

Mr. Medalie. We are; counsel behave themselves in our jurisdiction.

Mr. Youngquist. The second sentence of this requires that the court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury -- before the arguments begin.

Mr. Medalie. I was coming to that, but I should like to get rid of this "prior to summation".

The Chairman. I really think that is unfair.

Mr.Dean. Why don't you say, "after the close of the evidence", instead of "at the close of the evidence"?

Mr. Medalie. Because you do not fix the time. The rule of the southern district of New York has been found to be a good and workable rule.

Mr. Holtzoff. How about the rules in other districts?

Mr. Medalie. If it is a good and workable rule in that district it is good anywhere else.

Mr.Seasongood. How would it be to say, "as soon as the evidence is concluded or as soon as the court may direct"? It is in our code that any party may ask for written instructions after the close of the evidence or at the close of the evidence; and we say that if those instructions are correct they must be given in those words, or if they are not given in those words it is reversable error.

But our Federal court has always taken the view -- and I think quite properly -- of not being bound by that statute, that if they give the substance of the requested charge in the general charge that is all that can be asked.

Mr. Medalie. It is both the New York rule and the Feder-

al rule.

Mr. Youngquist. And the Minnesota rule.

Mr. Seasongood. That is the way it should be. The special charges go into the jury; but our Federal court simply says, "We satisfy that if we give the substance"; and the idea is to attract the court's attention to subjects on which you want him to charge.

Mr. Medalie. There is nothing to indicate here that the court is bound to follow the language of the requested instructions.

Mr.Seasongood. I think you should put that in.

Mr. Medalie. You do not need that in Federal cases.

Mr. Holtzoff. This is the language of the civil rule, and the civil rule has not been construed to require the court to follow the language of the request. So that you take the construction of the civil rule as a guide to the construction of the proposed language.

Mr.Crane. Suppose you are going to submit all the requests?

Mr. Medalie. Please do not say "all". We do not submit many requests.

Mr. Crane. If the judge charges incorrectly you can except to it; but can you ask him to rule if the requested instruction is correct?

Mr. Medalie. Yes. But also you are not making it impossible, after the judge has made his ruling and his charge to the jury, to get up and say, "I except to your Honor's charge of so and so."

Mr. Youngquist. You have that beginning in line 7:

"No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection."

Mr. Medalie. Won't you come back to mine?

Mr. Youngquist. Yes; that is what I am doing.

Mr. Seasongood. Would you object to putting in the words "in substance set forth in the request"? Because this way it looks as if you have an ambiguity, to make the court charge in the specific language of the instructions.

Mr. Medalie. I think what Mr. Holtzoff said as to the substance of the civil rule is correct.

Mr.Robinson. The substance would be as set forth, and not in the same words.

Mr. Youngquist. I move that after the word "evidence" in line 2 there be inserted the words "or as soon thereafter as the court may direct."

That is in the second line.

The Chairman. You have heard the motion. Are there any remarks?

(The motion was agreed to.)

Mr.Medalie. Now the next point.

Mr. Seasongood. What is the objection to having it at the close of the evidence?

Mr. Medalie. The court might want to give you a little more time, and we let him give you that.

"The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury."

I have practiced law in jurisdictions where the court

does not do that, and I found myself perfectly comfortable.

Mr. Holtzoff. The Federal courts do that in civil cases. Why should not they do it in criminal cases?

Mr. Medalie. I do not know why they were ever called upon to do it in civil cases.

The Chairman. The idea is to please the lawyers in the 26 States of the Union in which counsel sum up after the judge has charged the jury. It is almost impossible for us to conceive that that should be done in any civilized community; but there are 26 States of the Union in which that regularly happens. The charge precedes the summations. There are 26 States in which that happens.

Mr. Medalie. I think that is a good racket!

Mr.Crane. Does that really happen? It is hard to believe.

Mr. Medalie. And then you can answer it.

The Chairman. He ends up by yelling louder than any man ever has.

Mr. Medalie. No man here has thus far used any strong language, but I wish to put on the record the fact that I think that is a hell of a practice.

Mr. Holtzoff. I think that all of us recognize that we must take into consideration the practices in the various States if we want to get these rules passed.

The Chairman. There is a district on the Atlantic seaboard, not very far from where we are now, in which after the judge addresses the jury the counsel sum up. As I say, it is almost unbelievable. In that State in the State courts the judge has to charge the jury in every case, "Gentlemen, you are

the sole judges of the law as well as of the facts, and what I say is not to be your sole and controlling guide."

Mr. Youngquist. That is our rule in libel cases, but only in libel cases.

The Chairman. That is the rule in all cases, by the constitution of Maryland.

Mr. Crane. We had a judge in Westchester who followed the rule in this way: He said, "Gentlemen of the jury, it is my duty to charge the law, but it is your duty to be the sole judges of the facts. But I think if you give the plaintiff something you will not be going far wrong"!

Mr. Holtzoff. I do not see how on earth the court is going to find time to inform counsel of his proposed action on requests, prior to their arguments.

Mr.Robinson. In my State they just put on a "G" for "Given" and a "R" for "Refused".

Mr. Holtzoff. But that takes a little time, and the court is not getting the benefit of the requests himself.

Mr.Robinson. That is why the first sentence was drawn to read "or at such earlier time during the trial as the court reasonably directs". You have rather put the first sentence out of gear with the second, by your motion.

Mr. Youngquist. You cannot expect counsel to submit all their requests before the close of the evidence; but I do not think it unreasonable to ask the court to inform counsel of its proposed action on the requests before the summations begin. It is wholly within his control. And I am sure that counsel would not object to being given a few more hours in which to prepare their summations, if the court wants that time

to study the requests.

Mr. Holtzoff. May I mention the practice in the District of Columbia? In the District of Columbia, after the evidence is closed the parties present their requests -- they call them prayers in this jurisdiction -- and they argue and discuss them with the judge, and during their discussion or argument the judge indicates what his ruling may be. That process may take half an hour or half a day. Then the summations start. There is some merit in that practice.

Mr. Medalie. We cannot afford to take that much time in our district. They keep us moving.

Mr. Holtzoff. Perhaps New York judges can speak faster.

Mr. Medalie. They must -- not that they can.

The Chairman. You do not do this in civil cases in New York?

Mr. Medalie. No.

The Chairman. Neither do we. If I asked a judge in our district court to tell me what his rulings on my requests were he would just laugh at me.

Mr. Seasongood. Nevertheless it is a very fair thing, because it is very embarrassing for counsel to argue on the line that the judge will charge this way, and then the court charges differently. It makes counsel's argument ridiculous.

Mr. Medalie. That may be theoretically so.

Mr. Seasongood. No; it is practically so.

Mr. Medalie. But counsel are rather careful to avoid those pitfalls.

The Chairman. Gentlemen, I think this must stay in, in view of the situation in over half of the States of the Union.

We are getting up against a practical situation.

Mr. Seth. I think it is important to know how the judge decides.

Mr. Seasongood. He writes "G" or "R".

Mr. Holtzoff. Or he may raise the question.

Mr. Youngquist. It is simply for the information of counsel, for their guidance in making their arguments. That is all. It is not a part of the proceedings. I think it is all right as it is.

Mr. Medalie. You have indicated that we must accept this.

The Chairman. I think so.

Mr. Medalie. Then let me bring up the next point. Counsel takes his objection -- we call them exceptions -- to the instructions, and it is stated here that he must state the grounds of his objection.

In New York you do not do any arguing with the judge when he is instructing the jury. You just stated what your exception is. That is calling his attention to it sufficiently. If you are to engage in an argument with the judge after he has instructed the jury you are getting what we consider around New York as a disorderly proceeding.

The Chairman. No; the jury has retired, and then you step up to the bench, and the stenographer is still present, and you say, "I except, your Honor, to that part of your charge in which you dealt with the burden of proof in an arson case."

Mr. Medalie. It says, "Before the jury retires."

The Chairman. But out of the hearing of the jury.

Mr. Crane. I am not familiar with this practice. When the jury is out of hearing then you have this colloquy with the court. Then does thejudge call back the jury and charge them again?

The Chairman. If the judge thinks, upon reflection, that he missed the point of the charge he will call them back and say, "My attention been called to a point which perhaps I ought to clear up."

Mr.Crane. I thought it meant after they had retired for good.

Mr.Seth. No.

Mr. Youngquist. In our State it quite often happens that an additional charge be given after the objections have been made and the colloquy has occurred. I think that is a good idea.

The Chairman. Yes.

Does the rule stand, or are there any further suggestions? If there is nothing further we will pass on to Rule 52.

Mr.Seasongood. I should like to have it phrased so that--perhaps it does not read that way, but it seems to me that it might mean that you have to give the very instructions that are asked.

Mr. Woltzoff. No. The corresponding civil rule has not been so construed.

The Chairman. That you must give them or must not give them?

Mr. Seasongood. As I said before, I do not think that you have to follow the statute practice that the judge has to give the instruction exactly as you request it, but it should

be enough that the judge gives the substance in his general charge.

Mr. Crane. I think that is understood.

The Chairman. Just to cover that, may we have it understood that the Reporter will reinvestigate that particular point under the civil rules; and if there is any doubt about it I think it will be covered.

Mr.Waite. I thoroughly agree with Mr.Seasongood there. I wonder if we could not simplify it by making it read this way: "may file written requests that the court instruct the jury onthe law substantially as set forth in the requests."

Mr. Seasongood. That is what I suggested before -- or in substance.

The Chairman. Will the Reporter bear that in mind?

Mr.Robinson. Yes, sir.

Mr. Seth. Perhaps the word "modification" could be inserted in there and would take care of that: "giving, modifying, or failure to give."

I know cases on that, that I have mentioned.

The Chairman. Are we ready for No. 52?

Mr.Medalie. I move that it be stricken.

Mr. Holtzoff. I second the motion.

Mr.Robinson. Of course that is a new idea where trial is by the court.

Mr. Crane. That is the civil rule.

Mr. Waite. I should like to ask the reporter what he had in mind in line 5: "and in granting or refusing interlocutory injunctions". Where did you get those, in a criminal case?

Mr. Robinson. That was carefully discussed, and it was decided that it should be left in so that if the members of the committee thought there were any proceedings of a supplemental nature in which injunctions might be involved it could be left in. Of course it is doubtful if there is such a possibility.

Mr. Waite. I am asking in good faith and out of ignorance if there is ever any such thing as an interlocutory injunction in a criminal proceeding.

Mr. Seth. A later rule mentions a case in which there might be an injunction.

The Chairman. Where an injunction was issued on complaint of breach of peace-- enjoining that the man must perpetually behave himself.

Mr. Youngquist. I suppose some of these rules were put in just for the information of the committee, with the expectation that they would be stricken.

Mr. Robinson. Certainly, if there is no possibility of it.

Mr. Youngquist. I do not see any.

Mr. Robinson. Then that is out.

The Chairman. Rule 52. Do you want to say anything further?

Mr. Robinson. No. In fact, in New York some judges expressed the fear that this rule would be included in the criminal rules. Because they said they thought no judge should have to set forth his findings of fact, especially when the trial was by the court. They said that would be an impossible burden on the judge.

The Chairman. Is there anything further to be said by

the committee?

Mr. Burke. Why is it possible and desirable in civil cases but impossible in criminal cases?

Mr. Medalie. I think it is due to the fact that appellate courts want to make their jobs easier, and the only possibility they have is where there has not been a jury trial. Also the Federal courts in my district never have liked findings in civil cases.

The Chairman. The motion is to strike out Rule 52.

(The motion was agreed to.)

The Chairman. Did I interrupt you, Mr. Seasongood?

Mr. Seasongood. I have forgotten the ~~lore~~ law on the subject; but you get a more thorough review, in civil cases ~~that~~ if the jury has ~~weighed~~ been waived, when you have findings of fact than when you do not. Unless you ask for separate findings of fact -- I am not speaking very accurately; but it is just in the back of my head that you have a better review if you ask for findings of fact than if you do not.

Mr. Holtzoff. That is right.

Mr. Seasongood. It may be that the same thing would be true in a criminal case. I do not know.

The Chairman. Rule 54.

Mr. Youngquist. I take it there is no Rule 53?

The Chairman. No.

Mr. Robinson. No, sir. It had to do with masters, and we could not see how masters had a place in criminal cases.

The Chairman. I cannot, either.

Mr. Holtzoff. I am wondering whether Rule 54 has any application to criminal cases. Perhaps it has not, in its

present form. I move that we strike out No. 54.

Mr. Medalie. Including the cost provision.

Mr. Holtzoff. Yes.

Mr. Crane. Oh, yes; surely.

Mr. Medalie. It is not safe to commit crimes if you have to pay the costs!

Mr. Seth. So the rule goes out as a whole.

The Chairman. What is the present rule as to costs?

Mr. Medalie. There are special statutory provisions assessing the costs of prosecutions.

The Chairman. Could it not be summarized in a short paragraph like that?

Mr. Medalie. If you have specific statutes dealing with particular cases, then you have it. You have not abrogated it.

Mr. Holtzoff. Ordinarily the judge may impose costs as a fine, in his discretion.

Mr. Crane. In a criminal case?

Mr. Holtzoff. Yes. It does not do any good ordinarily; all we do is to accumulate thousands of unpaid judgments for costs, and we do not know what to do with them.

Mr. Youngquist. That applies only to judgments rendered?

Mr. Crane. Yes; that is only where there is a fine imposed.

Mr. Medalie. Where is that?

Mr. Youngquist. Page 1, on the left. That applies only in a prosecution for fine or forfeiture? Oh, I beg your pardon -- the latter part of it applies to offenses.

Pages 1 and 2 are reversed there.

Mr. Medalie. It is discretionary in cases not capital. For murder or treason you do not pay costs!

Mr. Youngquist. You may figure that the man may be hung and therefore could not pay. What do costs mean?

Mr. Medalie. It is the act of May 8, 1792.

Mr. Youngquist. In our State we do not assess costs against a defendant in a criminal case; and in view of the fact that if the defendant is acquitted he may not tax costs against the Government, I do not know why it should not work reciprocally.

Mr. Wechsler. I think this statute has been used primarily in criminal contempt cases, as a matter of fact, and in other cases in which corporations are defendants, and where the thing has been used.

The Chairman. Rule 58.

Mr. Medalie. What have we done? Are we satisfied about costs going out?

The Chairman. Yes; Rule 54 is out, by common consent. Now Rule 58.

Mr. Robinson. In Rule 58 we have some information here on the present Federal law. The judgment in a criminal case is the sentence.

"After a plea of guilty, or a verdict of guilt by a jury or finding of guilt by the trial court where a jury is waived * * * sentence shall be imposed without delay, * * *."

Of course that is in the criminal appeals rules.

Mr. Seasongood. Excuse me, please. Does it not say "impose sentence unless there is a motion for new trial?"

Those rules are at 292 U.S. It is my recollection that they do not impose sentence if a motion for new trial is pending or is about to be filed.

Mr.Robinson. You are speaking of the statute; are you?

Mr. Seasongood. No; I am speaking of the criminal appeals rules as given in the back of 292 U.S. Perhaps we can get that, can we not?

Mr. Wechsler. That is the provision of the criminal appeals rules.

Mr. Robinson. Oh, the criminal appeals rules?

Mr. Seasongood. Yes.

Mr. Robinson. We have them here.

Mr. Youngquist. In line 4 shouldn't we strike out "special verdict"?

Mr. Medalie. Don't you want to begin after the semicolon in line 3, and down to line 6 of Rule 49? I move that that be stricken.

Mr. Youngquist. Before you come to that in line 4 you should strike out "a special verdict in the form of a special" and insert the word "the".

Mr. Robinson. It is "upon the general".

Mr. Youngquist. "Upon the verdict".

Mr. Holtzoff. How are you modifying line 2? Because you do not enter judgment until after sentence.

Mr. Crane. The sentence is the judgment; is it not?

Mr. Holtzoff. Yes; that is right.

Mr. Medalie. No; the clerk could not enter anything until the judge sentences, after verdict.

Mr. Holtzoff. In the present Federal procedure, which was

modified two or three years ago, after the judge pronounces sentence orally in open court then the clerk fills out a written judgment. For many years we did not have that, and we had a good many ambiguous sentences. So the clerk was finally required to write them out.

Mr. Orfield. A sentence is a penalty; is it not?

Mr. Holtzoff. A sentence is a penalty pronounced by the judge in open court. Then a written document is signed by the court, ~~requiring~~ setting out the sentence and acting also as a commitment.

Mr. Medalie. Don't we want to provide, "After verdict and sentence, judgment shall be entered by the clerk in accordance therewith?"

Mr. Wechsler. I understand that the Reporter is going to draft a more elaborate provision with reference to sentence, anyhow. He referred to it yesterday in colloquy with Mr. Glueck. It seems to me that Rule 58 would play such a minor part in a statement about the total sentence problem, if it should be handled by the rules, that it is hardly worth while to consider this phase of it separately.

Mr.Robinson. I asked Mr. Glueck to give us his recommendations on that subject -- if you want to proceed with the let er he wrote, in which he stated some of his ideas. I said I hoped he would be able to stay and to present those to you. But he had to leave.

Mr. Wechsler. I see. You meant today. I thought you still had the problem under consideration; I misunderstood.

Mr.Robinson. Oh, no; it is still under consideration, all right.

Mr.Medalie. In the meantime can't we simplify what we

have here?

Mr. Robinson. Yes; but it is much more extended than this.

Mr. Youngquist. I was wrong in my suggestion, because that is dealing only with answers coupled with interrogatories.

The Chairman. Those are out.

Mr. Holtzoff. Yes.

Mr. Medalie. I think that after the semicolon everything to the end of the first sentence would have to go out.

Mr. Youngquist. That is right.

Mr. Medalie. I would take the words "after sentence is imposed by the court" --

The Chairman. Will you read the first clause as you have it?

Mr.Medalie. "After verdict and sentence".

The Chairman. Verdict of the jury?

Mr. Medalie. It might be the judge's.

"After the verdict of the jury or finding by the judge, as the case may be, and sentence thereon, judgment shall be entered forthwith by the clerk in conformity therewith."

The Chairman. The rest of the sentence is out?

Mr. Medalie. Yes.

The next sentence I do not understand: "But when the court directs entry of judgment of guilty or for other remedy"-- are there other remedies?

Mr.Holtzoff. No; I cannot recall a case.

Mr. Medalie. There is no forfeiture any more. That is 1789.

Mr.Robinson. Of course sometimes we have statutes --

at least in the State practice -- where you have an injunction rather closely wrapped up in a judgment -- padlocking a nuisance, or something of that kind.

Mr. Holtzoff. There is no such situation in the Federal law, I think.

Mr. Robinson. I do not know. Under the alcohol administration act -- but that is not criminal.

Mr. Holtzoff. No; that is a separate forfeiture proceeding.

Mr. Seth. Mr. Medalie, you mentioned the situation where there is a seizure of property, and I asked whether the forfeiture of the property was accomplished by a libel procedure upon land. Am I right about that? If there a separate libel to forfeit the property?

Mr. Medalie. Yes; there is a separate libel.

Mr. Seth. And it is not forfeited, as I understand.

Mr. Medalie. No; I do not understand so.

All right; that is cleared up.

Mr. Seasongood. I come back to the proposition that it is beyond our jurisdiction, because the order of the court is with respect to rules prior to or including the verdict or finding of guilty or not guilty. According to our minutes that is where we are stopped.

Mr. Youngquist. I thought at our meeting in January we decided we would go beyond that -- tentatively, at least.

Mr. Seasongood. My second point is that this is already covered by the rules on appeals, 297 U.S. 61.

Mr. Seth. Is that Rule 1 or Rule 2 of the Criminal Appeals? I cannot remember which it is.

Mr. Seasongood. My notation is "1", but I am not sure which is correct. As I read that you do not have the sentence if a motion for new trial is pending.

Mr.Robinson. Are you assuming that the criminal appeals rules will be binding on whatever we do here? We can consider them if the Court wishes us to do so, but that would not bind us.

Mr. Seasongood. After the Court has adopted those, would it not be rather peculiar?

Mr.Robinson. No; those rules are adopted with the view that they are being changed from time to time.

Mr. Seasongood. Of course I think there is good reason for not entering the sentence until the motion for new trial is disposed of.

Mr. Seth. I raised the question in my letter to the Reporter whether we should go into those rules. I think the whole scheme should be adopted in one set of rules, the same as was done with the civil rules. But I am not sure that we are committed to that task.

The Chairman. We are not, as our reference now stands.

But it was agreed the first day we met here that we should keep the thought in mind in case the Court should ask us to do so; and at least among the circuit court judges there has been talk of the desirability of doing it, because they are finding that the civil appeals practice is simpler now than the criminal appeals practice.

Mr. Seth. Moreover, there are some proceedings in the civil appeals rules that would be an entirely different procedure than what these criminal appeals rules would be, if

that were left as an entirely separate code, and if we stopped at that point. For instance, there ought to be some kind of a section in our code indicating what should be the ground of a motion for new trial -- those that have been recognized according to the usages of courts of law. I think the rule is good and ought to be specific.

At any rate, there is no provision in the criminal appeals rules of the grounds upon which a motion for new trial can be granted. They provide when the motion must be made, but they do not tell us anything more about it.

Mr. Seasongood. I should like to direct the attention of the brethren to the question of whether the sentence should be immediately on the return of the verdict of the jury or whether it should await the motion for new trial. Of course in a civil case you do not enter judgment until you either sustain the verdict --

The Chairman. What are the advantages both ways?

Mr. Seasongood. The advantage that it is expeditious. You sentence him as soon as you have the verdict of the jury.

Mr. Holtzoff. I think that should be in the discretion of the court. Of course, ordinarily if the court were seriously to entertain a motion for new trial -- which does not ordinarily happen in a criminal case -- he would postpone sentence. But some judges pronounce sentence immediately after the return of the verdict, at the end of the trial. But I think this should be clearly in the discretion of the court.

Mr. Wechsler. Is it not our purpose to introduce the idea of an investigatory probation as an aid to the court in sentencing? I do not see how any of that can work if you

sentence a man immediately after verdict.

Mr. Holtzoff. I agree with you that the ideal thing is to have a pre-sentence investigation in every case. But in many districts they make the pre-sentence investigation before the trial; a probation officer does that. That is done so as to have the facts ready in case of conviction.

Mr. Wechsler. Is that frequently done?

Mr. Holtzoff. In some districts.

Mr. Wechsler. That seems an incredible procedure.

Mr. Holtzoff. In any event it does seem to me, Mr. Wechsler, that the pendency of the motion for new trial is the test. But it is the making of the pre-sentence investigation that is important.

Mr. Wechsler. At least if you contemplate having such an investigation it indicates that sentence immediately after judgment should be outlawed -- as I think it should be.

Mr. Medalie. It should not be outlawed, because in many cases it does not matter how good or bad the defendant is; he just must go to jail for the crime he has committed.

For instance, a very responsible member of the community, a man who was known as a church member and the head of charity drives and the head of a corporation, or anything else you wish, is convicted of a crime. You do not hesitate with what is to be done with him. You intend to reform him.

Mr. Youngquist. Mr. Medalie's suggestion was that judgment be entered after sentence.

Mr. Medalie. Yes; it has to be.

Mr. Seasongood. Now we are talking about whether the sentence should be entered immediately on the finding of

guilty.

Mr. Holtzoff. Take an antitrust case. There is no question of a man's morals; no such question as that is involved. The judge knows whether he wishes to impose sentence, and all that sort of thing.

The Chairman. Gentlemen, it is quarter past ten.

Mr. Seth. Can't we have the criminal appeals rule with respect to reserving sentence ready for us in the morning?

Mr.Robinson. I thought that all the criminal appeals rules are here in the books.

Mr. Seth. Perhaps they are.

Mr.Robinson. Under Rule 72 they are all written out in the books.

The Chairman. Gentlemen, what time is it your pleasure that we meet in the morning?

Mr. Medalie. Ten o'clock. It is not a pleasure to come in late, but every morning I am compelled to handle a number of telephone calls to New York, and I cannot do that by 9.30.

Mr. Waite. At the rate we are going, can't we start at 10 o'clock and get through?

The Chairman. I have been looking ahead, and I notice that 63 to 69 are blanks. That is quite comforting. So if we assemble expeditiously at 10 o'clock I think we may be able to finish during the day -- possibly during the afternoon.

Mr. Wechsler. May I ask if you intend, in the present state of uncertainty as to our jurisdiction over appellate proceedings, to consider the subsequent rules here which relate to appellate problems?

The Chairman. I should hope very much that we might;

because I imagine that one of the things the Chief Justice doubtless will ask me is, "Have you anything really to suggest?" We cannot tell that until we have had our discussion here.

We have the memorial here prepared for Professor Baker, which is now ready to be signed. If you will step to the desk and sign in alphabetical order, we would like to get that on its way as soon as possible.

Mr. Dession. Is it safe to make engagements for the afternoon?

The Chairman. I think we shall have to leave in the afternoon. We may have a short lunch.

(Thereupon, at 10.15 o'clock p.m., a recess was taken until Thursday, September 11, 1941, at 10 o'clock a.m.)

RETURN TO FILES

CRIMINAL RULES COMMITTEE
207 United States Supreme Court

Copy for Mr. Alexander Holtzoff, Secretary.

Thursday, September 11, 1941.

Hearing Before the

ADVISORY COMMITTEE ON RULES OF CRIMINAL PROCEDURE

UNITED STATES SUPREME COURT

WASHINGTON, D. C.

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C O N T E N T S .

Thursday, September 11, 1941.

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ADVISORY COMMITTEE ON RULES

OF CRIMINAL PROCEDURE,

UNITED STATES SUPREME COURT

THURSDAY, September 11, 1941.

The Committee met pursuant to adjournment, at 10 a.m., Mr. Arthur T. Vanderbilt, Chairman, presiding.

PRESENT:

Same as previously noted, except-

ABSENT:

George James Burke

Sheldon Glueck

J. O. Seth

George H. Dession

John J. Burns

- - -

P R O C E E D I N G S

The Chairman. Gentlemen.

What rule are we on?

Mr. Robinson. 59. I think we had finished with 58.

The Chairman. In connection with Rule 58 I have just received a letter from Mr. Richard A. Chapel, chief of probations, with some valuable suggestions. It fits right in with the remarks made yesterday by Mr. Glueck, and Mr. Wechsler. We are turning it over to the Reporter so that if possible he can incorporate those ideas.

If there is nothing further on 58 we will turn to 59.

Mr. Robinson. This too will be connected with our considerations with regard to the relation of the rules to appeals. I do not believe I have any comment on 59.

Mr. Medalie. I would like to know about this provision, beginning at line 6 and on to line 7:

> "the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law"

Mr. Holtzoff. That would have to be changed I think in the light of a change we made yesterday striking out the rule as to findings of fact.

Mr. Medalie. Yes, but now, why "additional testimony"? I suppose the judge could take it if he were the sole trier of the fact.

Mr. Robinson. That is what it says in line 6, "tried without a jury".

Mr. Medalie. Oh, that is right. Excuse me.

Mr. Robinson. Pardon?

Mr. Medalie. That is the answer. Pardon my interposition.

The Chairman. You want the part in line 8, "amend findings of fact", out, though, do you not?

Mr. Holtzoff. Yes.

Mr. Youngquist. That would make it, then.

Mr. Robinson. Yes, that is right.

The Chairman. "And make new findings and conclusions."

Mr. Robinson. Yes.

Mr. Youngquist. He does not make findings and conclusions, under the practice we agreed on yesterday.

The Chairman. That is right.

Mr. Robinson. Yes.

The Chairman. Lines 8 and 9 are out.

Mr. Robinson. "And direct the entry of a new judgment."

The Chairman. That is in, I suppose.

Mr. Robinson. Yes.

Mr. Youngquist. On line 3, the new trial may be granted "on all or part of the issues in a criminal proceeding." Would there ever be a new trial on part of the issues in a criminal proceeding?

The Chairman. No.

Mr. Holtzoff. No.

Mr. Robinson. That goes out with some other material we put out here yesterday and the day before.

Mr. Youngquist. Yes.

Mr. Longsdorf. That is all?

Mr. Youngquist. "On all or part."

Mr. Holtzoff. Well, if that is so, I do not think you need anything beginning with the word "and" on line 3.

Mr. Youngquist. You do not.

Mr. Holtzoff. And ending with the word "proceeding".

Mr. Youngquist. That is what I had in mine.

Mr. Orfield. Lines 4-6 state the grounds of new trial. I wonder if that states the grounds broadly enough. Ought there not to be some additional grounds for new trial? I wonder if we could not incorporate some of the provisions of the Model Code of Civil Procedure, paragraph 65.

The Chairman. How does that read?

Mr. Orfield. (reading)

"The court shall also grant a new trial for any other cause not due to his own fault, if the defendant has not received a fair and impartial trial."

Mr. Holtzoff. I think that is agreeable. There is no harm in adding it, but that is implied in the statement that is in the rule now, because that is the present law. The judge's power to grant a new trial is unlimited under the federal procedure.

Mr. Orfield. I am not prepared to say that -- giving all sorts of reasons, but I do not know if the cases have come right out and said that.

Mr. Holtzoff. Your statutes say that.

Mr. Longsdorf. I think you will find cases which have decided that for any error amounting to a miscarriage of justice or substantial prejudice to the defendant the judge can grant a new trial. Isn't that according to the usage of courts of law?

Mr. Holtzoff. I know that in the federal courts they will grant--I know a case where it was done--a new trial for

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no particular error of law but because the judge feels that an unjust result has been reached.

Mr. Longsdorf. In his discretion?

The Chairman. Is there any harm in incorporating that language that has just been read?

Mr. Holtzoff. No.

Mr. Medalie. I think if we incorporated certain language there are implied exclusions of other things, and I think it is good to let the courts oontinue to expand or contract according to experience.

The Chairman. But have you not a very practical difficulty in some States? Granting the new trial in the State courts is very much hedged about; unless there is some express authorization, taking a broad point of view, there is always a tendency of a new district judge to take his state law with him, and I think a little sentence like that if it doesn't hurt anybody might be very helpful to many defendants.

Mr. Longsdorf. That may be, Mr. Chairman, but when the Civil Rules were being considered I very well remember that it was with the purpose of getting away from the implications that arose out of those two specific statutes, that it was worded in this language.

We have a statute in California which lays down the grounds upon which a new trial may be granted, and the very explicitness and specification that the statute contained made it troublesome, because it gave rise to a whole flock of implications. They did not know whether those were exclusive or not, and finally we amended the statute and put in an additional subdivision giving him power to do it in his

discretion, when he thought it ought to be done.

Well, what was the result? We cut them out, all the rest.

The Chairman. You have the suggestion before you.

Mr. Dean. I would like to move that at the end of the word "United States", the 6th line, we add that general language which Mr. Orfield suggests in the A.L.I. Code.

Mr. Longsdorf. I have no objection to it.

The Chairman. I haven't any conviction for it.

Mr. Longsdorf. Would you read that again?

Mr. Orfield. (reading)

"The court shall also grant a new trial when from any other cause not due to his own fault the defendant has not received a fair and impartial trial."

Mr. Crane. Why do you put it, "not due to his own fault"? That is where most of the trouble comes.

Mr. Dean. I would strike those words.

Mr. Crane. Why shouldn't it be when he has been clearly in error according to the law?

Mr. Longsdorf. He means the defendant's fault.

Mr. Crane. Oh, the defendant's fault?

The Chairman. Yes.

Mr. Crane. I do not see why that should not be eliminated.

Mr. Medalie. The real object of granting a motion for a new trial is in the interest of justice, isn't it?

The Chairman. Absolutely.

Mr. Medalie. Well, wouldn't it be enough if we said just that, and let the courts develop it whichever way they can--as they should?

Mr. Dean. I meant we would have that particular language,

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but I think there ought to be a general over-all one, if the present cases restrict the motion rigidly.

Mr. Holtzoff. No, but they do not. The present cases do not restrict it, I am quite sure. I think not only the decisions but the actual practice of the federal judges is to be rather plenary in their use of the power to grant new trials.

Mr. Dean. Would there be any objection to adding this one just to cover any eventuality?

Mr. Crane. He has it--

"criminal proceedings, for any of the reasons for which new trials have heretofore been granted in criminal proceedings in the courts of the United States."

The Chairman. That is taken from the Civil Rules, Judge.

Mr. Crane. Yes.

The Chairman. But I think we can do better than that.

Mr. Crane. I think if you had this, here, it would be sufficient, wouldn't it?

The Chairman. Or even the general language Mr. Medalie suggested.

Mr. Medalie. I suggest:

"by reason of error, insufficiency of testimony, or in the interests of justice"

Mr. Holtzoff. "Or for any other reason, in the interests of justice".

Mr. Medalie. Yes.

Mr. Holtzoff. Because they are all in the interests of justice.

Mr. Medalie. That is right.

Mr. Holtzoff. I think that is better wording.

The Chairman. That is what you said first?

Mr. Medalie. That is the first.

Mr. Holtzoff. I am afraid of the partial enumeration.

Mr. Dean. I am, too.

Mr. Crane. I think the general statement that they can grant a new trial where for any reason in the estimation of the judge it has been unfair or erroneous. I do not mean you have to recite that, but the American Institute has a good phrase, there, if you take the general one instead of specifications.

Mr. Longsdorf. Mr. Chairman, I think you will find some pretty good language in your federal statute, which is superseded by the Civil Rule. I think the Civil Rule departed from that language a little bit, and I do not think it was bettered thereby. I will try to get that, or Mr. Strine maybe can find that old New Trial section of the judiciary title.

Mr. Medalie. Well, the Judicial Code says:

"In cases where there has been a trial by jury, any reasons for which new trials have usually been granted in courts of law."

Mr. Longsdorf. Well, now, I think that is better a little bit than this, because it does not confine it at all.

Mr. Youngquist. Why not say:

"A new trial may be granted whenever required in the interests of justice."

Mr. Crane. That covers the whole thing.

The Chairman. Is that satisfactory?

Mr. Dean. That is all right.

The Chairman. The motion then, made by somebody, is to strike from the beginning of line 4, or from the word "defendant" on line 3, to the end of the sentence, and substitute:

"whenever required in the interests of justice"

Mr. Orfield. Yes, sir.

The Chairman. Any remarks on the motion?

(The motion was agreed to.)

The Chairman. Is there anything further on (a)?

(b)?

Mr. Holtzoff. I would like to make a suggestion as to (b). I had a rather harrowing experience with a death case here several years ago which led me to the conviction that there ought not to be any time limit on a motion for a new trial on the ground of newly discovered evidence.

What I have in mind is this. In this particular case the defendant had been sentenced to death. We discovered additional evidence, sent for the defense counsel with a view to having him make a motion for a new trial, and then after going into the matter we noticed that the time had gone by under the rules. There wasn't any remedy for this man, and all we could do was to arrange for a commutation of sentence, which we did.

Now, this sort of thing can occur not only in a death case, it can occur in a case where a person might have been sentenced to a long term of imprisonment, and after the term expires newly discovered evidence turns up. Now, of course these cases are very rare of motions for new trials on the ground of newly discovered evidence--fortunately, very rare--but in the unusual case where it arises it is very very necessary to achieve justice and there ought not to be any time

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limit.

Mr. Dean. It caused a great deal of trouble in the Mooney case, if you recall. The California statute provided that you could not make a motion for a new trial on the ground of newly discovered evidence after one year.

Mr. Holtzoff. The case I refer to, you probably recall - it was the ~~Richard Deshart~~ Gordon J. Shoppe case.

Mr. Dean. Yes, I do.

Mr. Holtzoff. And we had to ask the President to grant a commutation of sentence because the courts had lost jurisdiction to grant a new trial in the case, and the man had been sentenced to death.

The Chairman. Must there not on the other hand be some time limit as to when counsel in a particular kind of case may excite the public mind and keep on bringing in successive applications?

Mr. Holtzoff. I think of course you could trust to the good judgment and discretion of the courts not to entertain frivolous applications, and we ought to have a provision that there must be due diligence.

Mr. Seasongood. That is in here.

Mr. Medalie. The California statute is doubtless like the New York statute. There is a 1-year time limit, plus the requirement of due diligence. In other words, if you could have found it out in a month, and you move at the end of six months, the court could deny your application, on the ground there was lack of diligence.

Mr. Crane. And the probability that the newly discovered evidence would affect the result.

Mr. Dean. That is right.

Mr. Medalie. And the probability that the newly discovered evidence would affect the result. That would be implicit in it anyway, because there are many items of newly discovered evidence that would make no difference or are not likely to make a difference.

Now the cases in which any injustice is possible because of that time limit are so few and far between that if you weigh any possible injustice in those very occasional and rare cases against the danger of frivolous motions being made to the annoyance of the court I think we are safer in that one case that comes up in 10 years, either in some state court or in the federal courts, to leave that to the pardoning power and avoid the annoyance to the courts. Now, a year is a long time.

Mr. Holtzoff. Well, I will suggest this, that the pardoning power after all is a matter of grace. I think the courts ought to have inherent power to remedy a palpable injustice no matter when that comes to their attention, and I think the judges can protect themselves against frivolous motions.

Mr. Orfield. May I say that in England, in the Court of Criminal Appeals, they allow an appeal at any time. There is no time limit or limit as to the grounds, and the appeal would correspond I would say to our new trial.

Mr. Youngquist. If 10 years after the conviction new evidence should be discovered, would you in that case authorize the court to entertain a motion for new trial?

Mr. Holtzoff. I would if a man were say serving a 20-year sentence in prison and were still in.

Mr. Waite. I have heard a criminal lawyer of great repute say that if he were allowed a new trial on newly discovered

evidence at any time after the verdict and judgment, he could guarantee, give him money enough, to get every single man out of the penitentiary before the expiration of his sentence.

Mr. Medalie. Well, that is quite safe of him to say that, because of the impossibility of anybody meeting his offer. I do not think it is so.

Mr. Waite. If you are going to require a new trial, your "state's evidence" is gone 99 times out of 100. After three or four years they expire--you never in the world would get a conviction that late.

Mr. Orfield. Therefore I would leave it in the discretion of the court. I would not give the defendant an absolute right.

Mr. Waite. That throws a terrible burden upon the court.

Mr. Youngquist. Yes.

Mr. Holtzoff. I think the general tendency of the courts anyway is to deny motions for new trials on newly discovered evidence. It is in the exceptional case that those motions are granted, and if you have an exceptional case I think there ought to be no time limit.

It may be that I feel unduly stirred up about this point because of the rather harrowing experience we had with this death case, where the Department of Justice was helpless to get this man a new trial although we wanted to do so, and we had to resort to the pardoning power, which did not seem right.

Mr. Waite. It seems to me that is exactly what the pardoning power is for.

Mr. Holtzoff. Well, let me tell you another thing about that case. We were not willing to see the man let out to go

scot-free. We were willing for him to have a new trial. The man had been sentenced to death, and so we compromised by commuting his sentence to life imprisonment.

Mr. Medalie. Well, why didn't you want him to go scot-free? Was he implicated in the murder?

Mr. Holtzoff. No--because we were not quite sure of the new evidence. It was a question of identity, whether he was the person that had committed the hold-up. It was murder committed in the course of a hold-up. The newly discovered evidence threw a great deal of doubt upon the identification. It was evidence that had been suppressed--well, that had been in the possession of the local police, but they had not used it.

Now, some of us felt sure that if that evidence had been introduced at the trial there would have been an acquittal or at least a disagreement. We were not willing to pardon him on the ground of innocence, because we were not convinced of his innocence, but we were convinced he had not had a fair trial, because that evidence had not been before the jury, and yet there was nothing we could do about it except to commute that sentence to life imprisonment.

Mr. Waite. Now, unless it was an extremely unusual case, if there had been a new trial, by that time your "state's evidence" would have weakened so definitely that you could not have gotten a conviction anyhow.

Mr. Holtzoff. I doubt it.

Mr. Waite. I say, unless it was an extremely unusual case.

Mr. Holtzoff. This was within a year after the trial. It was after affirmance by the court of appeals, between the time

of affirmance and the date set for execution; but it does seem to me that the courts ought to have inherent power to grant a new trial on newly discovered evidence, at any time.

Mr. Medalie. Now what is the experience of the various States? Isn't that 1-year limitation fairly universal?

Mr. Dean. I think it is quite common.

Mr. Medalie. And do we know of any substantial number of instances, say more than 2 or 3 in 10 years, where there is any annoyance about this thing?

Mr. Holtzoff. Of course instances of this kind are isolated, but when the isolated instance occurs one does get a horrible sense of an injustice having been done and a sense of helplessness and frustration if you cannot grant a new trial merely because a certain time limit has gone by, so I think that there ought not to be any time limit on a motion for a new trial on newly discovered evidence.

Mr. Waite. I think that would be all right if there weren't any possible remedy, but inasmuch as the injustice can be prevented it seems to me to be better to let it be prevented by that means rather than raise all the difficulties and the injustices to society which you are going to get by new trials a long time after the evidence is gone.

Mr. Medalie. Mr. Chairman, to bring it to a head, I would like to move that subdivision (b) be re-written to conform to the New York and California statutes--that is, the 1-year limitation, with due diligence.

Mr. Holtzoff. I move to amend that so as to provide no time limit for motions for new trial on newly discovered evidence, and to preserve the limitation on motions for new trial for any

other ground, as there provided.

Mr. Medalie. The only amendment I made was with respect to new trials with respect to newly discovered evidence.

Mr. Dean. That is all the California statute covers, is one year on that ground.

Mr. Seasongood. May I call attention to the existing rule on that? Now, the existing rule in criminal cases--that is, that I mentioned yesterday--is:

> "except in capital cases a motion for new trial solely on the ground of newly discovered evidence may be made within 60 days after final judgment without regard to the expiration of the term at which the judgment was rendered, unless an appeal has been taken, and in that event the trial court may entertain the motion only on remand of the case by the appellate court for that purpose, and such remand may be made at any time before final judgment. In capital cases the motion may be made at any time before execution of the judgment."

Mr. Medalie. I would accept the amendment as to capital cases, the one that was just read, and I think that is the New York rule.

Mr. Holtzoff. This last sentence that Mr. Seasongood read was inserted in the rule at the suggestion of the Department as a result of that murder case that I was speaking to you about.

Mr. Seasongood. Well, then it is taken care of.

Mr. Holtzoff. I know, but then similar situations may occur in cases of imprisonment.

Mr. Medalie. Then, Mr. Chairman, my motion is "one year, plus diligence, and in capital cases, any time before it is too

late."

Mr. Seasongood. It seems to me that this rule now was as carefully considered as our own, and here, in 1934, the court promulgates this rule. Also you have got this question of an appeal. You would have to take that in, that if the case is appealed you cannot reconsider it, just as you would have to provide, just as they have done here.

I would think that the rule as it is here should stand.

The Chairman. Perhaps this rule that you are reading from might be enlarged to go to a period of appeal which might be more than 60 days, might it not?

Mr. Holtzoff. Five days in criminal cases, 60 days in civil cases.

Mr. Longsdorf. I think there is a good deal of reason to believe--

Mr. Seasongood. An appeal is within 5 days after entry of judgment.

The Chairman. We have first Mr. Medalie's motion.

Mr. Youngquist. Just a moment. I think he re-stated it.

Mr. Medalie. Well, in effect, it is one year, plus due diligence, and in capital cases no limit.

Mr. Wechsler. What is the situation with respect to motions not based upon the ground of newly discovered evidence?

Mr. Medalie. Well, we take that up separately. I did not want to confuse the two.

Mr. Wechsler. I see.

Mr. Seasongood. Well, why should you want a change? I do not want to protract the discussion, but here you have a rule of the Supreme Court. What is there in the nature of things

which makes you change it, and especially a rule which takes care of the fact that you have taken an appeal where your case doesn't say anything about it, any of your amendments? Suppose the case has been appealed; it has to be appealed within 5 days. Can a person come along and make a motion any time within a year for a new trial?

Mr. Medalie. Well, there is this experience that I can point to. While an appeal is pending a motion is made for new trial on the ground of newly discovered evidence, and in the event of the denial, that part of the case is added to the record, where courts are willing to pass upon it, and where courts do not consider such a motion properly before them for appeal on the ground that it is a matter that they do not pass on they just reject it from the record.

Mr. Youngquist. I suppose that it is intended in view of the fact that we are now extending the time of the motion to a time after an appeal has been taken that proper provision will be made in the statute for the mechanics of getting it back to the district court or whatever else may be necessary?

Mr. Medalie. Well, if the district court has power to entertain a motion for a new trial on the ground of newly discovered evidence while the case is pending on appeal, I do not think we need that provision.

Mr. Seasongood. It hasn't, though. The appeal lifts the case out to the appellate court.

Mr. Youngquist. By this rule, though, we are retaining jurisdiction of the district court for this particular purpose. However, provision ought to be made so that for instance the two courts will not be working at cross purposes.

Mr. Seasongood. That is why I say the present rule is better. It says you can only do that on a remand from the court of appeals. Why, if you have got to appeal within 5 days, and appeals are automatically advanced, the case, like as not, will be submitted. I have a case right now where it is up in practically no time. It was filed in June, and it is going to be heard in October, because they are automatically advanced for hearing in the court of appeals.

Mr. Youngquist. Haven't you one more problem, that this motion may be made after it has been affirmed in the court of appeals?

Mr. Seasongood. Yes. Well then it would be remanded, and maybe the problem would be less acute, if it had been affirmed.

Mr. Medalie. Two things arise in connection with your suggestion of following the Criminal Appeals Rule, "solely upon the ground of newly discovered evidence within 60 days after final judgment." I think we ought to make that one year instead of 60 days.

Now, the other provision, "unless an appeal has been taken, and in that event the trial court may entertain the motion only on a remand of the case by the appellate court for that purpose."

The Chairman. Aren't you really now re-stating the present appeal rule that is on page 2, on the left?

Mr. Medalie. That is what I am reading from.

Mr. Seasongood. Yes.

The Chairman. Plus changing to 1 year instead of 60 days?

Mr. Youngquist. I think that is what we are trying to do.

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Mr. Crane. Are you still on the 1-year proposition. I thought if I got out you could settle it all very easily.

The Chairman. The question, Judge, seems to be on a comparison of our (b) with the recent United States Supreme Court Criminal Appeals Rule cited on page 2 on the left under 3, "Motions, 3."

Mr. Medalie. Here is the trouble I find with subdivision 3 of Rule 2 of the Criminal Appeals Rules: "The trial court may entertain the motion only on remand of the case by the appellate court for that purpose." "For that purpose" means for the purpose of considering a motion for a new trial on the ground of newly discovered evidence.

Mr. Seasongood. Yes, sir.

Mr. Medalie. Now, how does the appellate court know anything about that?

Mr. Wechsler. You make the motion in the appellate court to remand for that purpose.

Mr. Seasongood. That is the court that has jurisdiction and that is where you have to do it.

The Chairman. Or the court of appeals kept such jurisdiction.

Mr. Seasongood. Yes.

Mr. Medalie. I can go along on that. I can see that clearly. You still have your 1-year limitation.

The Chairman. Are these motions abandoned?

Mr. Medalie. If in that one year the case is in the appellate court you go to the appellate court and get a remand for that purpose.

Mr. Seasongood. That is right.

Mr. Medalie. Which they won't give you if they think you are frivolous?

Mr. Seasongood. That is right.

Mr. Medalie. I will accept that as part of the motion. The only extension then is the 1-year period.

The Chairman. Now, may we have the motion rephrased as it is and brought up to date.

Mr. Medalie. Without committing the Committee to language, instead of the 60-day period in subdivision 3 of rule 2 of the Criminal Appeals Rules, the time limitation be one year in non-capital cases.

Mr. Holtzoff. I would like to offer a substitute.

Mr. Youngquist. Put no limit in capital cases?

Mr. Medalie. No limit in capital cases.

Mr. Holtzoff. I would like to offer a substitute for that motion, that we adopt the language of the Criminal Appeals Rules in place of Rule 50-B, but that there be no time limitations on motions for new trials on newly discovered evidence.

Mr. Wechsler. I second that, if it is in order.

Mr. Longsdorf. Will you re-state that motion, please?

Mr. Holtzoff. My motion or substitute in effect is that there be no time limit on motions for a new trial on newly discovered evidence.

The Chairman. As I see the situation it is this--we are abandoning our (b) and considering now Criminal Appeals Rule 2, paragraph 3; that Mr. Medalie makes one change, which is to substitute for the 60-day provision there a 1-year provision. Mr. Holtzoff's motion is to make it without time limit.

Mr. Crane. Let me say that I myself personally ought to be

in this matter influenced a good deal by the opinion of the Attorney General,and his experience in office on matters must count with me. It is not like the ordinary practice, and if he feels that this right for a defendant should be as wide as this I feel much like one of my associates in the Court of Appeals. He said that when a certain judge, whom you all know personally by name, voted to sustain a conviction, he never read the evidence, he "went right along." He was the other way. And so here when Mr. Holtzoff thinks that it can be opened as wide as this without any injustice to the Government, I am going along.

The Chairman. We are troubled, some of us, by the thought that if that period is left too long it makes it possible for the court to be troubled with frivolous applications after the state's evidence has been dissipated.

Mr. Crane. Now, you have got your remedy right here, and that is, in one week you can change the rule.

Mr. Orfield. You can resort to habeas corpus or coram nobis or some other form.

Mr. Holtzoff. No because on a writ of habeas corpus in the federal court you cannot consider evidence. There is a question as to the writ coram nobis, as to whether it does or does not still persist in the federal courts. In other words, there is no remedy now.

Mr. Crane. I think you will change the rule but perhaps not so readily as I thought. You have to get an act of Congress to change it, do you not?

The Chairman. That is one of the moot questions as to whether they have to agree to subsequent amendments. They

have to adopt these.

Mr. Crane. Can the Supreme Court change them without an act of Congress?

The Chairman. That is one of the questions.

Mr. Holtzoff. I am strongly of the belief that we are not going to be troubled with frivolous motions for new trials, because one or two attempts of this kind would discourage the bar, even if such a tendency began to develop.

Mr. Medalie. No, the bar gets discouraged. I once suggested on account of the activities of an association of credit men in New York 15 years ago bringing up prosecutions for fraudulent bankruptcies, that would put an end fo fraudulent bankruptcies in a large measure, and experienced bankruptcy lawyers said, "No, there is always some young man who may advise a business man that he has found a new method. It is usually one of the old ones."

Mr. Holtzoff. Even so, the judges could give such motions very short shrift.

The Chairman. I think we have got the question fully canvassed.

Mr. Longsdorf. Before we can proceed with this motion, Mr. Chairman, I think we ought to consider that phrase in the pending rules of the present Criminal Appeals Rules, "except in capital cases." Now, does that mean cases wherein sentence of death has been imposed, or merely cases punishable capitally? and therefore possibly include life imprisonment cases.

The Chairman. I think clearly it means cases where the sentence is death.

Mr. Longsdorf. Then why not say so?

Mr. Medalie. I am not sure of that.

The Chairman. It is indicated by the last sentence:

"In capital cases the motion may be made at any time before execution of the judgment."

I mean, the clear inference is it means death cases.

Mr. Crane. It means he could not get a new trial, on earth at least, after he is executed.

Mr. Wechsler. Mr. Chairman, may I underline one point which I think Mr. Holtzoff made which proved to be very real in one instance, in my own experience, and that is the difficulty which you face when there is an application for clemency based on newly discovered evidence which is very strong, coming at a time when they can no longer be considered by a court because of the time limitation, when you feel that justice requires some relief for the petitioner, but you are exceedingly reluctant to hold that a second jury ought not to pass on all the evidence.

I think it is really a gruesome situation which is likely to result in a denial of justice, whichever way you rule on it. This proposal to avoid a time limit means that the executive in that situation can remand it to a court which has the additional power to grant a new trial, and the executive cannot do that. It is to meet that situation that I would support Mr. Holtzoff's proposal.

Mr. Medalie. Answering Mr. Longsdorf's doubt, the New York statute met it by using this language:

"except in the case of a sentence of death"

Mr. Longsdorf. That is what I was just talking about.

Mr. Medalie. Yes. I think you were right.

Mr. Longsdorf. Sentence of life imprisonment is not executed until a man dies in jail or is discharged.

Mr. Medalie. I would use the language, and I would include that in my motion, "except in the case of a sentence of death," so there would be no doubt.

Mr. Orfield. In Nebraska the period for filing motions on newly discovered evidence was increased from "during the term" to three years because of a bad case. The legislature passed an act on the subject, changing it to three years.

Mr. Robinson. In Indiana they reduced it from a year back to 60 days, just the reverse of the action here. That was based on a state experience that was terrible.

Even changing the 60 days to one year would mean that the finality of judgment, which after all is the first characteristic of judgments, as a practical matter, would be to that extent weakened and every criminal case would be open really for a year, at least in the minds of a good many lawyers.

Mr. Crane. I do not want to take up time, but in my experience most of them turn on men going back on their confessions or their testimony. That is the run of the cases. Now, there is not much attention paid to them. As a very matter of principle you cannot. I have only known a very few instances where the matter has been re-opened on newly discovered evidence, and it has been done when some man turns up in prison and confesses that he committed the crime, and the man has been wrongly committed.

Mr. Holtzoff. In those cases, no matter how much time has gone by, the courts ought to be allowed to do justice.

Mr. Crane. I do not think any harm is going to come from

it.

The Chairman. We have three alternatives successively before us; one, Mr. Holtzoff's, which eliminates any time limit; one, Mr. Medalie's, which fixes one year; and I take it Mr. Seasongood is going to propose--if he doesn't, someone else will--

Mr. Seasongood: Yes, I will.

The Chairman (continuing). --the present rule, there. So let us vote on them successively.

All those in favor of the substitute motion of Mr. Holtzoff fixing no time limit show the hands.

(The substitute motion is LOST.)

The Chairman. Now the next will be on Mr. Medalie's motion to extend the period of 60 days mentioned in subdivision 3 to one year. All those in favor--

Mr. Seasongood (interposing). May I just say as to what Mr. Robinson said, that I think the object of this is to get certainty, and there is some maxim which I will not quote in Latin that there should be an end to litigation. Now, here you are going to have a situation where your appeal will have been heard and the conviction sustained, and as Judge Crane has said, most of this newly discovered evidence is just frivolous, there is nothing to it, but you are always going to have it in, you are going to have it in the papers and you are going to have the general people believing that notwithstanding there was a trial and a conviction, that person was wrongly accused and the proper way of handling that, if it is substantial is by clemency; so we have adopted this rule.

The capital case that Mr. Holtzoff spoke of has been

taken care of in the rule, and I think that the evils of extending the time are much worse than the very occasional good that you may have from some newly discovered evidence being really substantial instead of just a pretext for stirring up matters.

Mr. Orfield. The Institute code gives one year on newly discovered evidence in section 362.

The Chairman. Are you ready for the vote on Mr. Medalie's motion? Better have a show of hands.

Mr. Wechsler. I vote for this, too.

Mr. Holtzoff. Yes, I vote for that rather than 60 days.

Mr. Crane. If we are going to wite out the other one, I am going to No. 3.

Mr. Medalie. You just voted against it.

Mr. Crane. I say, if we are going to wite out the other one, I am going to No. 3.

The Chairman. That seems to have been carried.

(The motion is agreed to.)

Mr. Seasongood. We are going to record these votes, aren't we; somebody said, where it is close we had better be very careful.

The Chairman. I am also wondering if we are trifling with the rule of the Supreme Court adopted 3 years ago.

Mr. Seasongood. That is how I feel.

Mr. Longsdorf. I want to say that, too.

Mr. Crane. I think 3 would be all right, for this reason, if you want to reconsider it. These things are coming up all the time, not on newly discovered evidence. Three men were convicted and got life imprisonment. One appealed, and the

other two did not. Now, by the time they got to the Court of Appeals we reversed the one who appealed. What became of the two who did not appeal? They had no remedy, under the law, at all, except I put in my opinion that of course an application to the Executive would apply to the two who did not appeal.

Mr. Medalie. Was that about 1920 or 1921?

Mr. Crane. Yes.

Mr. Medalie. After the reversal I got the man an acquittal, and then the Governor promptly pardoned the other two, as you suggest, on your suggestion.

Mr. Crane. We dismissed it, said there wasn't a crime, or something.

Mr. Waite. Mr. Chairman, on one of the committees with which I have worked we evolved a process whereby if there was strong dissent from any particular proposition and several of the dissenting members felt strongly about it, we would submit to the executive committee what the majority favored, with a statement to the effect that there was some strong minority sentiment for thus and so. I am wondering--obviously I am not speaking for myself in this case because I happen to be with the majority, but I am wondering if there would be anything undesirable about submitting to the Supreme Court in this instance for example a statement that a number of the Committee feel that the 60-day limit is more desirable.

The Chairman. I think we may want to do that eventually, but I think we are now going on the general understanding that where there is a substantial minority their views will be given consideration again. I gathered from what Judge Crane

said that he is not wedded to the 1-year proposition.

Mr. Crane. I did not vote for the 1-year proposition.

The Chairman. Oh, pardon me. I thought you did.

Mr. Crane. I said if you are not going to adopt the Attorney General's suggestion, I am going to vote to keep this that is already the rule by the United States.

The Chairman. It may be well when we come back to the meeting of the entire Committee--we are now short four or five members--to give further consideration, whichmay result differently.

Mr. Longsdorf. Mr. Chairman, my memory is not very good, and sometimes it does not work as rapidly as it ought to, but we have got a recent federal statute which provides for compensation of persons unjustly convicted. Now, do not wag your head, Mr. Robinson, I am not going to drag in any irrelevancies, but I think we ought to remember that there is such a statute, and that it is not going to be changed by any rules that we can make, and we do not want to do anything that will frustrate that. I do not know. Mr. Holtzoff will no about that and explain it. I cannot.

Mr. Holtzoff. That is a statute which permits a civil action for damages.

Mr. Longsdorf. Yes.

Mr. Holtzoff. In the Court of Claims.

Mr. Longsdorf. Yes.

Mr. Holtzoff. For anyone who is found innocent, after he has been convicted and has served at least a part of his sentence. But that would not interfere with anything that we are doing here.

Mr. Longsdorf. I know, but what prompted me to think of that was Judge Crane's description of that case wherein three co-indictees were convicted, one appealed, and the others did not.

Mr. Robinson. You refer to my wagging my head--I was wagging my head in agreement, because I thought Mr. Holtzoff mentioned a man who had been in prison 10 years on his 20-year sentence. I began to think about this federal statute for compensation for unjust imprisonment.

Mr. Longsdorf. I see. I do not know what would happen.

Mr. Robinson. It is a factor.

Mr. Holtzoff. I do not think the $5,000 is very much compensation.

The Chairman. We have remedied (b).

Mr. Crane. It is coming up again, isn't it?

The Chairman. Yes. All of these are, Judge.

Is there anything under section (c)?

Mr. Medalie. How about line 12?

Mr. Youngquist. How about (b)?

Mr. Robinson. (b) went out.

Mr. Youngquist. We have discussed one phase of it, and not the rest. I wanted to raise the question of the making of the motion "not later than 3 days after the entry of the judgment". The Civil Rules provide for 10. It seems to me the 3 days is pretty short.

Mr. Holtzoff. Three days is the present provision of the Criminal Appeals rules.

Mr. Youngquist. Yes. Well, I would not suggest a change.

Mr. Medalie. Just about a month ago some lawyers came in

to see me about a conviction, and they had forgotten all about the time limit and appealed 10 days or 11 days after the conviction. There was no use, there was nothing pending.

Well, the United States attorney wanted an appeal in that case, so he could establish the law that he had gotten from the district judge, and he went back to the judge and they modified the sentence by some nominal reduction, which I do not think was effective, by the way.

Mr. Orfield. Does not line 12 change the existing criminal appeal rule providing 3 days after verdict, not after judgment?

Mr. Seasongood. Yes.

Mr. Orfield. The judgment might come considerably later.

Mr. Youngquist. That is right.

Mr. Holtzoff. Yes. This is more liberal to the defendant. I did not notice that.

The Chairman. Yes, I think it is.

Mr. Medalie. There is not much trouble about a motion for a new trial on the ground of error or insufficiency. As a matter of fact normally those motions are made by mumbling the appropriate formulas and giving your grounds immediately after the verdict. I think that is the general practice almost everywhere, unless there is some other rule that prevents it or the court says, "I will hear you some other day."

The Chairman. Your motion, Mr. Orfield, is to change, in line 12, the word "judgment" to "verdict"?

Mr. Orfield. Yes, to follow rule 2, section 2, of the Criminal Appeals Rules:

"after verdict or finding of guilt"

instead of "judgment".

Mr. Youngquist. In rule 50 we have provided that within 10 days after the verdict the court may grant or deny a motion for correction of judgment.

Mr. Crane. May I ask: If we have no power to deal with appeals, how can we put in our rules here anything inconsistent with it, if those are adopted? If those appeal rules stand, and we provide any rule here which is inconsistent with them, how can our rule be effective?

Mr. Orfield. The court can take them over. The '34 act still exists, that entitles them to change at any time.

The Chairman. Yes. The court, you see, in 1934 was granted the power to make rules in criminal cases after verdict. Now, the act under which we are operating gives them the same power, up to and including the verdict, and the two acts together give the Supreme Court complete power over criminal procedure.

Mr. Crane. Yes.

The Chairman. Now the court may ask and may authorize us at some early date to weave the two into one complete set of rules.

Mr. Crane. But they have not done so yet?

The Chairman. They have not done so yet.

Mr. Crane. Now, until they give us that power, should we adopt any rules inconsistent with that which they may think should stand?

The Chairman. Well, the suggestion was made at the outset that we might proceed tentatively along the line that we might be given such authority, because they do dovetail in,

and it makes it pretty hard to separate; but if the Court says "No, you have got all the authority we are going to give you," we have to stop right at the verdict.

Mr. Seasongood. That is why we should deviate as little as possible from rules they have adopted, and adopted very recently. I think it is a little preposterous.to do anything else.

Mr. Longsdorf. I feel strongly that way.

Mr. Seasongood. And I think that we are going too far when we take the rules as they have them and stick in "one year" instead of 60 days.

Mr. Longsdorf. It looks rather fresh on our part.

Mr. Youngquist. I do not feel that way about it.

Mr. Crane. You are a younger man.

Mr. Youngquist. Not so much as you might think. If we are going to make suggestions with respect to the appeal rules, I should think the Court would welcome the new ideas now that may develop on or off from the rules that are now in existence and in force; otherwise the Court is going to lose the benefit of what we think about those rules; and if we are going to do anything about it at all, certainly we ought to give the Court full benefit of what we do think, at the same time being reasonably conservative in our departures by reason of the fact that the court no doubt has itself carefully considered the rules now in force.

Mr. Longsdorf. What is going to happen if on the hypothesis that these changes or extensions into appellate rules are made, we frame our other rules, and then the Supreme Court rejects any rules that go into the matter of appellate procedure,

and therefore throws into disarray what we have done on the other part of the rules?

Mr. Seasongood. We would do it all over again.

The Chairman. We are not going to proceed to draft and submit to them any rules on the appellate procedure, unless we have a specific order from them in advance to do it.

Mr. Longsdorf. They are not to be included and submitted in the report of this Committee?

The Chairman. Not without authorization.

Mr. Seasongood. Does the Chairman or Mr. Holtzoff know, when they adopted these criminal rules of '34, whether they had a committee like this?

The Chairman. No.

Mr. Holtzoff. No they did not.

Mr. Wechsler. The Department submitted proposals which were adopted very largely.

Mr. Holtzoff. I suppose the reason they did not have a committee was because the scope of the work was much narrower.

Mr. Seasongood. I was just thinking that if there was a committee we should check it up.

The Chairman. No.

Mr. Wechsler. Mr. Chairman, may I offer as a substitute for Mr. Orfield's motion that instead of the present subsection (b), present Rule 2 in its entirety be substituted and constitute the working model, subject to the one change which the Committee has heretofore voted. That would meet the particular point that Mr. Orfield made, which is sound, with reference to "verdict" rather than "judgment".

It would also retain existing phraseology which is the

same in substance, unless there is some reason to deviate in substance from the existing language.

The Chairman. Do you accept that, Mr. Orfield?

Mr. Orfield. I think not.

The Chairman. Are you ready for the motion? The question is on Mr. Wechsler's motion.

Mr. Medalie. Pardon me, will you re-state that?

The Chairman. It is subject to the change made in Criminal Appeals Rules, too, by your motion that that rule as it stands be regarded as a substitute for our (b) under Rule 59.

Mr. Youngquist. Second the motion.

(The motion was agreed to.)

The Chairman. That brings us to item (c).

Mr. Holtzoff. Well, is (c) necessary, in view of the substitution that we have just now made? (c) merely is a matter of detail.

The Chairman. There is nothing under the present Rule 2 about--

Mr. Holtzoff (interposing). Well, there is nothing in the present Rule 2 about affidavits, but do you need a provision as to how to serve affidavits? In most cases you won't have affidavits in the motion for a new trial, except on newly discovered evidence.

Mr. Longsdorf. You might have something about occurrences--

Mr. Wechsler. Moreover, this would work an automatic delay of 10 days under the second sentence, which would probably be uncalled for in most cases.

Mr. Holtzoff. I move we strike out (c).

Mr. Seasongood. Second.

The Chairman. Any debate?

(The motion was agreed to.)

The Chairman. (d).

Mr. Holtzoff. I think (d) is surplusage in view of the way we modified (a), because we made (a) so broad that (d) becomes surplusage, I venture to suggest.

The Chairman. Mr. Reporter?

Mr. Robinson. I am not sure yet. I am checking. I would like to hear further discussion on it. What do you think about it, George?

Mr. Medalie. I do not think that you need that.

Mr. Holtzoff. I do not, either.

Mr. Seasongood. That limitation of 3 days--there is no point in that any way.

Mr. Holtzoff. No.

Mr. Robinson. I guess it can go out.

The Chairman. Well, by consent,--

Mr. Orfield. Gentlemen, we want to retain the power of the court to act on its own initiative, there.

Mr. Youngquist. That is what I was thinking of.

Mr. Holtzoff. I think you have it. Here we say under (a)

"A new trial may be granted to all or any of the defendants whenever required in the interests of justice."

The Chairman. That would clearly carry it with it.

Mr. Youngquist. I should doubt it then. We go right on and speak of motions, and again we speak of motions. The implication to me there is that it must be on motion.

Mr. Robinson. I do not think we are safe in assuming there that the court will take the initiative under a general

power or grant of that sort.

Mr. Youngquist. No.

Mr. Robinson. --as readily as it would where you expressly recognize that it may take certain action.

Mr. Holtzoff. Of course, there, the court does not take the initiative in those matters.

The Chairman. If there is any doubt--

Mr. Medalie. Where there is no limit at all the court may grant a motion for new trial, once the defendant has made the motion for new trial.

Mr. Robinson. It may.

Mr. Medalie. That means there is no limitation on the court's granting a new trial of its own motion.

Mr. Robinson. If you are sure we have given this enough consideration--I should think there that in civil matters there would be some guidance for us in criminal matters. Are we sure we have considered the same reasons that must have been before the Civil Rules Committee, in striking it out so readily?

Mr. Longsdorf. Suppose a defendant has been convicted on a minor degree, can the court on his own motion grant a new trial and give the district attorney a chance to convict the prisoner?

Mr. Holtzoff. Oh, no. The former jeopardy would be the plea there.

Mr. Youngquist. I think it ought to stay in conformance with the Civil Rules, if we can.

Mr. Medalie. The Civil Rule says "not later than 10 days after entry of judgment."

Mr. Youngquist. Yes. Ours has 3 days after finding or verdict.

Mr. Medalie. What we had in mind was the time at which the motion was made by the defendant.

Mr. Youngquist. And if the motion is not made the court ought to have the power on his own initiative.

Mr. Robinson. This relates to the suggestion made a few minutes ago to the effect that this would further delay.

Mr. Medalie. Giving the court power would not be very serious.

Mr. Wechsler. I move to strike the words prior to "the court" on line 25 so that there be no time limit. I do not think there is a danger that the court on its own initiative is going to do this out of time.

The Chairman. Giving to the court the right to do it at any time?

Mr. Wechsler. "The court of its own initiative may order a new trial,"and so forth.

The Chairman. The motion is to strike line 24 and the first two words of line 25.

(The motion was agreed to.)

Mr. Waite. Would that give the court power to grant a new trial more than one year afterwards? I am a little suspicious of that.

Mr. Wechsler. It says:

"for any reason for which it might have granted a new trial on motion of a defendant."

Mr. Youngquist. The court cannot grant the new trial after it has lost jurisdiction by appeal.

Mr. Seasongood. That means 5 days.

Mr. Longsdorf. It might if it was added.

Mr. Seasongood. I thought Mr. Wechsler did not put in any period. Did you? You simply said "the court may of its own initiative grant a new trial"?

Mr. Wechsler. Yes, but I did not specifically move to strike the words "for any reason for which it might have granted a new trial on motion of a defendant." And the point of the present remark is that perhaps that applies in the time limited on motions by the defendant.

Mr. Longsdorf. I certainly do not think it does.

Mr. Waite. I do not see the reason why, if it might grant on its own motion, that brings in the time limit.

Mr. Youngquist. No. Now, I would like to know one thing before we pass that.

Mr. Wechsler. Do you want the time limit in?

Mr. Crane. Aren't you going to make a great deal of confusion if you are changing the times and the rules, when you have got rules now that are operated in every court, and you are going to change the times for operations in other courts. You are going to get a hodgepodge.

Mr. Seasongood. Has not the court inherent power to set aside? It certainly has inherent power over its judgment. Couldn't it set aside a verdict without any motion?

Mr. Crane. The state court cannot do it after the term has expired. That is, a month.

Mr. Wechsler. If the court can do it on its own initiative after the period prescribed for the making of the motion, then I should think the court could invite a motion

any time, and the rule, in time, would cease to be a jurisdictional rule. I know that the cases under the present rule have treated the time limit as a jurisdictional limitation, and have not felt free to initiate motions outside of the time.

I think perhaps there is a real point in bringing in through the back door what we have just ejected through the front door.

Mr. Youngquist. If we provide that the court may do this at any time before the time for an appeal has expired, or appeal has been taken, that would take care of what I have in mind.

Mr. Holtzoff. That really means 5 days.

Mr. Seasongood. Five days after judgment.

Mr. Youngquist. Wait a minute. I suppose we will change this to "entry of verdict" as we did on the other rule, and the time for appeal does not begin until the entry of judgment, does it?

Mr. Holtzoff. No.

Mr. Youngquist. So that that would not mean the 5 days after verdict that we are talking about here.

Mr. Seasongood. Have we settled that, that the judgment does not go on after that?

Mr. Medalie. We are assuming that there is an appeal in all these cases. There might be no appeal.

Mr. Youngquist. I say, up to the time an appeal is taken, or up until the time for taking the appeal has run?

Mr. Holtzoff. No, not after it has run, because if no appeal is taken the district court would not have lost juris-

diction to re-open the judgment.

Mr. Youngquist. Well, I want to limit it to that.

Mr. Holtzoff. Oh, I see.

Mr. Youngquist. And I suggest that as an amendment.

The Chairman. What is your amendment, Mr. Youngquist?

Mr. Youngquist. I guess we have already voted on Mr. Wechsler's motion, so I move to reconsider it.

Mr. Wechsler. If I still had jurisdiction over the motion I think I would withdraw it at this point.

The Chairman. All right, let us consider the motion withdrawn.

Mr. Waite. May I suggest to Mr. Wechsler an amendment to his motion, to make it read this way:

> "The court of its own initiative may order a new trial at any time and for any reason for which it might have granted a new trial on motion of defendant."

Mr. Seasongood. That would limit the time.

Mr. Waite. To one year. Yes, that is what I meant.

Mr. Wechsler. If it is still in order I would accept that amendment.

The Chairman. Well, you have heard Mr. Waite's motion, accepted by Mr. Wechsler. Any discussion?

Mr. Crane. What is the time? I have forgotten, we have had so many different times, here.

The Chairman. One year.

Mr. Crane. One year?

Mr. Longsdorf. We have renewed the Supreme Court's 60 days.

The Chairman. On newly discovered evidence.

Mr. Crane. On this it is 60 days. We have got so much time here I do not know what it is.

Mr. Seasongood. You cannot do that if an appeal has been taken. He cannot grant a motion for new trial if an appeal has been taken, yet an appeal might have been taken within this time within which he could file a motion on the ground of newly discovered evidence.

Mr. Medalie. I do not think any judge would ever think of granting a motion for a new trial ofhis own initiative, unless it got into the judges hand right after the trial,or even during the trial something has been troubling him.

Mr. Seasongood. That is right.

Mr. Medalie. Now, if that is so, I think we can safely follow the civil rule.of a 10-day limitation after entry of judgment, subject of course to the case being taken away from him by its going to the appellate court.

Mr. Dean. In that situation he could as a practical matter suggest to counsel that this thing does trouble him, and suggest that he make the motion.

Mr. Medalie. Yes.

Mr. Holtzoff. I recall one case in Cleveland in the last two or three years where the judge was very much troubled by what he thought was the insufficiency of the evidence, and he of his own motion without talking to counsel filed an order setting aside the verdict and granting a new trial, after the 10th day.

Mr. Medalie. You could put the 10-day limit here, all right.

Mr. Holtzoff. I think the 10-day limitation is all right.

Mr. Medalie. I so move.

The Chairman. Now, is there a motion pending? I have sort of lost track.

Mr. Medalie. I think by common consent they have all been withdrawn.

Mr. Holtzoff. Mr. Waite had a motion.

Mr. Waite. There was Mr. Wechsler's motion.

The Chairman. He has withdrawn it.

Mr. Waite. Then he renewed it, as I remember it, at my suggestion.

Mr. Wechsler. I assigned it to you.

Mr. Waite. I do not know what Mr. Medalie's motion is. If he is asking Mr. Wechsler's motion I might be perfectly willing to accept Mr. Medalie's.

Mr. Medalie. Mymotion is that in conformity to the civil rule an order for a new trial may be made by a judge of his own initiative within 10 days after the entry of the judgment.

Mr. Robinson. Or in other words that leaves (d) just as it is, does it not?

Mr. Waite. No.

The Chairman. It changes (d) from 3 days.

Mr. Robinson. That is all.

Mr. Seasongood. I do not want to be persnickity but the rules provide an appeal has to be taken in 5 days.

Mr. Medalie. Yes, but it may not be taken.

Mr. Seasongood. But suppose it is taken?

Mr. Medalie. Subject to that.

Mr. Seasongood. Suppose it is taken? It has to be taken in 5 days, and you are granting 10 days to the judge to

grant a new trial, which cannot be.

Mr. Medalie. You are suggesting we make some provision to meet it?

Mr. Seasongood. You must.

Mr. Medalie. That would kill the appeal, wouldn't it?

The Chairman. I would like this to be referred back to the Reporter for further study.

Mr. Crane. I think so.

Mr. Seasongood. Second the motion.

Mr. Wechsler. Can an appeal be taken in 5 days if there is a motion for new trial?

Mr. Medalie. No. There is no motion.

(The motion was AGREED TO.)

The Chairman. The motion to refer this back to the Reporter has been passed.

Mr. Robinson. We are on Rule 60.

The Chairman. I think we have got to work out our time table a little more carefully.

Mr. Dean. Mr. Chairman, in that connection I have got a suggestion. If we are going to go through all the Criminal Appeals matters, shouldn't there be some explanation, since these rules were adopted such a short time ago, as to the necessity for changing these rules at this time, or any portion of them, rather than taking it chronologically and treating it as though we were the committee on criminal appeals rules?

Mr. Holtzoff. There is only one feature in the criminal appeals rules that is vitally different from the Civil Rules. The others ~~is a~~ are matters of detail. That is the presence of the

bill of exceptions, which the Criminal Appeals Rules require, and which the Civil Appeals Rules which came four years subsequently abolished. It might be wise to abolish the bill of exceptions in criminal cases.

The Chairman. I would like to make this suggestion, if it is agreeable--that we take up Rules 60 and 61 and then because some of our members have to leave this afternoon, that we go from there to Rules 77 and following, which deal specifically with matters within our reference, and then come back and go into this other general situation and let Mr. Robinson and Mr. Holtzoff outline the one or two vital changes we want to have made, if the Court will agree.

Now, may we have Rule 60.

Mr. Robinson: "Rule 60. Relief from Judgment or Order."

Under the present federal law clerical mistakes in judgments, orders, records, and the record generally may be corrected by order nunc pro tunc. This rule is a little more explicit and adds that section (b). In fact both are based on the civil rule as you see on the left. Section (b) of course will require some re-wording if you wish to accept it at all.

As you know, mistake, inadvertence, surprise, or excusable neglect generally are used for grounds of the motions to relieve from judgment in civil cases, but I do not know of any state statute in which those grounds are enumerated in criminal cases. For example the New York statute, section 542--well, that will come up in the next rule. I do not know of any state statute which would be comparable to 60-B.

I believe that is all I have to say.

The Chairman. Is there any question on (a)? If not,

we will consider that as passed and go to the discussion of (b).

Isn't (b) dangerous?

Mr. Longsdorf. I think so. It was dangerous in civil cases in California, it was very dangerous, and it produced an immense amount of litigation.

Mr. Waite. Would the Reporter mind giving me an illustration of where (b) might apply? I cannot think of one.

Mr. Robinson. No, I have no illustration in mind. I think (b) can go out.

Mr. Holtzoff. I can give you an illustration--a forfeiture of a bail bond. This might apply.

Mr. Youngquist. That would be a forfeiture against the sureties?

Mr. Holtzoff. Yes, but that is part of the criminal proceeding.

The Chairman. The surety may not be in court when the defendant is called.

Mr. Orfield. He might not be personally in court.

In respect to line 12, isn't 10 days too short a time? I believe the civil rule says six months.

Mr. Longsdorf. It was 6 months in California, and that enlarged its mischievous capacity.

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The Chairman. All right. We will pass that. We will refer that back to the reporter.

Mr. Seasongood. Well, I do not want to be obnoxious.

The Chairman. You have not been obnoxious at all.

Mr. Seasongood. You let everything be corrected but you do not want process to be corrected.

The Chairman. That does not refer to this.

Mr. Seasongood. No, that was a ways back. I was somewhat vehement about not allowing process to be amended, and instead you struck it out.

Mr. Wechsler. I think that at that time we agreed there would be a general saving equivalent.

Mr. Robinson. We did permit amendment of process.

Mr. Holtzoff. The general statute of jeofails.

Mr. Seasongood. That was what I thought you should have, a general jeofails.

Mr. Robinson. Line 13 and 14 state that "A motion under this subdivision does not affect the finality of a judgment or suspend its operation.

Mr. Holtzoff. I think it may stay because suppose the surety is paid and the executor asks for relief?

Mr. Medalie. How about fines levied against the estate? Are they paid?

Mr. Holtzoff. They die with the person.

Mr. Medalie. I know that they are never collected.

Mr. Seasongood. I think it is all right to leave in "legal representative," because you have some provision for taxing the lawyer costs in certain cases.

The Chairman. Rule 61.

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Mr. Robinson. That is the harmless error rule. There are two federal statutes under the accompanying civil rule, as you see on the left: Title 28, Section 391 of the Judicial Code deals with the harmless error where they grant new trials. Title 18, Section 556 refers to harmless error in indictments and presentments, and where there are defects of form.

The present federal law is:

"On the hearing of any appeal, certiorari, or motion for a new trial, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties."

That is Title 28, Section 391 of the U. S. Code.

Title 18, Section 556, states:

"No indictment shall be deemed insufficient, nor shall the trial, judgment, or other proceeding be deemed insufficient by reason of any defect or imperfection in matter of form only which shall not tend to the prejudice of the defendant."

A comparable state statute is Section 542 of the New York Code of Criminal Proceedings, which provides that the court must give judgment without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties.

Mr. Crane. And it is a very important and very useful section because so many cases are affirmed by citing that section.

Mr. Youngquist. Does this cover technical defects in the

b3

written accusation, too?

Mr. Dean. Apparently not.

Mr. Youngquist. I doubt that it does.

Mr. Robinson. If the court sustains or if the court overrules a demurrer, or whatever his motion is, to attack the sufficiency of a written accusation, it would seem that this section would not be subject to reversal, but that would not help on your question.

Mr. Youngquist. No.

Mr. Robinson. You think that should be out, Mr.Yonngquist?

Mr. Youngquist. Yes, I do.

The Chairman. Is that generally agreed?

Mr. Robinson. I might say that Rule 61 or, as described here, the harmless error rule, will incorporate the provisions of the two federal statutes and the New York statute.

The Chairman. Any further suggestions on Rule 61?

(There was no response.)

The Chairman. May we turn now to Rule 77, leaving these intervening rules dealing with appeals alone, until we dispose of what is clearly within our jurisdiction.

RULE 77

Mr. Robinson. Of course, in subsection (b) there you have also the question that in all criminal proceedings the accused shall be entitled to the right of public trial. That has to be kept in mind always. That is set out at the bottom of the page to the left of Rule 77.

In (c) you observe that Rule 77 is substantially the

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same if not precisely the same as Civil Rule 77 because it is difficult for us to see that there is any distinction between civil and criminal cases so far as the district courts and clerks are concerned. That is that under (a) the courts are kept always open; under (b), hearings in chambers, with the caveat mentioned in regard to the exception.

Then clerk's office and orders by the clerk under (c), and notice of orders or judgments under (d).

Mr. Holtzoff. I would like to say a word about (d).

Mr. Medalie. Before you get to (d), I would like to say something about (c).

Mr. Seasongood. Well, before you get to (c), I want to say something about (b). Why say "so far as convenient in a regular courtroom"? Trials should be public and should be in a courtroom. Otherwise that would be contrary to the Constitution.

Mr. Holtzoff. No. Under our juvenile delinquency act we hold hearings in chambers, and that is preferable when carrying out these juvenile delinquency cases.

Mr. Youngquist. That is correct.

Mr. Holtzoff. Yes, that is correct.

Mr. Medalie. That is not subject to these rules?

Mr. Holtzoff. They will be, I presume.

Mr. Medalie. They should not be. Doesn't that act make special provisions for these things?

Mr. Holtzoff. It does, but I think this is one of the subjects that we have not covered here as yet. Perhaps it would have to be one of the matters that will be covered later.

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Mr. Medalie. That act provides for hearings in chambers, does it not?

Mr. Holtzoff. Yes, it does.

Mr. Medalie. Then we could say nothing in these rules that affects the juvenile delinquency act.

Mr. Seasongood. According to this, they may not be in the courtroom?

Mr. Youngquist. The courthouse may burn down. That is possible.

Mr. Seasongood. This refers to a matter of convenience.

The Chairman. I am reminded of the Hall-Mills trial where they brought the pig woman down into court and put her on a stretcher. She was on the stretcher and testified for two or three days. However, they were not sure that they could get her there, and they contemplated holding trial and taking her testimony in the hospital.

Isn't that proper under this constitutional provision?

Mr. Youngquist. If the jury is present.

The Chairman. With the jury and the judge.

Mr. Youngquist. I think it is proper.

Mr. Wechsler. Wouldn't that be made by the deposition provision?

Mr. Holtzoff. In a certain town in Connecticut they hold court in the town hall, in the common council room. That is not a regular courtroom.

Mr. Medalie. I just reminded Judge Crane of a case in 1938 in Albany where the court, the jury, and the attorneys went to the hotel to get the testimony of a man who was in bed who said he had pneumonia, which he did not have.

b6

TheChairman. I think you have to have that exception clause.

Mr. Seasongood. I don't think "so far as convenient" is the way to express it.

Mr. Dean. Do we need any provision that it be in the regular court? Wouldn't it be enough to say that it shall be conducted in open court?

Mr. Crane. That is much better.

Mr. Wechsler. Why should this be limited to trials? Do not pleas, arraignments, and hearings and the other things that happen in criminal cases have to be conducted in open court?

Mr. Medalie. No. Suppose you come in at 4 o'clock in the afternoon with your defendant and arrange for the pleading: couldn't you arraign him before the judge in his chambers and then immediately walk out? Why should the judge have to take the elevator and go down to the courtroom and have the janitor open up the courtroom and just waste a lot of time? What is the need of doing all that?

Mr. Wechsler. I should assume that in that situation it is done at the defendant's initiative, but there could be situations where that is not the case.

Mr. Medalie. Suppose the judge is in one part of the district and the court is not in session and the defendant has been arrested? Then the district attorney wants the arraignment and the defendant would not have any objection to being arraigned where he finds the judge. He should be arraigned wherever the judge is found. Why should everything be held up until the judge takes a trip to the courthouse?

Mr. Wechsler. Suppose a defendant is in custody and the

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prosecutor wants to avoid publicity with respect to arraignment? They bring the defendant to the judge's house and arraign him there. Then he goes back to a place of detention and there is no witness to the incident. Is that a practice that should be encouraged?

Mr. Medalie. Well, the abuse of it should not be, but I think you should trust the judges to take care of that.

The Chairman. Aren't there quite a certain number of cases often on the equity side where you have to get the judge at his home occasionally? Aren't there corresponding matters in criminal cases?

Mr. Medalie. Yes, fixing bail.

Mr. Longsdorf. And habeas corpus.

Mr. Holtzoff. And frequently argument on motions.

Mr. Dean. That is often done.

The Chairman. Have we dispensed with (b)?

Mr. Seasongood. This says that all these other acts may be done within or without the district. Are there any other acts which shouldbe done out of the district?

Mr. Medalie. This is what often happens: A judge comes from one district and sits in another. He has had his trial and gone home; then there are motions. It is easier for the lawyers to go and see the judge than for the judge to come in and see the lawyers.

Mr. Youngquist. Or send it to the judge.

Mr. Seasongood. Or send a bill of exceptions to him.

Mr. Medalie. The judge having tried a case in June has gone off on his vacation from New York to Vermont or Yellowstone

b8

Park. In that case it should be possible.

Mr. Holtzoff. Then you have the situation of one judge in a district.

Mr. Seasongood. I agree that it isdesirable that there should be a lot of things that he could do, but I am just raising some of the questions because it says here "all other acts or proceedings."

Mr. Wechsler. How about sentences?

Mr. Holtzoff. That is part of the trial.

Mr. Wechsler. No, I do not think it is; it is the pronouncement of judgment.

The Chairman. Then again you may have the situation where a man may be designated as judge in two districts. You have to give him this power unless you get him going back and forth a lot.

Mr. Seasongood. There is no question about the power, but to say so broadly that all other acts or proceedings may be done outside the district is something I question.

The Chairman. How about sentences?

Mr. Seasongood. They should be had in the district.

The Chairman. They should be had in the district.

Mr. Crane. Yes. They should be had in the courthouse. I cannot imagine a judge sentencing a man except in a public courtroom.

Mr. Robinson. How about inserting the clause "all proceedings which require the attendance of the defendant shall be conducted" and so on?

Mr. Holtzoff. I think it is a good solution.

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Mr. Longsdorf. It sounds good.

Mr. Crane. How does that read, Mr. Chairman?

The Chairman. "All trials upon the merits and all proceedings which require the attendance of the defendant."

Mr. Wechsler. We do not need "trials upon the merits."

Mr. Robinson. Maybe not, but don't you think it is a good idea to state that?

Mr. Holtzoff. How are you changing this?

The Chairman. "All trials upon the merits and all other proceedings which require the attendance of the defendant."

Mr. Robinson. "Shall be conducted."

The Chairman. "Shall be conducted in open court."

Anything further on (b)?

Mr. Robinson. I think 11, 12, and 13 are safe. We have not been able to find any objection to that.

Mr. Holtzoff. I do not think any objection has been made to this amendment which you have just adopted.

Mr. Orfield. What do you mean by the rule "on the merits"?

Mr. Holtzoff. I do not think you need that at all.

The Chairman. Isn't that meant to eliminate motions?

Mr. Seasongood. What about a trial?

Mr. Holtzoff. Or former jeopardy.

Mr. Crane. It says "all trials."

Mr. Wechsler. I think it was intended to mean defaults in the case of the civil rules.

Mr. Medalie. I think you are safe there.

The Chairman. Anything on (c)?

Mr. Robinson. Line 18 sounds a little strange in criminal

b10

proceedings. If you have suggestions for modifying it I would be glad to have them.

Mr. Holtzoff. Line 18 should be changed. There is no final process to enforce and execute judgments.

Mr. Medalie. What about commitments?

Mr. Holtzoff. We use judgment and commitment.

Mr. Medalie. You mean that is a matter of just routine?

Mr. Holtzoff. Yes.

Mr. Dean. They may not use it next year. That is possible.

Mr. Holtzoff. I suppose it is all right, then.

The Chairman. We come to (d).

Mr. Holtzoff. I have a question on (d). I do not think it is applicable to criminal cases. We do not now serve judgments, and I hope that we will not change the practice.

Mr. Medalie. They do not serve orders, either.

Mr. Holtzoff. I move to strike out (d).

Mr. Medalie. Yes. I second the motion.

The Chairman. All those in favor of the motion say aye.

(There was a chorus ofayes.)

The Chairman. No.

(There was no response.)

3 The Chairman. It is carried.

Mr. Robinson. It is possible to draw an alternate draft.

The Chairman. We are not heartless on the reporter, because, as you remember, he expressed the idea in advance at the opening of the hearings that he put in there many things to bring them to our attention.

b11

Mr. Longsdorf. If it is in order to entertain a motion at this time, or perhaps a suggestion is enough, that the reporter in the course of his studies in recasting any of these suggestions or sections feels that an alternative would be appropriate or desirable--and of course it will be passed on again--but it would be understood that he has the authority of the committee to do that. Even though it is specifically left out, he may submit an alternative.

The Chairman. Yes. We are violating pretty nearly every rule of parliamentary law, or will before the motion to adjourn is made.

Mr. Longsdorf. I think we have done so.

The Chairman. Rule 78.

RULE 78

Mr. Medalie. With reference to the last part, lines 10 and 11, why impose on the judge the need for having a written statement of the reasons in support and opposition unless he wants it?

Mr. Robinson. Yes.

Mr. Medalie. He knows whether he wants it.

Mr. Youngquist. I cannot quite hear you, Mr. Medalie.

Mr. Medalie. You see in lines 10 and 11 "order for the submission and determination of motions without oral hearing upon brief written statements of reasons in support and opposition." The judge may make provision upon brief written statements of the reasons in support and opposition. The judge may not need them.

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The Chairman. The practical reason for that is this, that in some districts in connection with the civil rules the lawyers feel that the judges are imposing on them in requiring them. This was put in the civil rules, as I recall it, to give the judge a little bit of support from the Supreme Court in saying to the lawyers, "You have to submit a memorandum."

Mr. Medalie. But suppose the judge does not want it?

The Chairman. He does not have to have it then, but it gives him a little backing.

Mr. Medalie. Some of the districts may want to have a special rule for a certain class of lawyers.

Mr. Youngquist. "May make provision by rule or order."

Mr. Medalie. As I understand this paragraph, the court may make provision by rule without oral hearing.

Mr. Youngquist. By rule or order. He does not have to make a rule.

Mr. Medalie. That is all right, but having done that, why do we say that the judge can do that only if there is a brief written statement of the reasons in support and opposition? He may not require it. You can say that he can make an order only if he has a brief written statement in support or opposition.

The Chairman. He can give an oral hearing.

Mr. Medalie. No. This says "without oral hearing." It says here "upon brief written statements in support and opposition." He may not require them.

Mr. Dean. He may want an oral hearing without a memorandum and he may want neither.

b13

Mr. Medalie. Why tell the judge he has to have an oral hearing?

Mr. Longsdorf. Then without a hearing.

Mr. Medalie. Why say anything about it?

The Chairman. We cannot dispense with both the oral argument and with the memorandum without deleting the rights of the defendant,can we? He has got to listen to oral argument or read a written memorandum.

Mr. Seasongood. I do not see why you want this rule. I think the judge is better off if you get up and make your oral argument. Some may take five days and then you take six days for your reply and then it sometimes runs on into many weeks instead of getting up and making your argument right there.

Mr. Crane. I think there is something in that. I do not think a judge should require by order that matters be submitted to him without a chance to see them and have them explain their points.

Some appellate courts throughout the country are dead set against hearing oral argument, and they always make a mistake by not doing it, because I think that the purpose of the court is to be seen as well as to be heard; to listen and hear the arguments.

Personally I do not like the idea myself that all a judge has to do is a lot of paper work and that he can do it all by himself. I think the tendency should be the other way around. This idea that you have not got the time is just so much bunk in many cases, although not in all, of course. I think that when lawyers want to present a matter orally they should have

b14

the right to do so.

Mr. Medalie. Then you draw away from the practice in civil cases, in New York County, for example.

Mr. Crane. That is just an abuse.

Mr. Medalie. The lawyers are satisfied with it.

Mr. Crane. No.

Mr. Medalie. They do not want to make oral argument.

Mr. Crane. They are scared to death of the judges.

Mr. Holtzoff. I am wondering whether we need Rule 78 at all.

Mr. Youngquist. That is right.

Mr. Holtzoff. I doubt whether we need it in criminal proceedings. In civil cases it is desirable to have motion days because your case may be pending over a period of six months or a year; but in criminal cases there are very few motions and you can dispose of them quickly.

Mr. Medalie. There may be few motions in each case, but there are always a number of motions in connection with a criminal calendar. You will probably have a large number of motions. If you have a criminal calendar say of 200 cases in the district and if the court is in session at least one day a week, you will have a long calendar of motions.

Mr. Holtzoff. But you have in mind the Southern District of New York. On the other hand you take the country court where indictments are found today and trials commence tomorrow. Then there is no opportunity for a motion day.

The Chairman. There is no problem there because your judge has to have his civil motions taken care of, and he can combine

b15

them with the criminal motions.

Mr. Holtzoff. There would not be the interval between the indictment and the trial in country places that there is in the large cities.

Mr. Medalie. Whatabout cases where there is such an interval, even in sparsely populated districts?

Mr. Holtzoff. Well, I do not see any harm in it.

Mr. Youngquist. I do not think we need it.

Mr. Dean. I move we strike it out.

Mr. Medalie. I second the motion.

Mr. Longsdorf. Why doesn't Rule 83 cover it?

Mr. Holtzoff. I think it does.

Mr. Wechsler. 83 provides only for local rule.

The Chairman. The motion is that Rule 78 be eliminated. All those in favor of the motion say aye.

(There was a chorus of ayes.)

The Chairman. Opposed.

(There was no response.)

The Chairman. The motion is carried.

Rule 79.

RULE 79

Mr. Robinson. I would like to ask the committee at this point to hear Mr. Tolman with regard to the assistance that the committee may have from the Administrative Office and some others who are keeping in touch with these matters. I think it would be of great advantage to the committee to hear from Mr. Tolman.

The Chairman. Yes.

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Mr. Tolman. I would like to have the permission of the committee to consult with perhaps some of the clerks of the court and with Mr. Chandler on the advisability of this rule dealing with the criminal docket and with the criminal order book.

We have had a great deal of trouble with this order book, as it is provided for in Civil Rule 79. There seems to be very little practical reason for keeping that book, because it is a very expensive thing. You have photostatic machines and make copies of the several orders, and they run into quite an expense with respect to the machines and the photostatic work. The orders are kept by the clerk and there is a tremendous amount of time taken up with it and it is quite expensive.

I think that the Administrative Office is hopeful that some time they can persuade the Supreme Court to take out 79(b), and I think it would be unfortunate to put in a similar provision for criminal cases without considering the matter very carefully.

In other words, we are asking that we be allowed to consult about it and consider the present rule and make some suggestions on the subject.

Mr. Youngquist. I make that motion.

Mr. Seasongood. I second it.

The Chairman. Those in favor of the motion say aye.

(There was a chorus of ayes.)

Mr. Holtzoff. I would like to call attention to a minor point in line 479(a) and suggest that instead of providing for the Attorney General that it now should be the director of the

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Administrative Office, because the civil rules say the "Attorney General" because the civil rules were adopted before the director's office was established.

Mr. Medalie. It should not be the attorney for one party.

Mr. Holtzoff. That is one reason why the Administrative Office was established.

The Chairman. The words "Attorney General" come out and substitute "Director of the Administrative Office".

Mr. Holtzoff. I thinkthe last sentence on that page should come out in view of the action which was taken yesterday on the demands for a jury trial.

Mr. Medalie. May I ask whether there is any uniformity at all in the keeping of records in criminal courts in the various districts?

Mr. Tolman. I think not. I think there is no uniformity.

Mr. Medalie. I do not have any doubt from what I have seen in the Southern District that they have simply continued the system they started when there was no criminal business.

Mr. Tolman. That is correct. The dockets in our criminal
6 cases particularly are very difficult to understand. On visits of our representatives of the Administrative Office which they make to the courts they try to find out what the state of the court dockets is and examine the book entries. Our experience has been that they give you practically no information at all. You can find out very little from them.

Mr. Medalie. We keep it as it is and put it in the appeal book and let the Circuit Court of Appeals guess what it is.

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Mr. Youngquist. That last sentence that Mr. Holtzoff referred to should be changed to this effect: "that if the jury is waived" and so on.

Mr. Seasongood. I think that when any criminal procedure case is to be tried the clerk shall enter the word "jury" on it.

The Chairman. Isn't that excluding the normal whereas you might put it in the reverse? Say it where the jury is waived.

Mr. Seasongood. I think they like to have all the jury cases noted stating that it is a jury case.

Mr. Holtzoff. The nonjury case is the exception. It is assumed that they are all jury cases.

Mr. Seasongood. That is what I had in mind.

Mr. Medalie. May I ask whether or not anybody has developed expertness like an accountant in relation to the keeping of court records? It is my impression that the matter of court records is something that is important, and the method of keeping them is just archaic and something carried over from the time they started it around 1850, or whenever they did. They continue the same method without any attempt being made to develop a scientific system.

Mr. Tolman. I think that is so, until very recent years. The Administrative Office requested the Bureau of the Budget to call upon some representative clerk's offices. This was last year. As a result of that the representatives of the Bureau of the Budget have made a careful study of the filing systems and of the docket systems and the methods of reproducing

records and have made a careful report.

One of the suggestions was the use of microfilm instead of the great bulky files for keeping those records. The Administrative Office will give careful consideration to that. It is to be brought up also at the Judicial Conference and we will be able to do a great deal toward improving that particular thing.

However, you are correct: There has been no scientific study at all.

Mr. Medalie. Have any of these scientific societies like public accountants been consulted?

Mr. Tolman. No.

Mr. Medalie. I think that would be helpful. They have a better idea of how to organize matters of that sort than a great many other people, being experts in that line.

Mr. Tolman. That is a good idea.

Mr. Youngquist. I would suggest that we leave in these rules these matters just as wide open as we can, because in time the Administrative Office will have this nicely worked out.

Mr. Robinson. In that connection I would like to know whether the committee would extend the same invitation to authorizing the reporter to receive from Mr. Chandler and the Administrative Office his assistance with reference to probation and other matters coming under his particular office.

Mr. Youngquist. I so move.

Mr. Holtzoff. I second the motion.

The Chairman. All those in favor of the motion say aye.

(There was a chorus of ayes.)

The Chairman. Shall we leave this last sentence to be

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worked out by Mr. Robinson?

(There was no response.)

The Chairman. Rule 80.

RULE 80

The Chairman. I will ask Mr . Robinson to tell us the status of this, if he will.

Mr. Robinson. The rule as drafted follows the rule on the left-hand page in the civil rules.

Mr. Medalie. I would like to say something about this rule. There are no official stenographers in the federal courts. They have a system as in the Southern District of New York in which they make a contract with a company of public stenographers. The district attorney never orders the minutes. If the defendant orders them, the defendant pays a flat rate, but the district attorney gets a copy for nothing at my expense.

Mr. Youngquist. For nothing?

Mr. Medalie. For nothing. It is a contract, but I really pay for it. I hesitate to say it about a government agency, but I think it is a racket.

Mr. Youngquist. So do I.

Mr. Holtzoff. I think there is a good deal of error about Mr. Medalie's statement. For many years we have had a contract for official reporters in the Southern District. We get all copies of the transcript free. The reason why the group of official reporters was glad to make that particular arrangement with the Department of Justice is that they have the privilege of coming into the court and taking the testimony and selling

copies to counsel. In accordance with that system the government gets its transcript free.

Mr. Youngquist. That sounds like bribing the government.

Mr. Medalie. I signed the contract as United States Attorney each year I was in office. I may say that they could not have done this, this business, on any other basis, in view of the government's extortion. I am not blaming them.

Mr. Holtzoff. In these days when we are talking about saving the taxpayers' money--

Mr. Youngquist. (Interposing) Who is?

Mr. Holtzoff. You cannot condemn the Department of Justice.

Mr. Medalie. It is not the Department's fault at all. You do not just get the appropriation. You should get an appropriation which would have some relationship to the dignity of modern courts representing the greatest country in the world.

Mr. Holtzoff. I agree with you that we should have salaried official reporters in our federal courts as we have in the state courts. However, that would take legislation to take care of that. My understanding is that it is receiving the attention of the Administrative Office.

Mr. Medalie. I suggest that you get an appropriation now while the spending is good.

Mr. Holtzoff. We have to get legislation to establish the office of official reporter.

Mr. Crane. What is this? You do not pay these reporters anything and they have the privilege to take hearings other than criminal? Is that the situation?

Mr. Holtzoff. No, the situation is this: There are no

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official reporters in any of the federal courts. We make the parties get their own reporters. The result is that in most districts criminal trials are not reported at all except when you get a defendant who can hire a reporter.

So far as the government is concerned it makes a contract in every district with a reporter or a firm of reporters to report those cases which the government wants reported.

In the Southern District of New York, because of the volume of business, the form of contract is very advantageous to the government. They require the reporter to report every case whether anyone orders the transcript or not. Then the government can always get its transcript free. Counsel for the defendant when they order a copy have to pay for it.

Mr. Medalie. The government does not get anything that the defendant does not order or which the adverse party does not order?

The Chairman. There are no transcripts except on order by the defendant.

Mr. Medalie. With one exception that they make a transcript any time the judge wants it, but they do a lot of grumbling and feel that they are imposed upon, without paying for it.

The Chairman. In my district the parties pay the reporter a per diem in addition to paying for the transcript.

Mr. Medalie. You can bring anybody in you please in many districts.

Mr. Crane. You have these reporters in civil litigation?

Mr. Holtzoff. In civil litigation the parties will make arrangements with the reporter.

Mr. Crane. And he takes the testimony before the judge in

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the civil litigation?

Mr. Holtzoff. Well, this contract requires that these reporters take all criminal cases whether the party orders the transcript or not, but in most districts you do not have such contracts because the volume of business does not amount to very much.

Mr. Crane. I mean in civil cases. There are reporters to take civil cases?

Mr. Holtzoff. The parties have to pay the reporter and they make their own arrangements.

Mr. Crane. They do?

Mr. Holtzoff. Yes.

Mr. Crane. Good heavens!

Mr. Seasongood. Isn't it a question rather that there should be a stenographic reporter of all criminal proceedings and that a transcript should be made available to the defendant in some way by being taxed as part of the costs? I think it is most unfair to have this sort of thing. You get some poor fellow and the judge has complete liberty to say what is in his mind, and it is one of those things where the man has no remedy.

Mr. Crane. May I ask whether there is any money for this?

Mr. Youngquist. Well, he does not recover his costs.

Mr. Medalie. He does not.

Mr. Holtzoff. Here is what happens: for instance, ~~in~~ outside of the Southern District of New York there are a large number of trials which are not reported. The result is that there is no opportunity for appeal except on matters which appear of record. In

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many cases which are reported the defendant appeals in forma pauperis. He is not able to get the transcript.

We often get requests from defense counsel ~~to see if~~ but we cannot do anything about it. At times we used to order a transcript for the government and then furnish it to the defendant so that he could appeal. However, the Controler General has ruled that we cannot do it. So we are in a difficult position as to that. I think it is a subject that calls for legislation.

Mr. Crane. Yes. You should not let the thing go by without saying something about it.

Mr. Holtzoff. The subject requires legislation.

Mr. Seasongood. Why shouldn't it be reported by a stenographer designated by the court and taxed as part of the costs?

Mr. Medalie. You have a difficulty there.

Mr. Holtzoff. You cannot do that.

Mr. Medalie. In districts in large cities such as New York and Philadelphia before they start an important criminal trial there is a discussion in advance of the trial. The court asks counsel for the defendant, "Are you getting a reporter?"

Then you go out and get bids as cheaply as you can and bring in your own reporter.

8 Mr. Crane. My God! What a situation!

Mr. Seasongood. I do not think you should have a situation like that. Maybe they may bring in a defendant's reporter. The court should have the control over that situation as to who shall report the case.

Mr. Crane. I think he should be an official.

Mr. Holtzoff. Yes. That would take legislation.

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Mr. Seasongood. In our court the court designates a reporter to take all cases and charges $4 a day per diem for each person for attendance and a certain amount for transcript.

Mr. Holtzoff. I do not think that the Supreme Court would pass a rule requiring the government to hire official reporters. It takes legislation to do that.

Mr. Seasongood. The court designates someone to take all civil cases.

The Chairman. Isn't this a matter that we should submit to the reporter and ask him to confer with Mr. Chandler and others in connection with the other rules and then come back with a rule?

Mr. Seasongood. I am only suggesting to the committee whether it is desirable for all cases to be reported and by request to be transcribed and that the defendant be given a copy to be taxed as part of the cost. I think that would be helpful.

Mr. Dean. I think that would be helpful, but whether we can accomplish it or not, I don't know.

Mr. Medalie. As a matter of fact, if there were a rule on it prescribing official reporters the Controler General would have to change his rule. Under the present rule there is no obligation on the part of the government.

Mr. Youngquist. I would not say that all of the testimony should be taken down. Wouldn't it be enough in only those cases which were taken at the request of either party? In a good many cases it may not be necessary.

Mr. Seasongood. In a great many cases defendants do not

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have any lawyers. What is the harm of having it taken down? The court stenographer is there when the court is in session, and he can just as easily take it down. You do not have to write it up unless there is a request that it be written up.

The Chairman. Mr. Tolman tells me that it is on the agenda of the Judicial Conference and will come up for discussion two weeks hence. Perhaps the reporter can get some light for us from that and confer with Mr. Chandler and come back with a rule.

Your motion is, Mr. Seasongood, that it be the sense of the committee that all criminal proceedings be reported by an official reporter?

Mr. Seasongood. A reporter named by the court and that the defendant on request be furnished a transcript to be paid for as a part of the cost.

Mr. Medalie. I oppose the last part.

Mr. Seasongood. Suppose you are a poor man who cannot afford to buy a transcript and yet not be in forma pauperis. Mr. Holtzoff says that if he is not in forma pauperis, he does not get a transcript. He cannot appeal without a transcript.

Mr. Medalie. There is a different question after a trial has been concluded. In many trials lawyers do not order a transcript of the testimony. As far as I am concerned I will not try a case unless the client is able to pay for a transcript of all the minutes, because I realize the handicap I am under in not having it every night to use.

The Chairman. You are referring to day copy.

Mr. Medalie. Yes. Your provision refers to the run of trials and furnishing that copy.

Mr. Seasongood. No. I mean that he takes it down every

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day and then if the defendant wants it for his appeal and presents the matter to the court he should have the right to have it written up and have it taxed as costs.

Mr. Holtzoff. ~~That~~ What is a part of the costs? That does not mean anything as far as the government is concerned, because costs are hardly ever collected from a defendant.

Mr. Seasongood. Can't we collect from the government?

Mr. Holtzoff. We cannot collect that from the defendant.

Mr. Youngquist. There is no provision for taxing costs

9 against the government.

Mr. Holtzoff. If you provide for that, it is going pretty far to provide that the defendant may demand copies of the minutes. I think that if he does not have enough money to pay for the minutes he should have them or make a showing and give a reason to the judge why he wants them.

Mr. Seasongood. That is enough.

Mr. Wechsler. If he wants to appeal, that is enough.

Mr. Holtzoff. Yes, if he is asking for an appeal, but I do not think he should be allowed to ask for the minutes as a memento.

Mr. Longsdorf. I do not think he should have it even if he wants to appeal, unless he pays for it, without showing the probability that he will be successful on appeal or that he has an exceedingly good chance of success.

Mr. Seasongood. I do not think you could show that to the judge.

Mr. Crane. I think you are getting toward a situation in the United States with our increase in litigation and getting so close together that we are really all one. I think we have

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got to get a system such as exists in New York of stenographers paid a salary, proportionate, of course, to the costs of living in the particular locality and the amount of work. Then anybody who wants the minutes pays for them.

In New York he pays for them except in murder cases where the penalty is death. In that case the government pays for everything by furnishing him with a copy of the minutes. That is only in murder cases in the first degree. They get the stenographer's minutes of all the testimony. As I say, that is only in murder in the first degree. In other cases the stenographer takes down everything and makes a complete record. Why shouldn't they have a complete record?

They can afford to pay the man at the top; then they can afford to pay the reporter. They can afford to pay the reporter as well as they can afford anything else, and sometimes the reporter is ten times more important than the man at the top.

I do not say that this has to come right away, but I think that we should recognize that something like this is necessary. You are going to get more and more of this, because centralization is bound to come and to get greater and greater, whether you like it or not.

The Chairman. Then I think it is the sense of the committee that we have reporters.

Mr. Seasongood. That it be the sense of the committee that all criminal proceedings shall be reported stenographically and further that there be a provision for furnishing transcript to the defendant.

Mr. Longsdorf. Before we leave this rule, I should like to ask Mr. Holtzoff an embarrassing question. It is an embarrassing question because of the prime question.

Is an official reporter appointed under authority of the civil rules an official reporter in criminal cases?

Mr. Holtzoff. Well, in a good many districts, under the civil rules, there is appointed an official reporter. The court selects the reporter instead of the parties doing it. However, the parties pay for the transcript.

Mr. Longsdorf. The official character of the reporter as in civil cases is distinguished from criminal? He is the official reporter for the court?

Mr. Holtzoff. No, he is an official reporter to the judge in civil cases.

Mr. Longsdorf. Then you have an official reporter in each case?

The Chairman. No.

Mr. Holtzoff. No. It does not mean very much because the parties still pay for the reporter.

Mr. Youngquist. Does that mean that the court picks the man and he takes it down in civil cases in his court?

Mr. Seasongood. The court presumably will pick a competent reporter. The parties may pick somebody who is a friend of theirs.

Mr. Longsdorf. In the Evans case reported down in Kansas, the reporter having been appointed under the civil rules there was a question raised with respect to that reporter being in a criminal case whether or not he was an official reporter.

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Mr. Holtzoff. That happens as a matter of convenience that the official reporter in civil cases will also report criminal cases.

Mr. Longsdorf. But appointed under the authority of the civil rules.

Mr. Holtzoff. Yes.

The Chairman. Well, we know the sentiment of the committee. Rule 81, gentlemen.

RULE 81

Mr. Robinson. This rule is tentative.

Mr. Crane. Excuse me, Mr. Chairman. It is necessary that I leave now. I am very glad to have met all of you gentlemen.

The Chairman. What about this scire facias?

Mr. Robinson. In working in this Rule 81 it has applicability to the civil rules provision. We put it in just for that with the consideration of possibly striking it.

Mr. Holtzoff. Scire facias is used in criminal cases for the purpose of forfeiture of bail bonds.

Mr. Medalie. That is the only use.

Mr. Longsdorf. It is abolished in the civil rules.

Mr. Holtzoff. In some districts they enforce bail bonds in civil cases; in other districts it is regarded as a part of the criminal proceeding.

Mr. Orfield. There is a Supreme Court case calling it a criminal proceeding.

Mr. Wechsler. I would think that in a procedure to forfeit bond that such is a civil proceeding. I think that is one instance where I would be prepared to make a positive judgment

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and say that it is a civil one.

Mr. Holtzoff. There is one advantage in the writ of scire facias. It is a summary proceeding and you do not have to bring suit on the bond. It brings the bondsman in and if he does not come in you forfeit the bond summarily.

Mr. Medalie. You have got to have a section on bail.

Mr. Holtzoff. Yes.

Mr. Medalie. That would supersede it.

Mr. Seasongood. Did the Supreme Court say it was criminal?

Mr. Orfield. They called it such forty or fifty years ago.

Mr. Youngquist. Then I do not see why we should say it is civil.

Mr. Robinson. Do you want to delete mandamus?

Mr. Holtzoff. The civil rules delete mandamus.

Mr. Robinson. The civil rules do abolish it. Do we want mandamus in the criminal rules?

Mr. Medalie. The only mandamus I know of in connection with a criminal case is a mandamus from the circuit court of appeals to the district court to try a case or dispose of it. You cannot get a trial and you want to get the trial or the alternative, which in your case is a dismissal of the proceedings because the district attorney does not want to try the case.

Mr. Seasongood. Is that a mandamus?

Mr. Medalie. It orders the district court to try the case or dismiss it.

Mr. Youngquist. They did that in the Madison Oil case.

Mr. Seasongood. It is a civil proceeding.

Mr. Robinson. It is a question whether the abolition of the mandamus by the civil rules is a matter which we must consider.

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Mr. Waite. Why should we say anything about it at all? I think it is wise to strike it out.

Mr. Longsdorf. I second the motion.

Mr. Seasongood. Mandamus is a civil proceeding. There is no sense in abolishing it in the criminal rules. It exists or it does not exist.

Mr. Robinson. It was put in here for the committee's information. I am only inquiring for information, as Judge Crane said.

The Chairman. What about removed proceedings? Does anybody say that we should not say anything about that? Does anybody say mandamus is a criminal remedy?

Mr. Medalie. I ran across several removal cases. There was a case started in the state court and then removed to the federal court.

Mr. Youngquist. A criminal case?

Mr. Medalie. Yes. There were cases of prohibition agents shooting persons.

Mr. Waite. The use of mandamus plays a very important part in Michigan practice and I would hate to just abolish it. On the other hand, I do not think that we need to say that it still exists. I think our object should be to just let it alone.

Mr. Holtzoff. This would not abolish the procedure. It means that the relief heretofore obtained by the writ of mandamus can be obtained by motion or appropriate action under the practice prescribed in the rules. Wouldn't that meet your objection?

Mr. Waite. I have this sort of thing in mind. A judge of the Recorder's Court in Detroit dismissed a great number of prosecutions on the ground that the evidence had been secured

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by unreasonable search. Under our statutes the argument was made that the search was reasonable, but there was no way for the state to appeal. So what the state did was to go to the Supreme Court for a writ of mandamus ordering the trial judge to restore those cases to trial, and it worked.

Mr. Holtzoff. We mandamused a district judge some years ago to bring a case to trial.

Mr. Seasongood. But is it a criminal procedure? You order a particular criminal case to proceed just like an

11 injunction, but an injunction is a civil proceeding.

Mr. Longsdorf. Yes, it is a civil proceeding. I got the impression that has been positively decided by the federal court that when mandamus came out of the circuit court of appeals it is always more of an ancillary right necessary to the exercise of the jurisdiction of the circuit court of appeals. That jurisdiction would not be exercised until the case is brought and decided upon. If I am right about that then the use of mandamus pertains to the circuit court of appeals and we have nothing to say about it beyond the possible exception of appellate rules.

Mr. Medalie. What happens in a case like this: A defendant is awaiting trial for three or four years and wants a trial or wants a dismissal? Where does he go to direct the district court to try his case?

Mr. Holtzoff. He goes to the circuit court of appeals.

Mr. Medalie. Then you have got a provision for mandamus, haven't you?

Mr. Dession. Yes.

Mr. Holtzoff. These are rules for the district court. This abolition of the writ of mandamus would not affect the

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mandamus issued by the circuit court of appeals. That is the way the corresponding civil rule has been construed.

The Chairman. Do you know of amy other place where mandamus is used by a district judge in a criminal case?

Mr. Medalie. I do not believe anywhere.

Mr. Youngquist. You mean in the district court?

Mr. Longsdorf. No, they have no mandamus power except in the District of Columbia.

Mr. Dession. In order to bring the matter to a head I move that we strike out (b) and leave the question of scire facias for the bail bond rule.

Mr. Dean. I second the motion.

The Chairman. All those in favor of the motion say aye.

(There was a chorus of ayes.)

The Chairman. Opposed.

(There was no response.)

The Chairman. It is carried.

(c). Removed proceedings.

Mr. Longsdorf. I would like to make this observation about removed state criminal proceedings which can occur and have in some times. There are still state prosecutions and it seems to be obvious when that state criminal proceeding is brought into federal court by removed proceedings why the federal court is to apply the state criminal law. I think we should be very cautious about saying how this is done. I mean in the same way as if it were begun in the federal court for a federal crime.

Mr. Holtzoff. They follow federal procedure today.

Mr. Wechsler. It is quite a complex study and I think it should be studied in the light of the decision on removed

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criminal proceedings.

Mr. Orfield. In a removed case you apply the state substantive criminal law. It would not follow state procedure.

Mr. Longsdorf. I wonder if you have any statistics about the number of state criminal proceedings that were removed.

Mr. Holtzoff. Very few.

Mr. Medalie. Under the prohibition law there were some in which prohibition agents shot people.

Mr. Holtzoff. In prohibition days there were some but we get very few now.

Mr. Dean. You get them in murder cases where a federal agent is involved.

Mr. Medalie. Yes.

Mr. Holtzoff. Yes.

Mr. Medalie. The case of Marshal Nagle.

Mr. Holtzoff. No, that was habeas corpus.

Mr. Medalie. But it should have been done that way. They took the short cut by habeas corpus.

The Chairman. Let us get back to this.

Mr. Medalie. I understand that we want to find out whether federal or state practice applies. I take it that as suggested by Professor Orfield that the federal procedure would apply.

Mr. Orfield. There are cases in which they rule both ways. Some of them suggest you take state substantive law and then federal procedure.

Mr. Medalie. Can we without violating the Constitutional rights provide that federal procedure apply?

Mr. Holtzoff. Yes.

Mr. Medalie. I think so myself.

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Mr. Seasongood. We are only concerned with the procedure, not substantive rights.

Mr. Medalie. Why can't we make then a provision that we want to get?

Mr. Holtzoff. I think we could.

Mr. Longsdorf. I think we should be extremely careful.

Mr. Dean. You have a practical problem because the state prosecutor is a man who comes in and he is presumed to be familiar with the state procedure, and if we depart too much from it it may be difficult, to say the least.

Mr. Holtzoff. I think it would do the state prosecutor good to learn the federal procedure.

Mr. Youngquist. We are going to make it so simple that even the state prosecutor can learn it.

The Chairman. Make it so simple that perhaps he will want to stay in the federal court.

Mr. Medalie. The judge knows all the state law and the procedure.

Mr. Youngquist. I beg your pardon?

Mr. Medalie. The federal judge knows about the state law and the procedure. That is the law, isn't it?

Shouldn't we have a suggestion to leave it to the reporter to put in words "these rules apply so far as they may"?

Mr. Seasongood. I think you have to go further than that. That does not mean anything.

Mr. Dean. I would like to suggest this with reference to the removed cases. In two or three leading cases where this has occurred in the last four or five years, we may get some light from the district judge and the prosecutor. In a murder case in

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Memphis in 1935 it went on for several weeks, and it must have been quite a headache as to whether they were proceeding under federal or state procedure. I think that the district attorney and the court could throw some light on that.

The Chairman. This will be referred back to the reporter to get information on that.

Mr. Robinson. The general sentiment of the committee is that it does apply to removed cases?

The Chairman. The general sentiment of the committee is that federal practice should prevail.

Mr. Robinson. Is that correct?

Mr. Longsdorf. Yes.

The Chairman. The District of Columbia. Section (d).

Mr. Longsdorf. Do we want to include the insular courts as well?

Mr. Seasongood. All of those courts that are named, China, Alaska, and all the others.

Mr. Medalie. This may be unnecessary in view of the specification of the court to which the rules are to be applicable. I think it should come at the beginning.

Mr. Seasongood. That is what occurred to me, referring to the specifications in the first or second rule.

The Chairman. Why was this in the civil rules, Mr. Tolman?

Mr. Tolman. In the District of Columbia there is a difference in terminology. The judge in the district court is a justice. You have to make that distinction.

The name of the court of appeals is different. Instead of being a court of appeals for such and such a circuit, it is known as the United States Court of Appeals for the District

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of Columbia. It is really a technical distinction.

Mr. Holtzoff. I think it was put in at the request of the Bar Association of the District of Columbia.

Mr. Youngquist. I think the latter half of this should come out because this particular rule deals with district courts only, not with courts of appeals.

Mr. Holtzoff. We put in appellate rules.

Mr. Seasongood. Maybe we should bracket every instance where we have reference to the court of appeals so that we may know whether it goes in or out.

The Chairman. Yes.

Rule (e).

Mr. Wechsler. I suggest that you do not retain that unless there is some provision in the rule in which there is this incorporation by reference to the state law or until the state law is declared to be applicable.

The Chairman. What is the reason for this, Mr. Reporter?

Mr. Robinson. The same reason that you have in the civil rules. That is to the left. It is a question as to its applicability to criminal cases.

Mr. Holtzoff. In the civil rules this was necessary because the rule as to provisional remedies contain the statement that the law of the state shall be applicable in federal courts.

Mr. Youngquist. Has it any place in the criminal rules? I do not recall any occasion for it.

Mr. Robinson. What about it, Mr. Dean?

Mr. Dean. I am not sure.

Mr. Medalie. Suppose we pass that question until we see

what is proposed by the reporter. I think we should reserve decision on that until we see what is in our rules.

The Chairman. Then if there is any reference in our rules to state law, this will be eliminated.

Mr. Wechsler. Yes.

The Chairman. Rule 82.

RULE 82

Mr. Youngquist. When the law of the state is referred to, does the law include the statutes of that state and the ordinances and local regulations?

The Chairman. No. They are subject to proof, aren't they?

Mr. Seasongood. The law includes the statutes. Whenever the law is referred to the word "law" includes the statutes of the case.

The Chairman. How about judicial decisions?

Mr. Youngquist. It should go to enactment.

Mr. Seasongood. Does that take in judicial notice?

The Chairman. What do you have, Mr. Reporter?

Mr. Robinson. Strike out "construe". That will serve the purpose.

Mr. Longsdorf. Is it statutes and decisions of the state?

Mr. Robinson. That is satisfactory.

Mr. Medalie. Is that a correct definition that the law of the state may not be covered by statutes or judicial decisions?

Mr. Longsdorf. You will never adjourn if you go into that.

Mr. Seasongood. If you make a statement that they never include municipal enactments and regulations having the force of law, then we will come back to, do we need to discuss them.

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The Chairman. Let us pass it and make a note of it.

We have Rule 82.

Mr. Medalie. What is the need for that rule?

Mr. Holtzoff. It is in the civil rules.

Mr. Medalie. What is the applicability for this?

The Chairman. You are going to find out that it comes up in the minds of members of Congress that something may be done to take a man away from home and try a case in which he is involved. It does not hurt us any and I think it is desirable to have it in.

Mr. Wechsler. I have this question. Are we satisfied that there is nothing in the immediate future in criminal procedure that should be touched by these rules within the limits that the Constitution may permit them to be with respect to venue?

Mr. Robinson. What do you have in mind?

Mr. Wechsler. I have this generalproblem in mind: I think it is an abiding problem in criminal cases that the law of venue is controlled by the substantive rule as to where the crime was committed. In criminal courts you are dealing with continuing crimes like conspiratorial crimes committed over a broad territory sometimes, and the consequences are that you have at least a general question as to the propriety of grouping defendants in many large-scale transactions.

I do not suggest that this is a problem that would yield itself by rule, but I do suggest that it may catalog an important problem in connection with criminal procedure in our federal courts, and I state that that problem is one of the most important. With respect to substantive law, in my judgment I think it is generally a long procedural problem that merits

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study as to what can be improved upon.

Mr. Robinson. I would be glad to have improvements or suggestions made.

Mr. Wechsler. It is a matter of reading the cases on venue.

The Chairman. Would you have curbed such things as the Wisconsin Oil case?

Mr. Wechsler. That is a problem.

The Chairman. That is a very real problem.

Mr. Longsdorf. I think that is a matter which is outside of our province.

Mr. Wechsler. No. The matter of procedure is within our province.

Mr. Longsdorf. Some features of it. You cannot alter venue as laid down in 28, 101.

14 Mr. Wechsler. Yes, you can by rule.

Mr. Longsdorf. I do not believe that.

Mr. Wechsler. Isn't that a procedural matter which would limit the existing rules?

Mr. Longsdorf. I do not believe it.

The Chairman. Venue in my state is governed by rule in court.

Mr. Wechsler. There is a constitutional protection to the defendant which we could not alter if we wanted to, which we do not, but this other aspect of the matter is something different that causes me concern.

Mr. Longsdorf. You could not move a civil case to a place where the property was not situated.

Mr. Wechsler. Not by rule.

Mr. Dean. This rule may be read not in its strict sense

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but in a very broad sense that nothing in these rules extends or limits the territorial construction in civil proceedings. We may give in severalplaces the power to the district court to do certain things in any criminal proceeding out of his own district.

Mr. Longsdorf. Aren't we going to have some pretty serious questions when we take up the proceedings for removal from one district to another for trial? It may be a useful section.

Mr. Holtzoff. Mr. Dean, I think that that is answered by the fact that this is a case where in the civil rules it has not been construed to prevent a judge from doing things outside the district.

Mr. Dean. That does not mean much to me because I may think of a hundred problems in which it would extend the power of the district judge. I would like to canvass everything we do before we adopt this rule.

The Chairman. Leave it open and refer it back to the reporter.

Rule 83.

RULE 83

Mr. Seasongood. It says that these rules shall be furnished to the Supreme Court. I think that they should also be made available to the bar.

The Chairman. Aren't they promulgated in every district? I mean in printed form.

Mr. Seasongood. I think that is one of the things that should be taken care of. We have a multiplicity of rules and regulations.

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The Chairman. Well, Mr. Tolman says that the administrative office has been publishing local rules for the benefit of the court.

Mr. Seasongood. May we get them on request?

Mr. Tolman. I imagine so. We do not make up any large-scale distribution.

Mr. Seasongood. How many copies would you provide for my district?

Mr. Tolman. That depends on what the district court requests. I would rely on his judgment. Law libraries have copies of the rules.

Mr. Seasongood. But we do not want to chase up to the law library. We want it on our desk at the time.

Mr. Tolman. I may say that usually copies are available.

Mr. Seasongood. I will move for tentative consideration to request that after promulgation they be made available to the bar.

Mr. Robinson. We may leave that for the administrative office.

Mr. Seasongood. What is the method of distribution? How many can you distribute to the various districts? How many will you distribute to New York or to the clerk in our district?

Mr. Tolman. We usually have a certain number of copies.

Mr. Seasongood. All right.

The Chairman. This rule is the weak link in the whole system because in some districts the local rules are longer than the general rules.

Mr. Burke. Another thought occurs to me in that connection:

"By action of a majority of the judges thereof may

from time to time make and amend rules governing its practice not inconsistent with these rules."

In many instances in the adoption of the rules you have adopted the language of the statute "In the discretion of the court or with the consent of the court," with one general blanket rule in cases of that kind. Now it may be used as a basis for a general rule which would change many of the things that it seems to me you have sought to accomplish here.

Mr. Dean. It would encourage district courts to promulgate rules in criminal proceedings. Don't we do that by this rule?

Mr. Wechsler. I question their authority to promulgate rules; at least rules of criminal procedure. There is nothing in the statutes for that.

Mr. Medalie. Every court has inherent right to prescribe procedure, and there is a necessity for its having that right so that it can have an orderly procedure.

Mr. Longsdorf. So far as I know there is no restriction on that right and there should be nothing inconsistent with the statutes or rules pertaining to the statutes. Besides that, there is an act which gives them that authority, and which has not been repealed.

I think it is necessary for the district court to make rules. Those rules may refer to the date when certain things can be done, and the matter of notice, and so on.

Mr. Wechsler. We need say merely, "not inconsistent with the rules or any provision of law."

Mr. Medalie. I think they are able to make rules. I have no doubt of their authority to make them.

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The Chairman. What is your pleasure?

Mr. Longsdorf. I would like to ask a question. Upon furnishing to the Supreme Court of the United States copies of the local rules adopted by the district court, are those rules thereafter judicially noticed?

The Chairman. In the district? By the district court?

Mr. Longsdorf. By the Supreme Court of the United States?

Mr. Wechsler. Are they judicially noticed now, whether they are furnished or not?

Mr. Longsdorf. Mr. O'Connell out in San Francisco found that out.

The Chairman. I am not sure that I got Mr. Burke's point.

Mr. Burke. Maybe I was not quite clear. It seems to me, for instance, in connection with the rule we adopted permitting invitation, there was the equivalent of pretrial procedure. That authority was made to amend the rules governing this practice not inconsistent with these rules, but in extending local rules there may be an effect which was not contemplated.

The Chairman. The court may require pretrial procedure.

Mr. Burke. Yes. The judges may pass a general rule where I think you have in mind in some of the rules a procedure in a particular case.

The Chairman. We have in mind giving specific authority.

Mr. Burke. Is that to a single case?

The Chairman. No. Mr. Medalie has pointed out that there are various things which must be the subject of local rule.

Mr. Burke. That is correct. Otherwise there would be no orderly process, but do we eliminate the effect of some of the things you have sought to preserve in the way of the specific

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right of the defendant which may be included in the general rule which would provide what you have in mind. I do not know if I am clear.

Mr. Dean. I think we may eliminate this rule altogether. However, what Mr. Medalie says is true, that courts have the power to make rules, and they may relate to everything from the size of the paper to whatever else you want to mention. However, it seems to me that if this rule were adopted we encourage in every district for judges to get together and sit around a table and completely revise the criminal rule.

Mr. Holtzoff. I do not think we could afford to leave this out because the civil rules have such a provision. If we leave this paragraph out, the implication will be that local rules may be made for civil cases but not for criminal cases.

I think that it is true that one or two districts have gone pretty far in adopting too many local rules but that is not done in most districts. If you give such power in civil cases and then leave it out of criminal cases, the question is whether you are depriving the court by implication of the right to adopt any local rules.

The Chairman. The civil rules went into effect in September, 1938. I was made chairman of the local rules committee and went to work surrounded by four other technical lawyers. We have not yet agreed upon local rules, and last week the Court took the rules away from us and said, "I will fix the local rules."

Mr. Justice Roberts is coming to the Judicial Conference and they are ashamed not to be able to say that they have any local rules. Yet we have been able to carry along for three

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years without a single effective local rule.

I think that it should be possible to have the reporter affix a note to the rule that we recommend that the district judges use this power very sparingly.

Mr. Dean. Could we not say with respect to Rule 83 that "in cases where the rules may be promulgated by the district court that they shall not be inconsistent with these rules," or something of that sort?

The Chairman. I have examined some of those and most of them need never have been adopted. They are just drivel, and I have looked at about eight or ten of these local sets.

Mr. Dean. Well, in that way we may get away from this drivel.

Mr. Tolman. Some of these local rules have been perfectly outrageous. I worked with a committee headed by Judge Knox which was studying local rules, and I think that probably 75 percent of the local rules were useless, and many of them were inconsistent with the federal rules of civil procedure, and some of them put in additional requirements that the federal rules for civil procedure never contemplated.

Mr. Holtzoff. Suppose we leave this rule to the reporter in accordance with the sentiment of the committee?

The Chairman. The question is that we leave this with the reporter, having in mind the thought just expressed by Mr. Dean.

Mr. Dean. That the reporter may adopt such rules as are necessary to carry this into effect.

The Chairman. We will pass on to rule 84.

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RULE 84

Mr. Robinson. That was referring to Rule 8 that suggested forms of written accusation be prepared. I think it was generally agreed that the forms attached to the civil rules have been useful.

The Chairman. Any objection to that?

Mr. Seasongood. I would say "brevity and sufficiency." I want to know whether that is the proper form.

The Chairman. Is that necessary?

Mr. Seasongood. All right. I withdraw it.

The Chairman. Rule 85.

RULE 85

The Chairman. I would put some initials like F. R. CR. P.

Mr. Holtzoff. I think you have got to have initials that will not conflict with the rules of civil procedure because the initials are the same.

The Chairman. How about CR?

Mr. Medalie. You have to say CRIM.

The Chairman. That is what I wanted to bring out: F. R. CRIM. P.

Mr. Dean. Shouldn't this be rule number 1?

Mr. Robinson. That is a question I wanted to take up.

The Chairman. Rule 86.

RULE 86

Mr. Holtzoff. I am wondering whether the first sentence

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should not conform to the first sentence in the civil rule, Mr. Reporter? I do not know but I am just asking for information.

The Chairman. The reason for the blank is that we do not know which Congress it will be taken to.

Mr. Medalie. I think it is unnecessary, as a matter of fact.

Mr. Holtzoff. Suppose a person has filed a demurrer and the demurrer has not been disposed of?

Mr. Medalie. All right. You have answered it. I just wanted to know what the answer would be if someone from New York asked me.

The Chairman. That will be all for now. We will take up the rest this afternoon.

(Thereupon, at 12:55 o'clock p. m., a recess was taken until 1:30 o'clock p. m. of the same day.)

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AFTERNOON SESSION

The proceedings were resumed at 1:30 o'clock p.m., at the expiration of the recess.

The Chairman. Let us proceed, gentlemen.

Rather than take up the appeals rules one by one, I think it might be well, in the time that we have left, first to ask the reporter and then Mr. Holtzoff if they will state generally the matters that they think might be improved in the appeals rules and get the views of the committee on those points, and after we have disposed of that I would like to ask each member to suggest to the reporter the additional topics that he thinks should be covered by the rules.

If this program is agreeable to the members of the committee, I will ask Mr. Robinson now to comment generally onthe changes that are sought to be made by the appeals rules that have been drafted and submitted here.

Mr. Robinson. The only change of any importance between the rules of criminal appeals and the criminal rules on which we are working is the abolition of a bill of exceptions. Outside of that we have substantially incorporated in our rules the provisions of the rules of criminal appeals.

Is that right, Mr. Holtzoff?

Mr. Holtzoff. I think so.

The Chairman. Is there anything to be said in favor of the continuance of a bill of exceptions?

Mr. Seasongood. What do you mean? As I understand, the appellant makes up what he thinks should be included, and then the Government can ask for additional parts, and that constitutes the bill of exceptions. Isn't that the practice under these

rules? The court no longer has to fix the bill of exceptions.

Mr. Holtzoff. It does not under the present criminal appeals rules. Under the civil rules it does not. On this particular point, the purpose of this draft, and I think it is a very good one, is to assimilate the criminal practice to the civil practice and abolish the bill of exceptions.

Mr. Dean. What do you substitute for it?

Mr. Holtzoff. You substitute the transcript or so much thereof as either party wants to include. Therefore, you do not have to go to the trouble of settling bills of exceptions any more. That is the civil procedure. I think the reason the bill of exceptions is in the criminal appeals rules is that they were adopted in 1934. The improvements in the Federal practice did not come until later. Otherwise the criminal appeals rules could stand pretty much as they read now.

The Chairman. Is there any objection to considering that as a principle that we would like to see applied if we are assigned the task of drafting appeals rules?

Mr. Burke. Does it represent any substantial reduction of the right of defendants in the matter of appeals?

The Chairman. Oh, no. He has a right to say how much of the record he wants to go up.

Mr. Youngquist. It extends it, really.

The Chairman. It extends his right and relieves the court and counsel --

Mr. Holtzoff. And it is no longer necessary to transform the testimony into narrative form. You just file your stenographer's transcript or as much of it as you need.

Mr. Medalie. Practically, in our circuit it means this.

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You put in the so-called clerk's minutes, which state what happened. You can leave a large part of it out, if you want. It takes more time and expense if you leave it out. Then you incorporate the stenographer's minutes, taking out unnecessary colloquy, and you include such prior proceedings as necessary.

The practical thing is to go ahead and print the whole business.

Mr. Holtzoff. In some districts they still follow the old practice of transforming the transcript to narrative form.

Mr. Medalie. That is an old vicious practice which goes back to the ancient days, when you were not sure of what happened at the trial and where you relied on your own notes and the judge's notes. That practice persisted in New York until about 25, 26, or 27 years ago.

The old practice was to take your stenographer's minutes and go to the terrible work of reducing it to a narrative. That was your proposed case. Your adversary then proposed what he called amendments, and then the appeal was halted. You then wished that on the trial judge, who settled the case and had to settle the disputes and bickerings of counsel as to what should go in and how it should be said, with the net result that it took a long time, even if you were in a hurry, even if both sides were in a hurry, for an appeal to come on.

A few years ago Learned Hand wished on our circuit, for some inadvertent remark he made somewhere, this business of reducing the record of the trial to a narrative form, so that the entire office will take three weeks off to prepare a mail fraud case for appeal.

Now that is no longer necessary. We are all agreed that

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that is not necessary. You now get an appeal, in the case of a record of a thousand or two thousand pages, in a comparatively

2 short time. The printer can do it for you if you turn the papers over to him. That we ought to keep. I do not think we need worry very much about the reduction of the stenographer's transcript --

The Chairman. But, answering Mr. Burke's question, there is no loss of any rights to the defendant?

Mr. Medalie. No. He can put everything in.

The Chairman. He gains, because he gets it in the form where, if the court wants to turn to a particular page of testimony, he can come far nearer reproducing what happens in court than he could the other way.

Mr. Medalie. You have another aspect, and that is the assignment of errors. The requirement still is for assignments of errors in criminal cases.

Now, a lawyer who has tried a case and prepared the record for appeal will not omit any possible assignment of error, particularly because there might be other counsel in the case, and he will not exercise his judgment in the way that will preclude the exercise of judgment by another lawyer.

Also, he is not sure of what he will put in his brief until he has exercised a reasoned judgment on it and spent time on it. Therefore, every exception that he finds in the record is put in the form of an assignment of error, which the court never reads, which his adversary ignores, and which is subjected to a tremendous amount of expense and labor.

You remember that at the Second Circuit conference I digressed and went to the point of denouncing the practice.

Mr. Robinson. Judge Learned Hand and others agreed with you. They said they did not read the assignments.

Mr. Medalie. Even in Judge Learned Hand's mind there existed this idea, which he stated some years ago, not officially but in conversations with lawyers, semi-public expressions of opinion, and which he repeats today, to this effect: He says that if you want to sustain a conviction it is a good thing to be able to fall back onthe failure of an appellant to make an assignment, which is, I think, unworthy of a great judge like Learned Hand.

Mr. Robinson. He laughed when he said it.

Mr. Wechsler. He always does it in his opinions.

Mr. Holtzoff. I think we ought to follow the civil rules.

Mr. Medalie. I do not think that anybody can point out that there is any useful purpose served by assignments of error, in view of the practice in modern times of printing briefs, which the other side has enough time to prepare answers to.

The Chairman. Are we all united on this?

Mr. Seasongood. On what?

The Chairman. The abolition of the assignments of error and the printing of the record in this modernized form, authorized by the civil rules.

Mr. Youngquist. Without a bill of exceptions.

Mr. Seasongood. I am not entirely clear, Mr. Chairman. I just put this forward. It says here in the rules as they are now that all of the proceedings relating to the record are in the appellate court after you file your notice of appeal. From the time of filing the notice of appeal -- that is Rule 4 -- the appellate court has supervision and control of the proceed-

ings on the appeal, and wouldn't that have to be so if you abolished the bill of exceptions? That is a good deal of a burden. You cannot always get an appellate judge, and they do not want to be bothered with it, anyway.

Mr. Holtzoff. This rule relates to the mode of transferring the transcript to narrative form.

Mr. Seasongood. In one case I had the appellant filed certain parts of the record, and the United States insisted on a great mass of stuff, which cost two or three hundred dollars to print. There is nothing to do really except to let that go in.

Mr. Medalie. Unless the court gives you relief. Now, that frequently happens in long and complicated cases that are largely tried on exhibits.

The printing of exhibits is not only a great expense and a great loss of labor, but it is of no value to the court in most instances. The normal procedure, as you know, is to try to agree with your adversary as to what may not be printed, and you get a stipulation to that effect, with the provision that either side may use any exhibit not printed for perusal by the court.

If you do not agree with your adversary, the practice in our circuit, which is almost always in session except during the summer, is to have the court determine that question on a motion.

The Chairman. If we could agree on these two points, I would like to bring up a third one, which would be the recommendation of the practice that originated in the Fourth Circuit and has now been carried to the Third and adopted here in the

Court of Appeals of the District, and it is this: that instead of printing the record, the record from the district court comes up in typewritten form, and each side is allowed to print, as an appendix to his brief, those parts of the record on which he desires to rely, with the original record being there before the court, so that the court can get all of it if it wants, and the original exhibits are there for the court to look at.

3 The result is that you have your 50-page brief, then you have an appendix, which may vary from 20 pages to 200 pages, and the ultimate cost of the printing of these appendices is determined by the outcome of a case in a civil procedure, except that if any side prints something which the court concludes should never have been printed, the printing bill for that portion is deleted.

That is the rule in the Third and Fourth Circuits, and, according to an article by Claude Dean, it saves counsel about three-quarters of the cost which is ordinarily involved in printing the record.

All of us know that in an ordinary case there are great masses of the record that the court will never look at, and your case gains strength from the fact that the court knows you are printing the part that is worth looking at from your point of view.

I wonder if that is not something that we might well give consideration to and, if this task is assigned to us, urge it on the court to be adopted as the universal rule in criminal cases?

Mr. Dean. Do you send up just the one copy?

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The Chairman. Just the one copy.

Mr. Medalie. Couldn't it be done by any circuit court adopting a rule to that effect?

Mr. Holtzoff. It is done now by circuit rules.

Mr. Medalie. Why do we need to add anything? Suppose the Second Circuit finally broke down --

The Chairman. It has worked for years in the Fourth Circuit, and it is working here in the District, which is a district in which you have the heaviest records, from all these appeals from administrative bodies.

Why shouldn't it be presented to the court?

Mr. Medalie. The reason I would suggest, so far as it applies to my circuit, is this. The Second Circuit has a tremendous amount of business, certainly more than any other circuit --

The Chairman. I doubt if it has any more than the Court of Appeals for the District of Columbia.

Mr. Holtzoff. I think the number of cases is larger in the Second Circuit. The number of pages is more here in the District.

Mr. Medalie. In other words, it is not found to be an inconvenience --

The Chairman. Judge Groner is most enthusiastically in favor of it.

Mr. Medalie. I think we ought to consider that, and I think we should see what conditional resistance there will be to it, and clarify it in our own minds and see what objection there would be to that.

The Chairman. Mr. Dean has written an article on it. I

will see if he won't send a copy of it to each member of the committee.

Mr. Holtzoff. The First Circuit is considering it, if it has not adopted it.

Mr. Longsdorf. We have used exactly the system that you describe in the state courts in California for the last twenty-five years, and in Oregon, somewhat different but practically the same, for a little longer. We can still make use of a bill of exceptions. It is legal, but it has fallen into almost complete disuse.

I think it has worked very successfully in the state courts in California. I won't say that the system is flawless, but it works, and the profession has accepted it practically to the exclusion of using a bill of exceptions, although the right to use it still remains.

The Chairman. As a matter of fact, in cases coming up from the circuits that have that rule to the United States Supreme Court the United States Supreme Court has been accepting original stenographer's records plus the printing of those portions of the testimony that counsel want to rely on, not without some grumbling, I understand, originally, but they finally acquiesce in it.

From the standpoint of an indigent defendant or a poor defendant, it is really a very desirable thing.

Mr. Medalie. What happens as to the time that the appellee has to prepare what he thinks ought to be appended to his brief?

The Chairman. That is fixed by the rules. He is allowed so many days after the transcript is available.

Mr. Medalie. Is he given adequate time?

The Chairman. Yes.

Mr. Medalie. The time now for the writing of the brief may not be as long as the time you need for the preparation of the brief and appendix.

Mr. Holtzoff. You have to amend the rule fixing the time.

Mr. Youngquist. Ten days is provided here.

Mr. Holtzoff. Of course, this rule does not embody the rule that Mr. Medalie mentioned.

Mr. Seasongood. Is there any difficulty with reference to the correct printing of it in the brief? There is no official supervision of the printing?

The Chairman. You do not have that in the Second Circuit. There is no official printer.

Mr. Longsdorf. Mr. Vanderbilt, how do you get sufficient copies of the reporter's transcript to supply counsel on both sides -- I am speaking of civil cases -- and all of the counsel, where there are numerous parties, with enough copies of the transcript to choose what portions they want to print as an appendix?

The Chairman. Well, ordinarily you have only two sets of parties, a defendant and a plaintiff.

Mr. Longsdorf. What do you do when you have two or three attorneys or firms associated on one side of the case, and each one of them wants a transcript to see what portion he desires to have printed as an appendix?

The Chairman. They order carbon copies for their use.

Mr. Longsdorf. I suppose so.

The Chairman. The saving is not on stenographer's bills.

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The saving is on printer's bills and facilitating the work of the court.

Mr. Longsdorf. I have heard that criticism made. I guess there is no help for it.

Mr. Seasongood. I move we recommend it.

4 Mr. Dession. I second it.

The Chairman. All those in favor say "Aye."

(There was a chorus of ayes.)

The Chairman. Opposed,"no."

Mr. Medalie. I would like to reserve my views on that. I would like to consult with my judges in the circuit on that.

The Chairman. I think you will be convinced after you read this article.

Mr. Dession. I would like to cite one case which illustrates the need for this. There was a conspiracy trial in Connecticut for some labor officials. They were tried under an old statute, with a 15-year penalty, and there were real questions of law involved. They wanted to take an appeal, but were out of funds by that time.

They moved the Supreme Court of Errors for leave to go up on a typewritten transcript. Motion was denied, so there was no appeal.

That sort of thing can't happen, and that was only a few years ago.

The Chairman. That illustrates the stiff-necked attitudes of the court.

Mr. Dession. That record would have cost $15,000 to print.

Mr. Longsdorf. There is one other thing about that method

in a civil case. I cannot see any reason why you should not send the original files up and then get them back.

Mr. Medalie. Well, the parties usually have the exhibits, not the court.

The Chairman. Are there any other suggestions with reference to appeals practice?

Mr. Holtzoff. There is just one point, Mr. Chairman, on the question of stays. I think perhaps we might want to preserve the criminal appeals rules on the question of stays rather than follow the civil rules.

The Chairman. Is that involved in the situation that has made so much trouble in the Fifth Circuit, where a man will go to see --

Mr. Dession. That is the amount of bail.

Mr. Wechsler. Perhaps I misunderstood what we are doing. I thought the principle of our action was this: that we would abide by the present criminal appeals rules except that we were going to make the changes you referred to, to-wit, to abolish the bill of exceptions and the assignment of errors and to substitute therefor provisions for this other type of practice.

The Chairman. I mean on this abbreviated record.

Mr. Wechsler. Yes, but now Mr. Holtzoff raises the question of stays, and of course, Rule 62 of the civil rules deals with that. I just want to understand correctly that we have not taken any action with reference to these other civil rules.

The Chairman. We are passing by, for the moment, the question of the detailed consideration of whatever appeals rules appear in our draft, but saying that there are three changes

that we would like to recommend to the court, if this ever falls within our jurisdiction.

Now, I wonder if we might go on to the next point, which is one of getting from the members of the committee a list of additional topics that, in your judgment, should be incorporated into our draft.

Probation was mentioned earlier. Juvenile delinquents.

Mr. Wechsler. Procedure on sentence.

The Chairman. Yes.

Mr. Youngquist. You have, of course, arrests and proceedings before the commissioner.

Mr. Longsdorf. Preliminary proceedings.

Mr. Burke. Proceedings on bail.

Mr. Wechsler. Arraignment.

Mr. Holtzoff. Removal proceedings.

Mr. Wechsler. Yes. That is very important.

Mr. Medalie. I think we might really make a contribution on that subject, because of the abuses that come up occasionally.

Mr. Longsdorf. There is an obscure little provision, very seldom resorted to, but it is in the statutes: Proceeding for security to keep the peace.

Mr. Holtzoff. That is never used in the Federal courts.

Mr. Medalie. I did not know that there was such a provision.

Mr. Holtzoff. Search and seizure. Habeas corpus.

Mr. Youngquist. Motions to suppress evidence.

Mr. Holtzoff. That is under search and seizure.

Mr. Longsdorf. Habeas corpus.

Mr. Holtzoff. That is a civil procedure.

Mr. Wechsler. I do not think we could handle that. We

might get an authorization to deal with it. It is not touched by the criminal rules.

Mr. Holtzoff. In the light of the decision that came up from the Ninth Circuit, there ought to be somewhere, either in the civil or criminal rules, a set of rules regulating habeas corpus. Although habeas corpus is a civil proceeding, it is really applicable to criminal cases.

Mr. Wechsler. You realize what the situation is now. The civil rules apply except to the extent that they are inconsistent with the old habeas corpus statute.

There are eight, nine, or ten provisions in the U.S.Code regulating habeas corpus. In the case that you have in mind
5 the holding was that the rule authorizing reference was inapplicable to habeas corpus, because the habeas corpus statute provided for determination by the judge.

I think there is a case for re-examining habeas corpus generally, but the committee on civil rules decided to retain it and not to tamper with the habeas corpus statute, because the civil rule provision is that the rules apply except to the extent that they are inconsistent with the statute.

We ought to examine into the basis for their judgment, I think, before we go ahead.

Mr. Holtzoff. It may be that perhaps the Supreme Court will transfer habeas corpus jurisdiction to this committee, because even though habeas corpus is a civil proceeding technically, it is generally used in connection with criminal cases.

Mr. Youngquist. Don't you think we have enough now without adding that?

Mr. Holtzoff. Perhaps so.

Mr. Longsdorf. There are several kinds of habeas corpus.

The Chairman. Let us put a question mark after that.

Mr. Robinson. Just one more subject I have down here, and that is contempt, if you want any consideration on that.

The Chairman. If possible, we will cover it.

Mr. Medalie. Mr. Longsdorf has expressed to me his opinion again and again that wherever we are dealing with anything that has aspects that are both civil and criminal we ought not to be worried about the classification. We ought to deal with it if we are going to make a contribution to the subject. The only thing you would worry about is the number of the rule.

Mr. Holtzoff. Except that perhaps we might be encroaching on the duties of the civil rules committee.

Mr. Medalie. The court could tell us that.

Mr. Youngquist. We ought not to go into anything outside our duty as set forth without the Supreme Court asking us to.

Mr. Holtzoff. I would rather see habeas corpus in these rules than in the civil rules, because as a matter of substance they belong in the criminal procedure, even though it is a civil procedure.

Mr. Youngquist. Mr. Chairman, might I interrupt the discussion to ask what is the plan on procedure after the reporter has done the tremendous amount of work that he is assigned?

The Chairman. My thought was that after the reporter has made a redraft of the rules in line with the sense of the meeting the rules will then be distributed by mail to the members of the committee, and each man will be asked to reply

by memorandum with any suggestions or corrections.

That will soon develop whether or not we need another general meeting of the committee on the subject of the rules insofar as covered by this original draft.

We also have the next problem, which is the consideration of the rules which will be before him as the result of these topics now being thrown on the table. For the purposes of that discussion I think we clearly will have to have another meeting of the entire committee, to canvass them in just the same way as we have been going over the first draft.

Therefore, one way or another, we will have another full meeting of the committee as soon as the reporter is ready for us. Now, as to when that meeting will be, that is something that the reporter can say better than anyone else.

Mr. Medalie. What is the immediate outlook as to that? Will it be within the next two months?

The Chairman. I think it is too much to expect that it will be before Thanksgiving, but I hope it will be before Christmas.

Am I too ambitious in that, Mr. Reporter?

Mr. Robinson. Well, I have talked to Mr. Strine and Mr. Holtzoff. We think that two months for the work outlined for us would give us a very busy time. We recognize the pressure of time, of course. We would like to have at least two clear months, if possible.

The Chairman. Yes, but my thought is that with these new topics coming in we should seek to make financial arrangements with the court to augment the staff. I think we would clearly be asking too much of this relatively small staff -- very small

in comparison with what is available on the civil rules committee -- to do the work in the time assigned.

I think we can get additional help from the Department and perhaps people from the outside to give us a lift on these special topics.

If that were done, would two months be too little to suggest?

Mr. Robinson. For the record, the answer was that two months would be too little unless we get additional help.

The Chairman. Mr. Wechsler?

Mr. Wechsler. I do not mean to suggest that the reporter is incapable of working twenty-four hours or that any of his assistants is incapable of working at that speed, but I have a general familiarity with some of the topics that have been suggested, and I must say that I just do not see how it is conceivable that Mr. Robinson could do that much work in two months and be satisfied that it was the real thing.

I earnestly suggest that this is the time, with the great start that has been made in so short a time, to begin to breathe a little more easily and be more concerned with covering the ground fully and without undue pressure than for speed

6 in submitting this to the court.

I may be wrong about this, but I feel very confident that when these rules or proposals are submitted to the court, even at this preliminary stage, there will be from the court the most incredible demand for commentary to explain the principle and reason for any changes that are made or to delineate the difference between what we have got and what we had in the past. I do not see how this material could be in condition for that

kind of submission in anything like that time.

I am repeating the point that I have expressed privately to you.

The Chairman. Mr. Wechsler, haven't we got an additional step that must be gone through before this goes to the court, because after we have our next general meeting we will still have another process of revision, which will probably be just as arduous as the one now contemplated, before the draft will be ready to go to the court?

Mr. Wechsler. Well, I am addressing myself to the form in which the material could most helpfully be before we have that meeting, preliminary to submitting it to the court, and I do not see any advantage in expediting the meeting if there will be a delay after the meeting, during which the reporter has to get the material ready for the court.

It seems to me that that should come first, and then we could be of more use, if we are of any utility.

Mr. Waite. Mr. Chairman, is it possible to have only one meeting before it goes to the court? I would assume that another meeting would take up all the material that has not been taken up at all at this time.

The Chairman. That is correct.

Mr. Waite. And perhaps it would go over the revision of this material. Then I should think there would be another meeting to go over the second time that which was taken up for the first time at another meeting and put the matter in final form for submission to the court.

The Chairman. I suggested this. I thinkyou were out of the room for the second. I suggested that all of the material

that we have here discussed will be redrafted by the reporter and his assistants, and then that will go out to the members of the committee. We will be asked to return.

If there are rules that meet with consent, we won't need to discuss them at our next meeting. In other words, I think that as to the parts that we have been over the process of revision should be much easier than it was on this first draft.

Then in that meeting that we will come back to we will have to discuss new parts of the rules, topics that we have just suggested, in the same way as we have gone over these rules for the last four days.

Now, whether there will have to be a third meeting of the committee before the matter finally goes to the court will depend upon what degree of success we have at our second meeting.

Mr. Holtzoff. Mr. Chairman, after all, the draft is to be submitted to the court only to secure its permission for circulation in a tentative form, so that I do not suppose the court will study it at this particular junction.

The Chairman. Of course, I should think that the court, as in the case of the civil rules, would want something that would go out to the bench and bar and come back laden with criticism. As I understand it, there was hardly a section of the civil rules that did not have to be revised as the result of the suggestions made by judges or lawyers.

Mr. Wechsler. I do not remember. When the civil rules were first distributed to the bar were there commentaries with them or were they distributed alone?

Mr. Longsdorf. Yes, there were.

Mr. Wechsler. My recollection is that there were commentaries and that those commentaries pointed up the discussion of the bar. I think we ought to follow that practice here.

Mr. Longsdorf. Then there was a second tentative draft.

I would like to suggest that when the reporter completes the recasting of these rules and sends copies of them so recast to us, he determine on some sort of a form, the size of paper, and so on, that we should use in our making our comments, so thatwhen they come back they will work in with the plan of materials which he has on hand.

I know from experience that a lot of stuff coming in on different size paper is hard to handle. I think we would help him somewhat if we do that, and we would make our comments probably more pointed to him by doing it.

Mr. Youngquist. Mr. Chairman, I suppose somewhere in the course of the proceeding there will be appointed a committee on style. It occurs to me that if such a committee were appointed it could probably begin its work after the next meeting and prior to the submission to the Supreme Court, which might save a good deal of general committee work.

7 The Chairman. Didn't the committee on style act after submission to the Supreme Court?

Mr. Tollman. It worked immediately after the first draft was submitted to the court, but that was one year after the work was begun. For two years the committee on style worked, and they held, I should say, meetings about six times, and saved a large amount of work for the general committee.

The Chairman. Suppose, without trying to fix any dates, we see how things work out.

Mr. Longsdorf. Please do not tie the poor man down to a date. I have been through all that. It is awful.

The Chairman. Of course, you know there are some of us who have to get briefs ready by certain dates.

Mr. Longsdorf. I have done that, too, and that is awful.

Mr. Wechsler. I think, too, Mr. Chairman, we ought to have some reasonable time to study the work that the reporter has done before the meeting is called, and I think we ought to have at least the time that is ordinarily accorded to counsel after a brief on the outside has been filed.

Mr. Youngquist. As I understood it, we are to submit our commentaries after we get the next draft. The commentaries, of course, will be submitted before the meeting, and we need some time to prepare that. When they are in we ought to be all ready to go.

The Chairman. Well, I have had some experience with committees, and I think it is safe to say that no matter how much time is given, at least one-third of the members of the committee will read the material on the train from their home to the committee, and that at least another third of the committee will never have read it until they come to the meeting, and they will both start off about even.

Am I doing an injustice to my profession?

(There was a chorus of noes.)

Mr. Wechsler. May I ask one other question, Mr. Chairman? Is there any guiding principle on this question? There are a lot of provisions in the statutes which have appeared on the left-hand page as we have proceeded here. Many of them have been incorporated in proposed rules, either in substance, the

same, or with some change, but many of them also have been entirely neglected. Many of them deal with exceedingly minute detail, and I do not for the moment say that it is not right to neglect them, but is there any principle that the net product shall try to tap or reproduce or address itself to the statutory provisions that now exist?

I think in the case of the civil rules it is one of the great virtues of the result that you can pretty much forget about the statutes and confine yourself to the rules. Now, if we were to make that an ideal --

The Chairman. That is because some of the statutes were repealed immediately afterwards.

Mr. Wechsler. Precisely, but that is because the rules address themselves to all the problems to which the statutes were addressed.

The Chairman. Pardon me. I am in error. Mr. Holtzoff says they were not repealed. They were left standing.

Mr. Wechsler. But what is the provision in the rules? That they are ineffective to the extent that they are inconsistent with the rules.

Isn't it true that there is very little in the statutes in civil cases governing procedure that is presently significant? And that is because the rules address themselves pretty much to everything and were developed in part with an eye to what was in the statutes.

Now, I simply ask whether we have any principle with reference to that problem. I may add that I think it would be advantageous for the result if to the extent that we can we cover the ground that is covered by existing Federal statutes

of import, so that it won't be necessary for practitioners in the future to start with our rules and say, "I must go through the same old business of exhausting all the statutes to see if there is anything there that is touched by the rules."

We can examine the statutes, and if we reproduce them in the rules we are not enlarging the net bulk of the applicable law.

The Chairman. Well, the reporters had that in mind, as you will see from these forms which were prepared for discussion. If we had discussed these rules following this form, we would never have gotten through. This says:

"Present Federal Law. Why no change? Why change? How change? Where now law?"

and then a statement as to who endorses the proposed rule and who opposes it.

Mr. Wechsler. I know that, but I asked as a question whether it was an ideal, an objective, to cover everything in

8 the law, or whether there was some principle of --

Mr. Robinson. The question is very general.

Mr. Wechsler. I will make it more specific.

Mr. Robinson. I will have to answer generally, too. I think your objective is one that we have distinctly before us. We feel that to the extent that these rules can be sufficient within themselves to govern Federal criminal procedure, that is a very highly desirable objective, and that is our objective, and I think we can incorporate a good many of our statutes.

Mr. Wechsler. I wondered if there were a lot of Federal statutes that were not included in the documents you gave us, because there was no comparable civil rule.

Mr. Robinson. No. It was because there was no comparable Federal statute. We have been surprised to find the extent to which Federal criminal procedure is not statutory. A great mass of it is not statutory. That is the reason for the great variation between the various districts.

Mr. Youngquist. Couldn't we do this? Put an appendix on the rules that specified sections of the statutes shall no longer be controlling?

Mr. Longsdorf. We did in the civil rules. There is a parallel table furnished with the civil rules and it was furnished with the tentative draft that they sent out to us. There is a parallel table showing the citations of the judiciary statutes and the rule in another column which touches that subject.

Mr. Youngquist. What I mean is this, Mr. Longsdorf: To make it a rule that these specified statutes shall no longer control in criminal proceedings. That would serve as a repeal of those particular statutes.

Mr. Longsdorf. I would be afraid of that. I would prefer the word "supersede" without repealing. It may result in the same thing.

The Chairman. Before Mr. Youngquist gets away, I would like to ask if the reporter can get the work done in two months or something comparable to that. What time would best suit the convenience of the committee for a next meeting?

Mr. Medalie. I could not answer that question.

Mr. Youngquist. As far as I am concerned, any time except Christmas week.

Mr. Seasongood. I think Mr. Youngquist's suggestion is a

good one, because a great many States have the provision that you cannot repeal the statute without specifically mentioning it.

~~Mr. Holtzoff. That is a Federal law,~~

Mr. Seasongood. It is a good thing to know it has been repealed, so you do not have a question of whether the statute is in conflict with the rule or whether it is not.

Mr. Dean. It is something that should appear in the commentary to the rule, it seems to me -- what statute are we superseding, what statute are we embodying in part, and what statute are we embodying in full?

Mr. Seasongood. Mr. Youngquist made another suggestion, and that is the order of the rules. He thought that the logical order was to start at the beginning, and it seemed to me that that was so. Start with the arrest and go right through.

The Chairman. I think we came to the conclusion that we would abandon all hope of paralleling it with the civil rules and resort to chronological order.

Mr. Dean. I was out of the room when you discussed the subjects to be covered by the reporter. Was arrest covered?

The Chairman. Yes. Have you any others?

Mr. Dean. Proceedings before United States Commissioners.

The Chairman. We have that.

Mr. Dean. Habeas corpus.

The Chairman. That has a question mark.

Mr. Dean. Bail.

Mr. Longsdorf. There is another thing in connection with preliminary proceedings, proceedings before United States Commissioners. The statute qualifies a state magistrate to act

as a committing magistrate. I think we ought to bear in mind whether or not rules could be drawn with uniformity, so that in case any state magistrate was called upon to act, he should proceed in the same manner as the United States Commissioner does.

Mr. Waite. At the risk of repetition, may I ask if there was a suggestion that there be something about the power of the court to exclude certain persons from the audience, as there is in the state courts, for instance, to excuse youthful persons?

Mr. Medalie. Isn't that inherent in a court's power, providing it does not violate the defendant's right?

The Chairman. I think it is an inherent right.

Mr. Waite. I think it is inherent. I would rather have that.

The Chairman. The reporter willmake a note of that.

Mr. Waite. Also the power to order separation of witnesses.

Mr. Medalie. The court exercises that power.

The Chairman. That is something that is not done in many jurisdictions.

Mr. Medalie. The Federal courts in our locality exercise that power, and no one ever questions it.

Mr. Waite. I suggest that you consider some provision covering a conviction by the jury of included offenses, offenses which are included in an indictment.

Mr. Longsdorf. That leads up to this. We have not said anything about forms of verdicts yet.

Mr. Wechsler. And the subject of variance is related to that.

Mr. Longsdorf. Before we get too far away from the statutes, there are, among the few Federal statutes that we have, some, and notably Section 591, which combine a diversity of subjects. I think those ought to be separated.

We have the preliminary proceedings in Section 591, and then the removal proceedings very imperfectly stated in the concluding part of Section 591. Let us separate that.

Mr. Seasongood. I have a note of the same thing Mr. Waite stated. I took it that that was inherent, but maybe we ought to know whether there is anything different in criminal cases.

Another thing is examination of the premises. Of course, I would take it that the defendant would be present.

Mr. Robinson. I would like to cite the case of Blackley, 70 Pacific (2nd) 799, a case from Washington, which I mentioned in connection with joinder. There was an expression of belief from Mr. Youngquist that the final decision there was against the joinder, but the true situation is that at the trial in court the indictment was quashed for error in joinder, and in the higher court that was held to be error, by a divided court. Two or three judges and the Chief Justice dissented. I just want that in the record.

That was the case of a stage coach driver parking on a highway, followed by a drunken driver, with the result that a third party was killed, and they joined the first two.

Mr. Waite. There is another matter that I suggest for your consideration, and that is the necessity for the actual presence of the defendant in the courtroom.

Mr. Robinson. That is right.

Mr. Dean. Well, I hope you do not write a rule that he

must be present.

Mr. Robinson. It has been stated that it is not necessary to have all the defendants present at all times, especiallyin these anti-trust cases.

Mr. Longsdorf. When you get one of those anti-trust cases where a lot of corporate officers are indicted jointly with the corporation, you drag them across the continent just so they appear personally for arraignment. Then they go home and they make another trip three or four months later when the case is tried. They are perfectly responsible people. They won't run away, and you just make them waste time.

Mr. Medalie. I understand that they do not attend the trials. Do they?

Mr. Longsdorf. Well, they should not have to be present at the trial. The suggestion was to do it by a summons, allow them to authorize an appearance for arraignment without appearing in person at the arraignment.

Mr. Dession. Why limit that to anti-trust cases?

Mr. Longsdorf. It should apply to all similar types of cases.

Mr. Medalie. You mean cases where the penalty is not very serious, like one-year cases?

Mr. Longsdorf. Well, they did not specify that kind of case. They simply said it was useless procedure to drag responsible people clear across the continent merely to arraign them in the district where the crime was committed.

Mr. Holtzoff. You mean to allow a person to give bail wherever he is and to return later to where the trial is being held?

Mr. Longsdorf. Yes, and make some arrangement for arraignment day without being present.

Mr. Dession. That would be a difficult rule to frame.

Mr. Medalie. If the Government would object, its objection should be final on that. Now, the Government is not quite as unreasonable as some people would like to have you think.

Mr. Dession. Some of your district judges are going to have a feeling that they are discriminating. This class would have to be defined in a way that meant a defendant in every kind of case that met the requirements.

I am very much for using the telephone instead of a warrant where it is feasible, but sometimes the court would be your obstacle.

Mr. Medalie. If the court is opposed to it, it should not be done, but if the court and Government agree it ought to be done and it is safe to do it, I think it ought to be all right.

Mr. Longsdorf. I am simply pointing out something that ought to be done, not how it shall be done.

Mr. Seasongood. I raise the question whether there is anything peculiar in affidavits of prejudice in criminal cases. Should that subject be explored?

Mr. Robinson. That question comes up with contempt.

Mr. Seasongood. In any criminal case is there anything special in that regard that requires different treatment from ordinary statutes?

Mr. Holtzoff. There is a statute applicable either to criminal or civil cases.

Mr. Wechsler. Was the subject of grand jury proceedings mentioned?

The Chairman. Yes.

Mr. Waite. Does the question of change of venue arise in the Federal courts?

Mr. Holtzoff. The Federal statutes do not provide for change of venue.

Mr. Wechsler. That is an aspect of the proposition that I propounded before, that venue is a subject that should be considered. I think a change of venue should be possible in the Federal courts.

Mr. Longsdorf. That would mean amending the Constitution.

Mr. Wechsler. If the defendant asks for the change, it won't.

Mr. Holtzoff. I suppose the defendant would waive his constitutional right.

Mr. Wechsler. Moreover, the change would be likely to be made where the Government has a choice of venue, anyhow.

Mr. Medalie. I think that is a substantial fact. It is not a matter of just local prejudice, as in some state statutes, but where the Government should have tried them in Boston and chose to try them in Duluth, he might have some reason on account of local conditions.

Mr. Wechsler. In a conspiracy case the Government can bring an action anywhere in the United States.

Mr. Waite. If he can find an overt act. Judge Roberts told me he did his best to get the Sinclair and Doheny affair out of the District of Columbia, but he could not find an overt act anywhere else.

(A discussion as to the next meeting took place, after which the following occurred:)

The Chairman. I think we will have to leave the date open for the present.

Are there any other matters?

Mr. Dean. Is it feasible to send these rules out rule by rule, rather than wait until they are all redrafted?

Mr. Robinson. I should think it would be desirable to send them by sections, at least.

The Chairman. If there is nothing further to come before us, we will adjourn subject to the call of the Chair. We thank everyone for the helpful cooperation they have given.

(Thereupon, at 2:55 o'clock p.m., an adjournment was taken subject to the call of the Chairman.)